# P.H.Paul Manoj Pandian vs P.Veldurai on 13 April, 2011

## Equivalent citations: AIR 2011 SUPREME COURT 1660, 2011 AIR SCW 2623, AIR 2011 SC (CIVIL) 1193, 2011 (5) SCC 214, (2011) 2 RECCIVR 723, (2011) 4 SCALE 596, (2011) 2 CURCC 105, (2011) 5 MAD LJ 805, 2011 (4) KCCR SN 359 (SC)

## Author: J.M. Panchal

## Bench: Gyan Sudha Misra, J.M. Panchal

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4129 OF 2009

P.H. Paul Manoj Pandian ... Appellant

Versus

Mr. P. Veldurai ... Respondent

J U D G M E N T

J.M. Panchal, J.

This appeal, under Section 116A of the Representation of People Act, 1951, is directed against judgment dated December 2, 2008, rendered by the learned Single Judge of the High Court of Judicature at Madras in Election Petition No. 2 of 2006 by which the prayer of the appellant to declare the election of the Returned Candidate, viz., the respondent, from 220 -

Cheranmahadevi Assembly Constituency of the Tamil Nadu Legislative Assembly as null and void, is refused.

2. The relevant facts emerging from the record of the case are as under: -

> The Election Commission notified election schedule for the Thirteenth Tamil Nadu Legislative Assembly on March 3, 2006. Pursuant to the said notification, the Returning Officer, Cheranmahadevi called for nominations for Cheranmahadevi Assembly Constituency. The last date for filing the nomination papers was April 20, 2006. The date of scrutiny of the nomination papers was April 21, 2006 and the election was to be held on May 8, 2006. The appellant filed his nomination papers on April 17, 2006. So also the respondent filed his nomination papers on April 17, 2006. The nomination papers, filed by both, i.e., the appellant and the respondent were accepted by the Returning Officer. During the scrutiny of the nomination papers on April 21, 2006, the appellant raised an objection that since the respondent had subsisting contracts with the Government, his nomination papers should not be accepted. The respondent filed his counter stating that the contracts entered into by him with the Government were terminated before filing of the nomination papers and, therefore, his nomination papers were not liable to be rejected. The Returning Officer passed an order dated June 26, 2006 over-ruling the objections filed by the appellant.
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> The election for the Tamil Nadu Legislative Assembly took place on the scheduled date, i.e., on May 8, 2006. The results were declared on May 11, 2006 and the respondent was declared elected. Therefore, feeling aggrieved, the appellant filed Election Petition No. 2 of 2006 under Sections 80 to 84 read with Section 100(1)(a) and Section 9A of the Representation of People Act, 1951 ("the Act" for short) read with Rule 2 of the Rules of Madras High Court - Election Petition, 1967, challenging the election of the respondent on the ground that the respondent was disqualified from submitting nomination papers and consequently from contesting the election as he had subsisting contracts with the Government. The appellant made reference to G.O.Ms. No. 4682 of Public Works Department dated November 16, 1951 and stated that in the light of the contents of the said G.O. a contractor would be entitled to terminate a subsisting contract only if other contractor acceptable to the Chief Engineer was available and that another contractor was willing to enter into a contract to execute the works under the existing terms and conditions so that no loss was suffered by the Government. The case of the appellant was that as per the said G.O. dated November 16, 1951, termination of a subsisting contract would take place only after settlement of the rights and liabilities between the Government and the existing contractor, but in the present case no such settlement had taken place between the respondent and the Government and, therefore, the election of the respondent was liable to be set aside. What was maintained in the Election Petition was that the respondent had not terminated his subsisting contracts in terms of G.O. dated November 16, 1951 and mere removal of the name of the respondent from the

list of approved contractors should not be construed as termination of the contracts as long as the contracts were not specifically terminated in terms of the aforesaid G.O. The main prayer in the Election Petition of the appellant was to set aside the election of the respondent.

3. On service of notice, the respondent contested the Election Petition by filing reply affidavit. In the reply it was stated that the respondent was not having any subsisting contract with the Government on the date of filing of his nomination papers as well as on the date of the scrutiny of the nomination papers. According to the respondent it was not necessary to follow the procedure contemplated under the G.O. dated November 16, 1951 before termination of contracts for contesting the election. What was maintained by the respondent was that even if it was assumed that the conditions enumerated in the G.O. were not followed, that would not nullify the termination of the contracts if made. According to the respondent the Divisional Engineer (Highways) NABARD and Rural Roads, Nagercoil had terminated the contract on April 17, 2006 and had freezed as well as forfeited the deposits of the amount made by him for crediting the same into Government account.

Thus, according to the respondent, it was not correct to say that any contract was subsisting as far as the works relating to Tirunelveli Division was concerned. After mentioning that only a procedure as mentioned in G.O. dated November 16, 1951, was left to be followed by the subordinate officials of the Government, it was stated that non-observance of the said G.O. would not nullify the order terminating the contract issued by the Divisional Engineer on April 17, 2006. The respondent maintained that he was no longer a registered contractor with the Tamil Nadu State Highways Department nor was he having any subsisting contract in respect of the works referred to in the Election Petition and, therefore, his election was not liable to be set aside. It was further stated in the reply that balance work not executed by him was completed by the substitute contractor S. Rajagopalan on the same terms and conditions, which were agreed upon by him with the Government to execute the works concerned and thus no loss was suffered by the Government. The averment made in the Election Petition that the respondent had not made any alternative arrangement for another contractor was emphatically denied by him. By filing reply, the respondent had demanded the dismissal of the Election Petition.

4. Having regard to the pleadings of the parties, the learned Single Judge of the High Court, framed necessary issues for determination. In order to prove his case, the appellant examined four witnesses including himself and produced documentary evidence at Exhibits P-1 to P-21. The respondent examined himself as RW-1 and one another witness as RW-2 and also produced documents at Exhibits R-1 to R-21 in support of his case pleaded in his written statement. The record further shows that Exhibits C-1 to C-32 were marked as Exhibits at the instance of the learned Single Judge.

5. On perusal of the election petition filed by the appellant, the learned Judge held that it was pertinent to note that the appellant had never set up a plea that the Divisional Engineer, Nagercoil had no authority to terminate the contract entered into with the respondent nor any plea was raised to the effect that there was collusion between the respondent and the Divisional Engineer, who was examined as RW-2 nor was it averred in the Election Petition that the respondent had mounted

pressure on the Divisional Engineer, Nagercoil to terminate the contract and the Divisional Engineer had yielded to such pressure. Having noticed the above mentioned defects in the pleadings, the learned Judge observed that in view of the failure of the appellant to plead necessary facts and raise contentions, it was not necessary for him to decide the issues regarding which no averments were made in the Election Petition. The learned Judge took into consideration the evidence adduced by the parties and the principle laid down by this Court in Competent Authority vs. Bangalore Jute Factory and others (2005) 13 SCC 477, wherein it is held that where a statute requires a particular act to be done in a particular manner, the act has to be done in that manner alone and in no other manner and concluded that the G.O. dated November 16, 1951, issued by the Government of Tamil Nadu, was only an administrative instruction but not a statute enacted by the Legislature and, therefore, the ratio laid down in the above mentioned decision was not applicable to the facts of the case. The learned Judge held that it was rightly pointed out that the Government Order dated November 16, 1951 contained only administrative instructions and while communicating the said Government Order to the Superintending Engineers and Divisional Engineers, it was specifically mentioned that the said administrative instruction was for information and guidance. What was deduced by the learned Single Judge was that the Government Order did not say that the Chief Engineer was the authority to terminate the contract of a contractor, entered into with the Government, nor the Government Order stated that an order of termination could be issued only when Chief Engineer had accepted a person, who was available and was willing to enter into a contract on the same terms and conditions. The learned Judge was of the opinion that a contractor, who wanted to terminate his contract, had nothing to do with the administrative instructions issued by the Government Order dated November 16, 1951.

After referring to Exhibit C-11 it was held by the learned Judge that the agreements were entered into between the Governor of Tamil Nadu on the one hand and the respondent on the other and on behalf of the Governor, Superintending Engineer, NABARD had signed the agreement. The learned Judge found that when the Sub-Division was brought under the direct domain of the Superintending Engineer, the clause in agreement entered into between the parties that in the event of transfer of work to another circle/division/sub-

division/ Superintending Engineer/Divisional Engineer/Assistant Divisional Engineer, who was in charge of the circle/ division/sub-division having the jurisdiction over the works would be competent to exercise all the powers and privileges reserved in favour of the Government, would not be applicable.

According to the learned Judge, the record produced showed that the Divisional Engineer had terminated the contract only under the blessings of the Superintending Engineer, NABARD, which order was subsequently ratified by the Superintending Engineer by his proceedings dated April 26, 2006 and, therefore, it was wrong to say that the contracts were not terminated as required by G.O. dated November 16, 1951. The learned Judge referred to Exhibit P-17 dated April 17, 2006 and concluded that the contract with the respondent was already terminated by the Divisional Engineer whereas Exhibit C-12, the office note, was wrongly prepared on the footing that the order of termination was yet to be passed. The learned Judge found that the order of ratification passed by the Superintending Engineer PW-4 being Exhibit P-

19 dated April 26, 2006 validated the order of termination of contracts passed by the Divisional Engineer on April 17, 2006 and the contracts stood validly terminated as on the date of filing of nomination papers by the appellant. According to the learned Judge the substitute contractor S. Rajagopalan was a registered contractor as on April 17, 2006 and at the time when the contract with the respondent was terminated by the Divisional Engineer, a substitute contractor, who was willing to perform the remaining work left behind by the respondent, was made available and having made available a substitute contractor to step into his shoes to perform the remaining part of the contract, the respondent had got the contract validly terminated. The learned Judge interpreted the Government Order dated November 16, 1951 to mean that the Chief Engineer was not vested with the power to terminate the contract. According to the learned Judge the said G.O. did not say that only after the Chief Engineer had accepted such a substitute contractor, an order terminating contracts should be passed. The learned Judge noticed that the Chief Engineer was not a party to the contract and even if it was assumed for the sake of argument that there was a breach of the conditions laid down in the Government Order dated November 16, 1951, failure to follow the procedure or breach of the said Order would not nullify the order terminating the contracts passed by the Divisional Engineer and subsequently ratified by the Superintending Engineer.

6. In view of the above mentioned conclusions and findings, the learned Judge has dismissed the Election Petition by judgment dated December 2, 2008, which has given rise to the instant appeal.

7. This Court has heard the learned counsel for the parties at length and in great detail. This Court has also considered the documents forming part of the appeal.

8. From the pleadings of the parties, it is evident that the controversy centres around the Government Order dated November 16, 1951 and, therefore, it would be advantageous to reproduce the said Government Order, which reads as under: -

> "Government of Madras Abstract Contracts - Highways Department - Ensuing General Elections to Legislature - Request of Contractors for withdrawal from Subsisting Contracts and removal of the name from list of approved contractors - instructions - issued.
>
> @@@@@ Public Works Department G.O.Ms. No. 4682 Dated 16th November, 1951 Read the following:
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> From the Chief Engineer (Highways) Lr. No. 56703/D2/51-1 dated 8th November, 1951. From the Chief Engineer (Highways) Lr. No. 55865/D2/51-2 dated 13th November, 1951.
>
> @@@@@ Order:
>
> In his letter first cited the Chief Engineer (Highways) has reported that several contractors in the State who have got subsisting contracts under Government and District Boards have applied for closing their accounts and for removal of their names

from the list of approved contractors in order to enable them to stand for election as a candidate. As the existing provisions in the preliminary specification to Madras Detailed Standard Specifications do not permit the contractors to withdraw from their existing contracts for the reasons now given by them, the Chief Engineer has requested instructions on the general policy to be adopted in such cases.

2. After careful examination His Excellency the Governor hereby directs that the contractors who desire to stand for election as candidates for the Legislatures be permitted to terminate their subsisting contracts and also get their names deleted from the list of approved contractors provided other persons acceptable to the Chief Engineer are available and are willing to enter into a contract to execute the works under the existing terms and conditions without any loss to the Government.

3. The Chief Engineer is informed in this connection that the following points should be considered in the termination of contracts referred to in para 2 above.

1. There should be a final and complete settlement of rights and liabilities between the Government and the existing contractor.

No sum of money should remain payable to him and nothing should remain liable to be supplied or done by him;

2. Substitution of a fresh contract in regard to the unfinished part of the work should not involve the Government in loss or extra expenditure with a view to enabling any particular person to stand for election as a candidate; and

3. The contractor who is allowed to back out of his contract should do so at his own risk and should be made liable to make good any loss to the Government arising out of the necessity to enter into a fresh contract.

4. The instructions now issued will apply also to the termination of contracts under similar circumstances in the Public Works and Electricity Departments.

M. Gopal Menon Deputy Secretary to Government To The Chief Engineer (Highways) /True Copy/ Copy of Endt. No. 55868/D2/51 HR dated 16.11.1951 from the Chief Engineer (Highways and Rural Works) Madras-5 to the Superintending Engineers and Divisional Engineers (H) @@@@@ Copy communicated to the Superintending Engineers (H) and Divisional Engineers (H) for information and guidance.

K.K. Nambiar Chief Engineer (Highways)"

According to the appellant the respondent was disqualified because the contracts entered into by him in the course of his trade or business with the appropriate Government, were subsisting at the time when he filed his nomination papers on

April 17, 2006 and, therefore, his Election Petition should have been allowed.

Therefore, it would be relevant to notice statutory provision which deals with disqualification of a candidate having subsisting contracts with the Government.

Section 9-A of the Act, which deals with disqualification for Government contracts etc., reads as under: -

"9A. Disqualification for Government contracts, etc. - A person shall be disqualified if, and for so long as, there subsists a contract entered into by him in the course of his trade or business with the appropriate Government for the supply of goods to, or for the execution of any works undertaken by that Government.

Explanation. - For the purposes of this section, where a contract has been fully performed by the person by whom it has been entered into with the appropriate Government, the contract shall be deemed not to subsist by reason only of the fact that the Government has not performed its part of the contract either wholly or in part."

9. According to the appellant, the respondent had following three contracts subsisting with the Government on the date of his filing of the nomination papers, which was quite evident from communication dated April 17, 2006 addressed by the Divisional Engineer (Highways) NABARD and Rural Roads, Nagercoil to Mr. S. Madasamy, the learned advocate of the appellant: -

(a) Strengthening Pothaiyadi Road Km 0/0-2/2 Estimate Rs.14.50 lakhs;

(b) Strengthening Bethaniya Road Km 0/0-3/0 Estimate Rs.19.00 lakhs;

(c) Strengthening Eruvadi - Donavoor Road to Kattalai Road, Km 0/0-1/4 estimate Rs.9.50 lakhs.

10. Before considering the effect of abovementioned contracts entered into between the respondent and the Government, it would be essential to analyze the Government Order dated November 16, 1951. The Chief Engineer (Highways) had reported to the State Government that several contractors in the State, who had got subsisting contracts under the Government and District Boards, had applied for closing their accounts and for removal of their names from the list of approved contractors in order to enable them to stand for election as a candidate. However, the then existing provisions in the preliminary specification to Madras Detailed Standard Specifications did not permit the contractors to withdraw from their existing contracts so as to enable them to contest the election. Therefore, the Chief Engineer by letter dated November 13, 1951 requested the Government to issue instructions and general policy to be adopted in such cases. The Government considered the proposal made by the Chief Engineer and provisions of Madras Detailed Standard Specifications. After careful examination, His Excellency the Governor of Madras issued directions that the contractors, who desired to stand for election as candidates for the Legislature, be permitted to

terminate their subsisting contracts and also get their names deleted from the list of approved contractors, provided other persons acceptable to the Chief Engineer were available and were willing to enter into a contract to execute the works under the existing terms and conditions so that no loss was suffered by the Government. In view of the directions given by His Excellency the Governor of Madras, the Government issued G.O. dated November 16, 1951. By the said G.O. the Chief Engineer was informed that while terminating subsisting contracts of the contractors the facts and/or following points mentioned should be considered: -

> i) There should be a final and complete settlement of rights and liabilities between the Government and the existing contractor. No sum of money should remain payable to the contractor and nothing should remain liable to be supplied or done by the contractor;
>
> ii) The substitution of a fresh contract in regard to the unfinished part of the work should not result into loss to the Government or extra expenditure merely because a particular contractor was to stand for election as a candidate; and
>
> iii) The contractor, who was allowed to back out of his contract, should do so at his own risk and should be made liable to make good any loss to the Government arising out of the necessity to enter into a fresh contract with another contractor only because the existing contractor was to stand for election as a candidate.

11. Normally, a contract entered into between two parties would come to an end (1) by performance, (2) by express agreement, (3) under the doctrine of frustration, (4) by breach and (5) by novation. Such contingencies and eventualities are always contemplated while entering into an agreement between the two persons and a contract can be brought to an end in any of the aforementioned methods. However, in view of the fact that several contractors had applied for closing their accounts and for removal of their names from the list of approved contractors in order to enable them to stand for the election, a recommendation was made by the Chief Engineer (Highways) to the Government to issue instructions and lay down general policy to be adopted in such cases. When a contract was brought to an end because contractor was desirous of contesting election, it was not a case of either breach of the contract or performance of the same or novation of the same or frustration of the same and, therefore, a special method was required to be devised by the Government before terminating the existing contract to enable the contractor to contest the election. The method devised was that the G.O. dated November 16, 1951 was issued/addressed only to the Chief Engineer (Highways). In order to see that the unfinished work of the Government did not suffer nor Government suffered any loss, a special care was required to be taken and, therefore, the Chief Engineer was directed that the contractors, who desired to stand for election as candidates for the Legislature, should be permitted to terminate their subsisting contracts and also get their names deleted from the list of approved contractors only if other contractor acceptable to the Chief Engineer was available and was willing to enter into contract to execute the works under the existing terms and conditions so that no loss was suffered by the Government. The Government specifically mentioned in paragraph 3 of the said Government Order that the Chief Engineer should consider the following three points before terminating the contracts existing: -

a) that there should be final and complete settlement of rights and liabilities between the Government and the existing contractor;

b) the Chief Engineer must ensure that no sum of money remained payable to the contractor; and

c) nothing remained liable to be supplied or done by the contractor.

The G.O. further required the Chief Engineer to ensure that the substitution of a fresh contract in regard to the unfinished part of work should not cause any loss to the Government nor the Government should be made to incur extra expenditure merely to enable a particular contractor to stand for election as a candidate. What was highlighted in the said Order was that the contractor, who was allowed to back out of his contract, was to do so at his own risk and was liable to make good any loss that may be suffered by the Government out of necessity to enter into a fresh contract.

12. A reasonable reading of the above mentioned stipulations and conditions mentioned in the Government Order dated November 16, 1951 makes it evident that only the Chief Engineer was competent to terminate the existing contracts where the contractor was desirous of contesting election.

It is wrong to say that an instruction had been issued to the Chief Engineer to see that another contractor was available as substitute to perform the remaining part of the contract without any loss to the Government and that the Order dated November 16, 1951 did not provide that an order of termination of a subsisting contract should be issued only when the Chief Engineer had accepted a person, who was available and was willing to enter into a contract on the same terms and conditions to which the existing contractor had agreed.

13. One of the accepted principles of interpretation is as to how those, who are conversant with the Government Order and are expected to deal with the same, construe and understand the Order. The opinion expressed by the Government officials, who are expected to have sufficient knowledge and experience as to how a Government Order should be operated and/or implemented, may be relied upon.

In order to ascertain this, it would be necessary to refer to the evidence on record. Though the High Court has concluded that the Chief Engineer had no power to terminate contracts in terms of Government Order dated November 16, 1951, this Court finds that the High Court has not adverted to the evidence on record at all. In this case evidence of G. Shanmuganandhan was recorded as PW-3.

His evidence indicates that in April, 2006, he was Superintending Engineer, Highways Projects, Madurai. According to him, Tirunelveli Division Projects were under his jurisdiction. It is mentioned by him that he had issued Exhibit P-12 by which name of the respondent was deleted from the list of contractors. After looking at Exhibit P-13 it was stated by him that it was an erratum and he had marked copy of Exhibit P-13 to the Superintending Engineer, Tirunelveli with

instructions to take appropriate action. He explained to the Court that appropriate action meant cancelling of ongoing contract works of the respondent. He further stated that the Superintending Engineer, NABARD and Rural Roads, Tirunelveli, had entered into the contracts. In cross-examination this witness clarified that there was no connection between the act of removal of name of contractor from the list and termination of the contract and the two issues were different. In his further examination-in-chief by the learned counsel for the appellant, he was put a question as to who was the competent authority for approving the substitute contract as per G.O.Ms. 4682. In answer to the said question he replied that the Chief Engineer, NABARD and Rural Roads, was competent authority for approving the substitute contract. Again, Mr. P. Velusamy, who was Superintending Engineer, NABARD and Rural Roads, Tirunelveli, was examined by the appellant as PW-4. He stated in his testimony that between September, 2005 and August, 2006, he was Superintending Engineer, NABARD and Rural Roads, Tirunelveli and was working under Chief Engineer, NABARD and Rural Roads, Chennai.

According to him, three divisions were under his control and they were (1) Nagercoil, (2) Tirunelveli and (3) Paramakudi. He further mentioned in his testimony that the Divisional Engineer, NABARD and Rural Roads, Nagercoil was under his control.

He was shown Exhibit C-11 and after looking to the same, he stated that it was the original agreement in respect of three works awarded to the respondent in respect of Nagercoil Division. After looking to Exhibit C-12, he mentioned that they were the proceedings of the Divisional Engineer, NABARD and Rural Roads, Nagercoil wherein the Divisional Engineer had sought his orders. According to him, Exhibit C-13 was a letter dated April 18, 2006 addressed by the Divisional Engineer to him informing about the order of termination of contracts passed by him in respect of the contracts entered into by the respondent and by the said letter the Divisional Engineer had also sought ratification from him of the order terminating the contract. According to him, the ratification sought for under Exhibit C-13 was granted by him vide Exhibit P-19 letter dated April 26, 2006. He further stated that he had the power either to ratify or to refuse the ratification of any orders of the Divisional Engineer. The witness stated that Exhibit C-9 was the proceeding issued by him making recommendation that the term of Rajagopal as a contractor be renewed. According to him Mr. Rajagopal had made an application on April 18, 2006 with a request to mention his name in the list of contractors again and under Exhibit C-14 dated June 1, 2006, his requested was granted.

According to him by Exhibit C-6 dated May 2, 2005 he had requested the Chief Engineer to ratify the action of the Divisional Engineer to substitute Rajagopal in place of the respondent to do the balance work whereas Exhibit C-15 were the proceedings dated June 19, 2006 forwarded by him to the Chief Engineer recommending the name of Rajagopal as a substitute for the respondent.

According to him, pursuant to the Order dated June 26, 2006 issued by the Chief Engineer, he had imposed certain conditions for accepting Rajagopal as substituted contractor. The witness further explained that Exhibit C-8 were his proceedings dated June 26, 2006 pursuant to the orders of the Chief Engineer contained in Exhibit C-7 whereas Exhibit C-16 dated July 4, 2006 was the original agreement entered into with Rajagopal with respect to three balance works to be completed in Nagercoil Division. The witness stated that under Exhibit C-7 the Chief Engineer had required him

to send his acknowledgement for having received the ratification order passed by him. In his examination-in-chief the witness had mentioned that every contractor was required to take steps to bring his name on the list of approved contractor from 1st April of every year within a period of three months therefrom and if a criminal case was pending against any contractor, his name would not be included in the list of approved contractors. The witness in no uncertain terms admitted that from the file he was able to say that in the year 2000 Rajagopal was involved in a criminal case of assault but there was no data available in the records showing that pursuant to the said criminal case his name was ever removed from the list of contractors.

He denied the suggestion that on April 17, 2006 Rajagopal was not a registered contractor.

14. Mr. Y. Christdhas, who was Divisional Engineer at the relevant time, was examined on behalf of the respondent as RW-2. According to him, the respondent was working as a contractor in his Division and was nominated as a contractor for the works mentioned by him in his examination-in-

chief. According to this witness, the respondent had addressed a letter dated April 10, 2006 and another letter dated April 17, 2006 to him with the request to terminate his subsisting contracts and both the letters of the respondent were forwarded by him to the Superintending Engineer by forwarding letter dated April 17, 2006, with his endorsement that order terminating contracts passed by him be ratified. The witness stated in his testimony that the respondent wanted to contest the election and, therefore, he had addressed a letter dated April 10, 2006 to him for termination of contracts. The witness further mentioned that pursuant to his letters the Superintending Engineer had instructed him to pass the order terminating the contract and to get ratification. The witness stated that accordingly he had terminated the contracts awarded to the respondent. He also stated that he had sent a letter Exhibit C-13 seeking ratification of the order terminating the contracts awarded to the respondent. The witness mentioned in his testimony that the Superintending Engineer accorded ratification through Exhibit P-19 whereas under Exhibit C-21 Rajagopal was appointed as substituted contractor. According to him by letter dated April 19, 2006 he had recommended Rajagopal's appointment as substituted contractor and along with the said recommendation he had also sent Exhibit R-4, which was a letter of the respondent for agreeing to compensate the Government for the loss, if any, which might take place. This witness also mentioned that Exhibit C-7 were the proceedings drawn by the Chief Engineer approving the substitution of Rajagopal in the place of the respondent. It was also stated by the witness that Exhibit R-18 dated September 21, 2006 was the reply given by him to the letter of the appellant Exhibit R-17 dated September 16, 2006, wherein he had mentioned that the account with the respondent was settled and no cash payment was made to the respondent. In his cross-examination this witness in no uncertain terms admitted that the power to terminate the contract awarded to a contractor, who proposed to contest the election, was only with the Chief Engineer and since he had no power to terminate the contract, he had forwarded the papers to his superior officers. The witness stated that Exhibit C-13 was forwarded to the Superintending Engineer only after he passed order Exhibit P-17 cancelling the contracts awarded to the respondent. According to him the urgency of the situation was also the reason for making Exhibit P-17 order. He further clarified that in Exhibit P-17 he had not mentioned that his order was subject to ratification by the Superintending Engineer.

15. The evidence of the above mentioned witnesses clearly indicates that the power to terminate the contract in terms of Government Order dated November 16, 1951 was only with the Chief Engineer and neither the Divisional Engineer was competent to terminate the contracts awarded to the respondent nor the Superintending Engineer was competent to ratify an order passed by the Divisional Engineer cancelling the contracts awarded to the respondent. The record nowhere shows that the contracts entered into between the respondent and the Superintending Engineer, Tirunelveli were ever terminated by the Chief Engineer in terms of Government Order dated November 16, 1951 by passing an order. Therefore, the assertion made by the respondent that his contracts were terminated by the Divisional Engineer by passing an order, which was subsequently ratified by the Superintending Engineer is of no avail. There is no manner of doubt that the contracts entered into between the Superintending Engineer, Tirunelveli and the respondent were not terminated as required by Government Order dated November 16, 1951 and, therefore, it will have to be held that they were subsisting on the date of filing of the nomination papers by the respondent as well as on the date on which those papers were scrutinized.

16. As noticed earlier, one of the conditions to be fulfilled before termination of the contract of a contractor, who was desirous to contest election, was that he must offer a substitute, who was willing to undertake unfinished work on the same terms and conditions but without causing any loss to the Government. The former Chief Engineer, who was examined in this case as PW-2, has, without mincing the words, stated that Mr. Rajagopal offered by the respondent as substitute contractor was substituted in place of the respondent on June 1, 2006. It means that the contract could not have been terminated earlier than June 1, 2006 and were subsisting at least as on June 1, 2006, which was the date beyond the last date of filing of the nomination papers and scrutiny thereof. Therefore, the finding recorded by the learned Judge of the High Court that on the date of filing of the nomination Mr. Rajagopal was already substituted in place of the respondent is not born out from the record of the case nor the record shows that after June 1, 2006 the contracts were terminated by the authority contemplated under Government Order dated November 16, 1951.

17. At this stage, it would be relevant to again reproduce clause 1 of Government Order dated November 16, 1951, which is as under: -

> "1. There should be a final and complete settlement of rights and liabilities between the Government and the existing contractor. No sum of money should remain payable to him and nothing should remain liable to be supplied or done by him."

Mr. Y. Christdhas, who was the Divisional Engineer at the relevant point of time, has, in terms, mentioned that under Exhibit C-12 it was noted that a sum of Rs.98,227/- payable to the respondent should be kept in the deposit and the contract should be permanently terminated seeking orders from the Superintending Engineer. The record further shows that on April 19, 2006 the Divisional Engineer had forwarded a letter to the Superintending Engineer, Tirunelveli mentioning inter alia that since the contract of the respondent was cancelled, the fourth and final list of approval was given to him and deposit amount of Rs.2,02,341 was kept in kind-IV deposit. The Government Order dated November 16, 1951, which is quoted above, clearly requires that no sum of money should remain payable to the contractor and nothing should remain liable to be supplied or done by

the contractor. Keeping the amount of more than two lakhs in kind-IV deposit can hardly be said to be compliance of clause 1 of the Government Order dated November 16, 1951. In fact as held earlier, everything was required to be done by the Chief Engineer himself.

There is nothing on record to show that the steps and/or actions, which were taken by the Divisional Engineer, were ever ratified by the Chief Engineer except that the Chief Engineer had accepted the proposal of the Superintending Engineer to accept Rajagopal as substitute of the respondent. Thus, this Court finds that on the date of filing of nomination papers and scrutiny of the same, the respondent had not validly terminated the contracts entered into by him with the Government and was disqualified not only to file his nomination papers but also to contest the election in question.

18. The learned Single Judge has brushed aside the Government Order dated November 16, 1951 by stating that it was only an administrative instruction circulated to the Engineers (Highways) NABARD and Rural Roads for information and guidance, forgetting the important fact that in the last clause of the Government Order it is specifically mentioned that the instructions issued by the said Government Order would also apply to the termination of the contracts under similar circumstances entered into with the Public Works and Electricity Departments. Therefore, the High Court was wrong in holding that though Government Order dated November 16, 1951 was an order by the Government, at best it must be construed as an administrative order for the guidance of the Engineers (Highways) NABARD and Rural Roads in various hierarchies.

19. Departmental circulars are a common form of administrative document by which instructions are disseminated. Many such circulars are identified by serial numbers and published, and many of them contain general statement of policy. They are, therefore, of great importance to the public, giving much guidance about governmental organization and the exercise of discretionary powers. In themselves they have no legal effect whatever, having no statutory authority. But they may be used as a vehicle in conveying instructions to which some statute gives legal force. It is now the practice to publish circulars which are of any importance to the public and for a long time there has been no judicial criticism of the use made of them. Under Article 162 of the Constitution, the executive power of the State extends to matters with respect to which the State Legislature has power to make laws. Yet the limitations of the exercise of such executive power by the Government are two fold;

first, if any Act or Law has been made by the State Legislature conferring any function on any other authority - in that case the Governor is not empowered to make any order in regard to that matter in exercise of his executive power nor can the Governor exercise such power in regard to that matter through officers subordinate to him.

Secondly, the vesting in the Governor with the executive power of the State Government does not create any embargo for the Legislature of the State from making and/or enacting any law conferring functions on any authority subordinate to the Governor. Once a law occupies the field, it will not be open to the State Government in exercise of its executive power under Article 162 of the Constitution to prescribe in the same field by an executive order. However, it is well recognized that in matters relating to a particular subject in absence of any parliamentary legislation on the said subject, the State Government has the jurisdiction to act and to make executive orders. The executive power of

the State would, in the absence of legislation, extend to making rules or orders regulating the action of the Executive. But, such orders cannot offend the provisions of the Constitution and should not be repugnant to any enactment of the appropriate Legislature. Subject to these limitations, such rules or orders may relate to matters of policy, may make classification and may determine the conditions of eligibility for receiving any advantage, privilege or aid from the State. The powers of the executive are not limited merely to the carrying out of the laws. In a welfare state the functions of Executive are ever widening, which cover within their ambit various aspects of social and economic activities. Therefore, the executive exercises power to fill gaps by issuing various departmental orders. The executive power of the State is co-terminus with the legislative power of the State Legislature. In other words, if the State Legislature has jurisdiction to make law with respect to a subject, the State Executive can make regulations and issue Government Orders with respect to it, subject, however, to the constitutional limitations. Such administrative rules and/or orders shall be inoperative if the Legislature has enacted a law with respect to the subject. Thus, the High Court was not justified in brushing aside the Government Order dated November 16, 1951 on the ground that it contained administrative instructions. The respondent could not point out that the said order was repugnant to any legislation enacted by the State Government or the Central Government nor could he point out that the instructions contained in the said Government Order dated November 16, 1951 were repugnant to any statutory rules or the Constitution. In fact, there was neither any enactment nor any statutory rule nor any constitutional provision as to how the contractor, who has entered into contracts with the Government, should be permitted to contest election, more particularly, when a request is made by the contractor to terminate his contracts so as to enable him to contest the election. There is no manner of doubt that in this branch of jurisdiction there was absence of statutory enactment, regulations and rules and, therefore, this Court is of the firm opinion that the Government had all authority to issue Government Order dated November 16, 1951 to fill up the gaps. Thus the case of the respondent that his three contracts were terminated before he filed nomination papers will have to be judged in the light of the contents of Government Order dated November 16, 1951.

Viewed in the light of the contents of the Government Order dated November 16, 1951, there is no manner of doubt that there was no valid termination of the contracts by the Government and those contracts were subsisting on the date when the respondent had filed his nomination papers and also on the date when the nomination papers of the respondent with other candidates were scrutinized by the Returning Officer.

20. The argument that the contracts were validly terminated by the Divisional Engineer, which action was subsequently ratified by the Superintending Engineer and, therefore, it should be held that there were no subsisting contracts on the date of submission of the nomination papers, has no merits and cannot be accepted. On true interpretation of the Government Order dated November 16, 1951 this Court has held that only the Chief Engineer was competent to terminate the contracts and, therefore, the termination of the contracts by the Divisional Engineer, which was subsequently ratified by the Superintending Engineer, cannot be treated as valid termination of contracts. The record of the case shows that on April 10, 2006, the respondent had addressed a letter to the Divisional Engineer, NABARD informing him about his intention to contest the Assembly election and requesting him to cancel the contracts immediately.

In the said letter a request was made to issue a certificate indicating that the contracts entered into by the respondent with the Government were cancelled. Obviously, the Divisional Engineer had no authority to cancel the contracts and, therefore, he had forwarded the letter of the respondent to the Superintending Engineer immediately for necessary action. The record shows that in view of the request made by the respondent, an orders was passed by the Office of Superintending Engineer cancelling the registration of the respondent as a contractor permanently and the respondent was informed that if any work was pending on his side, he should obtain a separate work cancellation order for the work pending from the concerned Highways Division. It was also informed to the respondent that the cancellation of registration of contractor would be final only after obtaining such separate work cancellation order from the concerned Division and the order passed for cancellation of registration as contractor from the Register would not be treated as work cancellation order for any pending work.

The proceedings of the Divisional Engineer (H) NABARD and Rural Roads, Nagercoil dated April 17, 2006 mention that the contracts were absolutely terminated as per Government Order dated November 16, 1951 and the respondent was informed that the works entrusted to him would be got executed at his risk and cost and that orders for entrustment of the works to the new contractor would be issued separately. It was also mentioned in the said letter that the deposits available in favour of the respondent for the works, which were determined, were freezed and forfeited for crediting the same into Government account. Thereafter, the Divisional Engineer had addressed a communication dated April 18, 2006 to the Superintending Engineer informing that as the respondent was desirous to contest Assembly election and had requested to cancel the contracts in the present position and issue termination certificate for the said works, he had conducted proceedings for cancelling the contract on April 17, 2006. By the said letter the Divisional Engineer had requested the Superintending Engineer to accord ratification to the order dated April 17, 2006 for cancelling the contracts. The record shows that thereafter by an order dated April 26, 2006 the Superintending Engineer (N) NABARD and Rural Roads, Tirunelveli had ratified the order dated April 17, 2006 by which the Divisional Engineer (H) NABARD had terminated the contracts entered into by the respondent with the Government. The Superintending Engineer had informed the respondent that the Divisional Engineer was competent to terminate the contracts. However, it is an admitted position that the contracts were entered into by the respondent with the Superintending Engineer and under the terms and conditions of the contracts, the Superintending Engineer was competent to terminate the contracts.

The Government Order dated November 16, 1951 nowhere provides that the Divisional Engineer was competent to terminate the contracts. Having noticed the Government Order dated November 16, 1951 the Superintending Engineer could not have informed the respondent that the Divisional Engineer was competent to terminate the contracts entered into by him with the Government nor the Divisional Engineer was competent to terminate the contracts entered into by the respondent with the Government.

21. Normally, the Superintending Engineer would be competent to terminate the contracts when breach of the terms and conditions is committed by a contractor. However, in the present case the court finds that the contracts were to be brought to an abrupt end because the respondent was

intending to contest the election. Such an eventuality was never contemplated under the contracts and the contracts entered into by the respondent with the Government could have been terminated only as per the terms and conditions stipulated in Government Order dated November 16, 1951. Therefore, neither the Divisional Engineer had authority to terminate the contracts nor the Superintending Engineer had any authority to terminate the contracts. Thus, the action of the Superintending Engineer in ratifying the cancellation of the contracts made by the Divisional Engineer is of no consequence.

22. The net result of the above discussion is that on the date of submission of nomination papers by the respondent as well as on the date of scrutiny of the nomination papers, the contracts entered into by the respondent with the Government were subsisting and, therefore, the respondent was disqualified from filing the nomination papers and contesting the election. The respondent having incurred disqualification under the provisions of Section 9A of the Act, his election will have to be declared to be illegal. Accordingly, it is declared that the respondent had incurred disqualification under Section 9A of the Act and, therefore, his election from the Constituency in question is declared to be illegal, null and void.

23. The appeal is accordingly allowed. There shall be no order as to costs.

.....J. [J.M. Panchal] .....J. [Gyan Sudha Misra] New Delhi;

April 13, 2011.