

(2011) 12 MAD CK 0210

Madras High Court

Case No: Writ Petition No. 24970 of 2011 and M.P. No. 1 of 2011

E. Palani

APPELLANT

Vs

The Tamil Nadu State Election
Commission and Others

RESPONDENT

Date of Decision: Dec. 10, 2011

Acts Referred:

- Tamil Nadu Panchayats (Election) Rules, 1995 - Rule 67(3)

Hon'ble Judges: N. Kirubakaran, J; D. Murugesan, J

Bench: Division Bench

Advocate: D. Shivakumaran Mr. A. Navaneethakrishnan A.G. for R-1, Mr. R. Vijayakumar, Addl. G.P. For RR2 to 4 and Ms. A. Sujatha for R-5, for the Appellant;

Final Decision: Allowed

Judgement

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D. Murugesan, J.

The writ petition raises an important question as to whether the Returning Officer of an election to the Ward Member of a Panchayat is entitled to conduct re-election after announcing the result and declaring the contesting candidate, to whom largest number of votes were polled, as elected and also certifying the Return in the necessary form as per the first election.

2. The petitioner contested to the post of Ward Member in Ward No.6 of Vattamuthampatti Panchayat of Salem Panchayat Union in the election held on 17.10.2011. The fifth respondent was also a contestant. The counting of votes was held on 21.10.2011 and in the counting, the petitioner and the fifth respondent had secured 68 votes each out of total 225 votes. As per Rule 67 (3) (c) of the Tamil Nadu Panchayats (Elections) Rules, 1995, which is applicable to the election in question, if there is an equality of votes between two or more contesting candidates, and the addition of one vote will entitle any of these candidates to be declared elected, the

returning Officer shall decide between the candidates by lot and the candidate on whom the lot falls shall be deemed to have received an additional vote and the Returning Officer shall then declare the result accordingly.

3. In terms of the above rule, the Returning Officer had conducted the lot between the petitioner and the fifth respondent. It is not in dispute that after the said lot, the petitioner was declared elected and the Return in Form 26 signed by the Returning Officer was also furnished to the petitioner, as could be seen from the copy of Form-26 annexed in the typed set of papers at Page 1. But, after sometime, the Returning Officer had announced that the lot would be again held on 24.10.2011 at 12 noon and on that day, the fifth respondent was declared elected and he was issued with a certificate dated 24.10.2011 in Form 26.

4. The contention of Mr.Shivakumaran, learned counsel appearing for the petitioner, is that the Returning Officer, after completing the formalities in terms of Rule 67, particularly Rule 67 (3) (c) by conducting a lot, declaring the election and certifying the Return in Form 26 and also furnishing the same to the petitioner, he/she will become functus officio and has no jurisdiction to order a re-election. In that sense, the declaration of the fifth respondent on 24.10.2011 is without jurisdiction.

5. Mr.R.Vijayakumar, learned Additional Government Pleader appearing for respondents 2 to 4 would, on the other hand, submit that as the petitioner and the fifth respondent had secured equal number of votes, in terms of the Panchayats (Elections) Rules, lot was conducted and the petitioner was declared elected and the necessary form was also issued. However, having noticed that at the time of lot, the fifth respondent was not present, the Returning Officer again directed the election to be held on 24.10.2011. The procedure adopted by the Returning Officer, therefore, cannot be found fault with.

6. Ms.A.Sujatha, learned counsel appearing for the fifth respondent would submit that after announcing the equal number of votes polled for both the petitioner and the fifth respondent, the Returning Officer has informed the candidates that the election would be held on 24.10.2011. In view of the said intimation, the fifth respondent left the counting place and after he left the place, the petitioner had forced the Returning Officer to certify the Return as if the election was conducted by lot, in which the petitioner had been declared elected. Therefore only an objection was made to the Returning Officer, which had resulted in the Returning Officer to conduct the poll on 24.10.2011, on which date the petitioner had failed to appear and during the lot, the fifth respondent had been declared elected. In support of the above submission, the learned counsel would rely upon the counter-affidavit of the Returning Officer, the fourth respondent, wherein he has stated that the petitioner had forced him to declare the results by lot on 21.10.2011 itself.

7. We have considered the above submissions. The issue to be considered is only with reference to the rules relating to the conduct of election to the ward member

of a village panchayat. Rule 67 (3) (a) empowers the Election Officer to count the votes and after scrutiny, to declare the election of the contesting candidate, to whom the largest number of valid votes have been given and complete and certify the return in form 24 and send the signed copy to the District Election Officer and the State Election Commission. In the event, two or more candidates secured equal number of votes, the Returning Officer should follow Rule 67 (3) (c) wherein the Returning Officer is empowered to decide between the candidates by lot and the candidate on whom the lot falls, shall be deemed to have received an additional vote and thereafter, the Returning Officer should declare the result accordingly.

8. Rule 67 (3) (c) contemplates a deeming provision whereby a candidate in whose favour the lot falls shall be deemed to have received an additional vote. The facts of the case are that as the petitioner and the fifth respondent had received equal number of votes, the Returning Officer had followed Rule 67 (3) (c) and lot was conducted, in which the petitioner had been declared elected and had also been issued with the Return Form certified by the Returning Officer. The conduct of lot at the first instance is disputed by the fifth respondent. This takes us to two questions, viz., 1) in the event if the first lot conducted is disputed, the same could be a ground for this Court to go into that question or leave the candidate raising that contention to work out the remedy by filing an election petition; and 2) whether after the declaration was made, the Returning Officer would have jurisdiction to conduct another election.

9. As far as the second question, which we would prefer to consider first, is concerned, a reading of the rule would show that after declaration of results and the Returning Officer certifying the return in the necessary form, such Returning Officer will become *functus officio* and thereafter, he cannot order for re-election. In the event, the Returning Officer is of the view that the election could not be conducted in a free and fair manner in view of the interventions, the course open to the Returning Officer is to stop the election and report to the District Election Officer or the Chief Election Commissioner and after instructions from the State Election Commission, a re- election could be conducted on a notified date. There is no provision under the Tamil Nadu Panchayats (Elections) Rules for the Returning Officer to direct re-election. In view of the same, the Returning Officer, after conducting election on 21.10.2011 followed by a lot on the same day and having issued Form 26, has no power to order re-election.

10. Even assuming for the sake of argument that the Returning Officer would have such power and for considering the first issue, we may point out that issuance of declaration form in favour of the petitioner on 21.10.2011 is disputed by the fifth respondent. When once the said dispute is raised by the fifth respondent, then it is for the fifth respondent to approach the Election Tribunal and establish the same by way of producing evidence and consequently, seeking for declaration of the election as null and void. As we have held that the Returning Officer has no power to order

re-election after declaring the results and after issuing the necessary form, the election held on 24.10.2011 is not valid in the eye of law and for that reason, the declaration of the fifth respondent as having been elected as a ward member of the panchayat in question cannot also be sustained.

11. In view of the above reasoning, we find force in the writ petition. Accordingly, the writ petition is allowed. The election of the fifth respondent as declared on 24.10.2011 is set aside and the declaration of the petitioner as having been elected as the Member of the Ward in question as declared by the Returning Officer on 21.10.2011 by issuance of certificate in prescribed form is sustained. We have not expressed any opinion on the disputed question relating to the election conducted by the Returning Officer by way of lot on 21.10.2011 and it is for the fifth respondent to work out his remedy by filing appropriate petition before the Election Tribunal in accordance with law. No costs.