

## Vadivelu vs Sundaram And Ors on 10 October, 2000

**Equivalent citations:** AIR 2000 SUPREME COURT 3230, 2000 AIR SCW 3664, 2000 (1) JT (SUPP) 408, 2000 (6) SCALE 719, 2000 (8) SCC 355, 2001 (4) LRI 938, 2000 (9) SRJ 372, (2001) 1 MAD LW 349, (2000) 6 SCALE 719, (2000) 4 SCJ 250, (2000) 7 SUPREME 57, (2001) 1 UC 94

**Author:** R.C.Lahoti

**Bench:** R.C.Lahoti

CASE NO.:  
Appeal (civil) 6543 of 1999

PETITIONER:  
VADIVELU

Vs.

RESPONDENT:  
SUNDARAM AND ORS.

DATE OF JUDGMENT: 10/10/2000

BENCH:  
R.C.Lahoti, K.G.Balakrishna

JUDGMENT:

Balakrishnan, J.L.....I.....T.....T.....T.....T.....T.....T..J The appellant contested the election for the post of President of Vannavalkudi Village Panchayat, Pudukkottai District in Tamil Nadu. The respondent nos. 1, 2 & 3 were also the candidates for the same election. The polling took place on 12.10.96 and the votes were counted on 14.10.96. The 1st respondent, Sundaram secured 1011 votes and the appellant Vadivelu secured 1010 votes and the 1st respondent was declared elected. The other respondents had secured only lesser number of votes. The appellant filed an Election Petition under Rule 122 of the Tamil Nadu Panchayats (Elections) Rules, 1995 before the District Judge, Pudukkottai, challenging the election of the 1st respondent. In the Election Petition, the appellant contended that certain irregularities were committed while the counting of votes was made. According to the appellant, the names of the dead persons were not deleted from the electoral roll and the first respondent took advantage of this, and despite the objection raised by the agents of the appellant, impersonation had taken place at the time of polling. The appellant also alleged that at

the time of counting, a number of valid votes polled in favour of the appellant were treated as invalid by the Returning Officer and though the appellant's agents raised objection, the Returning Officer did not pay heed to it. The appellant further alleged that the counting officers had no knowledge as to which was valid vote and which was invalid one. The counting was done in a hasty manner and the agents of the appellant were not allowed to closely peruse the ballot papers. Certain ballot papers contained thumb impression, but they were rejected as invalid votes. The appellant filed a petition before the Returning Officer for recounting of votes, but that prayer was not allowed and on the above grounds, the appellant filed Election Petition for setting aside the election of the 1st respondent.

The 1st respondent filed counter affidavit denying the allegations in the Election Petition. The 1st respondent contended that the allegations in the Election Petition are vague and insufficient to set aside the election. He contended that no material particulars are furnished in the Election Petition and only bald allegations have been made and, therefore, the Election Petition was liable to be dismissed. The 1st respondent also alleged that the appellant had not given any particulars regarding inclusion of names of dead persons in the electoral roll. According to the 1st respondent, there was no irregularity or illegality in the counting of votes.

Four witnesses were examined on the side of the appellant. On the respondent's side, RW1 and RW2 were examined. The Election Tribunal held that no details were available as to how many votes were secured by the appellant-Election Petitioner and the 1st respondent after the first round of counting and that the appellant had filed an application for recount before the Returning Officer. Therefore, the Election Tribunal ordered re-count of votes and an Advocate-Commissioner was appointed for recounting of votes and he submitted a detailed commission report. On re-count made by the commissioner, the appellant had secured 1002 votes and the 1st respondent, Sundaram, had secured 975 votes. Based on the report of the Commissioner, the Election Tribunal declared the appellant-Vadivelu as the person elected as President of the District Panchayat and the Election Petition was accordingly allowed.

Aggrieved by the order of the Election Tribunal, the 1st respondent, Sundaram, filed a Revision Petition before the Hon'ble High Court, Madras under Article 227 of the Constitution of India. The learned Single Judge held that the Election Tribunal was not justified in ordering the recount of votes as the appellant had not made out a prima facie ground for recounting. The learned Single Judge held that the Election Petition is bereft of any material facts and only vague allegations have been made and the appointment of the Commissioner for recounting of votes was illegal and incorrect and, therefore, without jurisdiction. The Revision was allowed and it was held that the Election Petition would stand dismissed with costs. Aggrieved by the above facts, the present appeal is filed.

We heard the appellant's Counsel Ms. Indu Malhotra and the Counsel for the 1st respondent, Mr. R. Sundaravardan. The main contention urged by the appellant's Counsel is that the learned Single Judge seriously flawed in holding that the Election Petition did not contain the necessary pleadings for seeking recount of the votes. The appellant's Counsel also contended that the 1st Respondent had never raised any objection when the Commissioner was appointed by the Election Tribunal and the

Commissioner had correctly conducted the recounting of votes and declared the appellant elected. The Counsel for the 1st respondent contended that the Election Tribunal should not have ordered re-count of votes and there was no foundation in the pleadings raised in the Election Petition. It was urged by the Counsel for the 1st respondent that the Election Petition itself was liable to be dismissed for want of necessary pleadings.

It was also argued by the counsel for the 1st respondent that the Commissioner, who conducted the recounting, wrongly rejected 31 ballot votes cast in favour of the 1st respondent and according to the Counsel, in view of the Proviso to Rule 63 of the Tamil Nadu Panchayat's (Election) Rules 1995, the Commissioner should have treated those votes as valid votes even though they did not contain the distinguishing mark of the polling station. Counsel for the 1st respondent further argued that the Election Petitioner had filed the application for recount before the Returning Officer after the declaration of the result of the election and the failure to file a proper application for recount before the Returning Officer would disentitle the Election Petitioner from making a similar prayer before the Election Tribunal.

The main arguments of Counsel on either side centered round the question whether in the instant case the Election Tribunal was justified in ordering a recount. The circumstances under which a recount could be ordered have been considered by this Court in various decisions. A survey of at least some of the cases would be of much assistance to know how this Court made pronouncements on this legal question in the settings of various factual background.

In *Satyanarain Dudhani vs. Uday Kumar Singh and Others* 1993 (Supp.) 2 SCC 8, it was held that the secrecy of the ballot papers cannot be permitted to be tinkered lightly and an order of recount cannot be granted as a matter of course. Only when the High Court is satisfied on the basis of material facts pleaded in the petition and supported by the contemporaneous evidence, that the recount can be ordered. When there was no contemporaneous evidence to show any irregularity or illegality in the counting, ordinarily, it would not be proper to order re-count on the basis of bare allegations in the Election Petition.

In *Jitendra Bahadur Singh vs. Krishna Behari and Others*, AIR 1970 SC 276, the election-petitioner, who claimed to be a counting agent filed Election Petition alleging that there was irregularity and illegality in the counting of votes. The learned Single Judge, who was trying the Election Petition permitted the petitioner to inspect the packets of the ballot papers containing the accepted as well as the rejected votes of the candidates. This Court, while allowing the appeal, held that the basic requirements to be satisfied before the Election Tribunal can permit the inspection of ballot papers are that (1) the petition for setting aside the election must contain an adequate statement of material facts on which the petitioner relies in support of his case and (2) the Tribunal must be prima facie satisfied that in order to decide the dispute and to do complete justice between the parties, inspection of ballot papers is necessary. The material facts required to be stated are those facts, which can be considered as materials supporting the allegations made. In other words, they must be such facts as to afford a basis for the allegations made in the petition.

In *D. P. Sharma vs. Commissioner and Returning Officer and Others* 1984 Supp. SCC 157, allegations were made in the Election Petition that there was discrepancy between the total number of ballot papers issued and ballot papers taken out and counted from the ballot boxes. This Court held that the discrepancies alleged in the statements prepared under Rule 45 and 56 of the Conduct of Election Rules, 1967 do not make out a case for directing a re-count of votes especially when the discrepancy is marginal and insignificant. In Para 4 of the said Judgment, it was held that in order to obtain re-count of votes, a proper foundation is required to be laid by the Election Petitioner indicating the precise material on the basis of which it could be urged by him with some substance that there has been either improper reception of invalid votes in favour of the elected candidate or improper rejection of valid votes in favour of the defeated candidate or wrong counting of votes in favour of the elected candidate, which had in reality been cast in favour of the defeated candidate.

*P.K.K. Shamsudeen Vs. K.A.M. Mappillai Mohindeen and Others* (1989) 1 SCC 526 is a case where the petitioner contested the election for the post of President of a Panchayat in Tamil Nadu. In the election, the 1st respondent was declared elected and the petitioner challenged the election on the ground that while counting, the Returning Officer had wrongly treated some valid votes cast in favour of the petitioner as invalid votes and certain invalid votes were treated as valid votes which were cast in favour of the 1st respondent and that the Returning Officer had not permitted the petitioner's agents to have scrutiny of the ballot papers at the time of counting. The Tribunal after recording the evidence of all candidates and the Assistant Returning Officer ordered re-count of votes. On recounting of votes, it was found that there was no difference in the number of votes secured by the petitioner but insofar as the 1st respondent was concerned he had secured only 528 votes as against 649 votes he was originally held to have secured. 121 votes cast in his favour had been found to be invalid votes. Based on the figures of the re-count, the Election Petitioner was declared duly elected as he had secured 28 votes more than the 1st respondent on recount. This order was challenged by the 1st respondent in Civil Revision Petition before the High Court. The learned Single Judge allowed the Revision Petition and held that the Tribunal had erred in ordering a recount of the votes when the petitioner had not made out a prima facie case for an order of recount of votes cast. This Order was challenged before this Court. This Court held in para 13 of the said Judgment as under:-

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

not order the recount of votes."

In *Ram Sewak Yadav vs. Hussain Kamil Kidwai* (1964) 6 SCR 238, this Court held that an order for inspection of ballot papers can be granted under the following circumstances:

"An order for inspection may not be granted as a matter of course : having regard to the insistence upon the secrecy of the ballot papers, the court would be justified in granting an order for inspection provided two conditions are fulfilled :

(i) that the petition for setting aside an election contains an adequate statement of the material facts on which the petitioner relies in support of his case; and

(ii) The Tribunal is prima facie satisfied that in order to decide the dispute and to do complete justice between the parties inspection of the ballot papers is necessary But an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts or to fish out evidence to support such pleas. The case of the petitioner must be set out with precision supported by averments of material facts.

To establish a case so pleaded an order for inspection may undoubtedly, if the interests of justice require, be granted. But a mere allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection."

In *S. Raghbir Singh Gill vs. S. Gurcharan Singh Tohra & Ors.* 1980 Supp. SCC 53, in paragraph 31 of the Judgment, it was held as under:

"True, re-count cannot be ordered just for the asking. A petition for re-count after inspection of the ballot papers must contain an adequate statement on material facts on which the petitioner relies in support of his case and secondly the Tribunal must be prima facie satisfied that in order to decide the dispute and to do complete justice between the parties an inspection of the ballot papers is necessary. The discretion conferred in this behalf should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fishing out materials for declaring the election void."

In *R. Narayanan vs. S. Semmalai and Others* (1980) 2 SCC 537, the Election Petitioner challenged the election on the ground that there were a number of errors in the counting of votes and that the electoral roll itself was inaccurate. The petitioner sought for re-count of votes. The High Court ordered a re-count holding that although there was no clear evidence of any irregularity in counting in the first two rounds, there was a possibility of the counting staff being completely exhausted in the third round which may have led to erroneous sorting and counting of votes. In ordering a re-count the High Court was also influenced by the fact that the margin of the "returned candidate" was only 19 votes. The Order of the High Court was challenged before this Court. This Court

reversed the order passed by High Court and after referring to various decisions on this point, it was held as under:-

"The court would be justified in ordering re-count of the ballot papers only where:

- (1) The Election Petition contains an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded;
- (2) On the basis of evidence adduced such allegations are prima facie established, affording a good ground for believing that there has been a mistake in counting; and
- (3) The court trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties."

In *M.R. Gopalakrishnan vs. Thachady Prabhakaran and Others* 1995 Supp. (2) SCC 101, the Election Petitioner alleged that the counting was not done in a congenial atmosphere. The allegation was that counting was held in a small hall and there were several tables and chairs and counting agents of all the candidates along with other officials were present in the hall; therefore, it became very crowded and sorting out of the bundles of the ballot papers was done hastily and, therefore, it was not possible for the agents of the petitioner to carefully keep track of the process of sorting-out and it was alleged that the Returning Officer rejected many votes as invalid in spite of the protest made by the petitioner. On these allegations, the petitioner sought for re-count of votes. That prayer was rejected by the High Court and the same was challenged before this Court. After referring to the various decisions, it was held that the demand of the defeated candidate for re-count of votes has to be considered keeping in view that secrecy of the ballot is sacrosanct in a democracy and, therefore, unless the Election Petitioner is able not only to plead and disclose the material facts but also substantiate the same by means of evidence of reliable character that there existed a prima facie case for re-count, no tribunal or court would be justified in directing a re-count.

The result of the analysis of the above cases would show that this Court has consistently taken the view that re-count of votes could be ordered very rarely and on specific allegation in the pleadings in the election petition that illegality or irregularity was committed while counting. The petitioner who seeks re-count should allege and prove that there was improper acceptance of invalid votes or improper rejection of valid votes. If only the Court is satisfied about the truthfulness of the above allegation, it can order re-count of votes. Secrecy of ballot has always been considered sacrosanct in a democratic process of election and it cannot be disturbed lightly by bare allegations of illegality or irregularity in counting. But if it is proved that purity of elections has been tarnished and it has materially affected the result of the election whereby the defeated candidate is seriously prejudiced, the Court can resort to re-count of votes under such circumstances to do justice between the parties.

In the instant case, the appellant in his Election Petition alleged in paragraphs 5 and 6 of the Election Petition as under: "..... The wrong electoral roll was utilized by the Presiding Officer. The appellant and his agents strongly protested against the wrong electoral roll. The dead persons names were not deleted from the electoral roll, and other Panchayat Villagers names were in the

electoral roll. The 1st respondent utilized the same. The appellant and his agent strongly objected but the Presiding Officer, has not taken any care about the electoral roll and impersonation. The said votes polled in favour of the 1st respondent are void and therefore has to be excluded.

While counting of votes, the appellants and his agents represented these facts and requested the counting officers and the Returning Officers both orally and in writing to reject these votes polled by these persons. But they refused to consider the said objections. Their such acts are illegal ..... The Counting Officers wantonly put the appellant's valid votes to invalid vote box. The appellant's valid votes were added in the invalid votes. The appellant and his agents strongly objected but the Counting Officers and Returning Officers did not care about the objections. The Counting Officers counted the votes in favour of 1st Respondent.

"Furthermore, the Counting Officers did not know which is valid vote and which is invalid vote. During the polling votes, the Booth Officers received the thumb impression from some voters and gave the ballot papers. The thumb impression ink marks available in the ballot papers. The same votes were rejected and put into the invalid votes. The Counting Officers were newly appointed. They were not properly counting the votes. The Counting Officers were counting the votes very fast and they had not shown the ballots to the agents, even when they raised objection. The Counting Officers threatened the Appellant's agent and told him that they are supreme authority for counting votes. .... Finally, the Returning Officer announced that the 1st Respondent had secured 1011 votes. Appellant secured 1010 votes. The difference is only one vote. More than 100 votes were added in the invalid votes by the Counting Officers. Some invalid votes were included to the 1st Respondent which were void and which ought to have been rejected. The Counting Officers and the Returning Officers had not seen the intention of the voters in the ballot."

From the above pleadings, it is evident that the appellant has not set forth material facts or particulars required for re-count of votes. To justify his contention that there was irregularity or illegality in the counting, except making some general and bald allegations, no other details are given. Though an allegation is made that electoral roll contained the names of dead persons, that the 1st respondent took advantage of the same, and that some persons had impersonated and cast votes in his favour, no details are given as to who committed such irregularity. The appellant has also not mentioned as to how many such votes had been cast in favour of the 1st respondent. So also, the appellant has not alleged the nature of the illegality or irregularity said to have been committed by the counting officers. How and in what manner there was improper acceptance of invalid votes and improper rejection of valid votes also is not explained by the appellant. In short, the Election Petition is bereft of all details and the appellant, while examined as PW 1, could not supplement anything by way of evidence.

The appellant has contended that an application for re-count was made by him before the Returning Officer. Rule 66 of the Tamil Nadu Panchayats (Elections) Rules, 1995 states that after the completion of counting and recording in Form 22 the total number of votes polled by each candidate

under sub-rule (2) of rule 64, the Returning Officer shall announce the same. After such announcement, and before the declaration of the result of the election, a contesting candidate or in his absence, his election agent may apply in writing to the Returning Officer for a recount of all or any of the votes already counted stating the grounds on which he demands such recount. Sub-rule (2) of Rule 66 further says that on such application being made, the Returning Officer shall decide the matter and may allow the application in whole or in part, or may reject it in toto if it appears to him to be frivolous or unreasonable. Therefore, an application for recount shall be made before the declaration of the result of the election, but after the completion of the counting, when such result is entered in part II of Form 20. This form is to be signed by the Counting Supervisor and the Returning Officer.

The appellant-Election Petitioner in this case has not stated as to when did he file the application for re-count. He has stated that he had given an application to the Returning Officer for recounting of votes and the request for recounting was not accepted. At the time of the evidence also, the appellant has not stated as to when did he file the application. In cross-examination, he stated that at about 10.00 p.m. on 14.10.1996, it was announced through loud speaker that the 1st respondent was elected and he denied the allegation that the application for re-count was made at 11.45 p.m. The 1st respondent was examined as RW 1. He deposed that the result of the election was declared at 10.30 p.m. and in all probability, the appellant filed an application for re-count after the result of the election was declared. Therefore, the application for re-count was not filed in accordance with Rule 66 of the Tamil Nadu Panchayats (Elections) Rules, 1995.

It is all the more important to note that the appellant sought to set aside the election of the 1st respondent and in the Election Petition urged the grounds under Section 259(2)(d)(iii) & (iv) of the Tamil Nadu Panchayats Act, 1994 and the relevant provision is to the following effect:-

"259. Grounds for declaring elections to be void.

(1) Subject to the provisions of sub-section (2), if the District Judge is of the opinion

(a) XXXXXX (b) XXXXXX (c) XXXXXX

(d) that the result of the election in so far as it concerns a returned candidate has been materially affected

--

(i)-(ii) XXXX

(iii) by the improper acceptance or refusal of any vote or reception of any vote which is void; or

(iv) by the non-compliance with the provisions of this Act or of any rules or orders made thereunder, the court shall declare the election of the returned candidate to be



void."

But in the Election Petition, the appellant has not stated that by the alleged improper acceptance or refusal of any vote or reception of any vote, which is void, or by the alleged non-compliance with the provisions of the Act or of any rules or orders made thereunder, the result of the election of the 1st respondent had been materially affected. The appellant was examined as PW 1. At the time of the evidence also, he had not stated that because of the alleged illegality or irregularity, the result of the election had been materially affected. Grounds under Section 259(2) could successfully be urged only if it is proved that the election of the returned candidate had been materially affected.

The Counsel for the 1st respondent contended that the Commissioner while counting postal ballot papers illegally rejected 31 votes cast in favour of the 1st respondent on the ground that these ballot papers did not contain the signature of the Presiding Officer. Three votes cast in favour of the appellant also were rejected by the Commissioner on the same ground. The Commissioner held the view that Rule 63(1)(h) of the Tamil Nadu Panchayat(Election) Rules, 1995 requires that the postal ballot paper shall contain the signature of the Presiding Officer as well as the distinguishing mark of the polling station. The procedure for issuance of postal ballot papers is given under Rule 51, which says that before any ballot paper is delivered to an elector, the Presiding Officer shall sign his name in full on the back of each ballot paper and affix the distinguishing mark of the polling station.

The relevant portion of Rule 63 of Tamil Nadu Panchayat(Election) Rules, 1995 reads as follows:-

"63. Rejection of ballot papers. (1) A ballot paper shall be rejected.-

(a)-(g) XXXXXX

(h) if it does not bear both the distinguishing mark and/or the signature of the Presiding Officer which it should have borne under the provisions of sub-rule (1) of rule 51 or the words "elector on election duty" under sub-rule(1) of rule 52, or (i) XXXXXX Provided that where the Returning Officer is satisfied that any such defect as is mentioned in clause (g) or clause

(h) has been caused by any mistake or failure on the part of a Presiding Officer, the ballot paper shall not be rejected merely on the ground of such defect.

XXXXXX"

The rejected ballot paper did not contain the signature of the Presiding Officer, though it contained the distinguishing mark of the polling station. Rule 63(1)(h) dealing with rejection of ballot papers provides that in order to reject ballot papers it should be one not bearing "both the distinguishing mark and/or the signature of the Presiding Officer". Therefore, a harmonious construction of Rule 51 and 63 would show that in order to reject a postal ballot paper, the same should have lacked both the features, viz; the signature of the Presiding Officer as well as the distinguishing

mark of the polling station. In the instant case, it is evident that due to some mistake or inadvertence, the Presiding Officer did not sign these ballot papers. The absence of signatures under the circumstances could not invalidate the ballot paper, which bore the distinguishing mark of the polling station. Therefore, the Commissioner went wrong in declaring these votes as invalid. That apart, it may be noted that had these votes been treated as valid by the Commissioner, even on re-count, the 1st respondent would have secured the highest number of votes.

The appellant-Election Petitioner could not make out a case for re-count of votes. He filed the application for re-count before the Returning Officer only after the declaration of result and that was rightly rejected by the Returning Officer. The appellant had no case that the illegality or irregularity, if any, committed had materially affected the result of the election. Taking all the aspects into consideration, we are of the view that the learned Single Judge was perfectly justified in holding that the Election Tribunal erred in appointing a Commissioner and ordering the re-count of votes. The Counsel for the appellant contended that the powers of the Revisional Court are not as wide as the powers of the Appellate Court and, therefore, the learned Single Judge should not have set aside the order passed by the Election Tribunal. We do not find any force in this contention. When there is error of jurisdiction or flagrant violation of the law laid down by this Court, by exercising the revisional powers, the court can set aside the order passed by the Tribunal to do justice between the parties. The illegality committed by the Election Tribunal has been corrected by the Revisional Order. We find no merit in the present appeal and the same is dismissed.

Having regard to the facts and circumstances, there will be no order as to costs.