

K. Kamaraja Nadar vs Kunju Thevar And Ors. on 22 April, 1958

Equivalent citations: AIR 1958 SC 687, (1958) IIMLJ 52(SC), (1958) 36 MYSLJ~(SC), [1959] 1 SCR 583

Bench: A.K. Sarkar, J.L. Kapur

JUDGMENT

Bhagwati, J.

1. These Civil Appeals raise a common question of law, viz., the interpretation of sections 82 and 117 of the Representation of the People Act, 1951, (hereinafter referred to as "the Act") and can be disposed of by a common judgment.

2. Civil Appeal No. 763 of 1957 : The appellant in Civil Appeal No. 763 of 1957 is the Chief Minister of Madras and was declared duly elected to the Madras State Legislative Assembly at an election held on March 4, 1957, from the Sathur Constituency having got 36,400 valid votes against 31,683 valid votes secured by his rival, the respondent No. 2 in the petition. There had been seven candidates duly nominated for election in that constituency out of whom 4 had withdrawn their candidature by February 4, 1957, which was the last date for such withdrawal. Three candidates were thus left in the field, the appellant, the 2nd respondent and one Sundararaja Pillai and their names were placed in the list of contesting candidates and published by the Returning Officer under section 38 of the Act. Pillai retired from the contest on February 21, 1957, under section 55A(2) of the Act, thus leaving the appellant and the 2nd respondent the only two contestants for the seat.

3. After the appellant was declared duly elected, the first respondent who was an elector in the said constituency filed an election petition, being election Petition No. 147 of 1957, impleading the appellant and the 2nd respondent as party respondents to that petition and prayed that the election of the appellant from Sathur Constituency be declared void and further that the 2nd respondent be declared duly elected.

4. As Pillai who had retired from the contest on February 21, 1957, was not impleaded as a party respondent to this petition an objection was raised by the Election Commission on the score of his non-joinder. A notice was issued to the 1st respondent on May 1, 1957, calling upon him to show cause why the petition should not be dismissed summarily for non-joinder of one of the necessary parties and on May 10, 1957, the Election Commission by its order stated that it would be for the Election Tribunal to decide at the Trial after hearing the parties if the issue of the non-joinder of Pillai as a respondent necessarily affected the prayer seeking that the 2nd respondent be declared duly elected. The Election Commission also discovered a defect in the deposit of Rs. 1,000 inasmuch as the proper and complete head of account had not been mentioned in the treasury receipt nor had

the deposit been made in favour of the Secretary, election Commission, as laid down in section 117 of the Act. This question also was left to the Tribunal to decide after hearing the parties, if the defect should be treated as fatal or one that could be cured by fresh deposit or otherwise so as to secure the costs of the appellant if eventually awarded to him. The Election Commission admitted the petition and a copy of the petition was published in the official gazette as required under section 86(1) of the Act. It was also served on the appellant and the petition was referred to the Election Tribunal for trial.

5. On June 22, 1957, the appellant filed I.A. No. 1 of 1957 before the Election Tribunal asking for a dismissal of the petition as required by section 90(3) of the Act on the ground that the respondent had failed to join Pillai, who was also a contesting candidate, as a respondent. On the same day the appellant filed another application being I.A. No. 2 of 1957, before the Election Tribunal similarly asking for the dismissal of the petition inasmuch as the proper and complete head of account had not been mentioned in the treasury receipt which the 1st respondent had sent to the Election Commission and the deposit also had not been made in the name of the Secretary, Election Commission, as clearly and strictly required under section 117 of the Act. The first respondent filed before the Election Tribunal I.A. No. 3 of 1957 asking for an amendment of the petition by deleting paragraph 7A :- "the second respondent would have obtained more votes if the first respondent had not resorted to such corrupt practices in the said election" and also a portion of the prayer which asked for the following relief :- "and further it is also prayed that this Honourable Court may be pleased to declare the second respondent as a duly elected candidate in the election." All these applications came up for hearing and final disposal before the Election Tribunal on July 5, 1957.

6. Evidence was led by the first respondent in connection with the treasury receipt and K. Nataraja Mudaliar, head Accountant in-charge of the Madurai Taluk Sub-Treasury, gave evidence to the effect that the Sub-Treasury, clerk had filled up the head of the account in the Chalan, that the Treasury Officer would make necessary entries in the Chittas and carry forward the amounts to the respective heads of accounts, that the amount was kept in the Election Revenue deposit and could not be disposed of without the Election Commission's order and that the money was at the disposal of the Election Commission. On cross-examination by the Election Tribunal he further stated that the amount of Rs. 1,000 was entered in the deposit register as security deposit for costs of Election Petition, that the Election Commission could draw the money and any one authorized by the Election Commission could also draw the same.

7. The Election Tribunal passed a common order on July 5, 1957. It dismissed I.A. No. 1 of 1957 being of the opinion that the said Pillai was no longer a contesting candidate after his retirement from the contest on February 21, 1957. As regards I.A. No. 2 of 1957, it held that there was no defect in the matter of the head of accounts and was further of opinion that the non-mention of the fact that the deposit was made in favour of the Secretary, Election Commission was immaterial in that it was made and taken to have been made in favour of the Election Commission at whose disposal the fund was placed. There was therefore sufficient compliance with the requirements of section 117 of the Act and it accordingly dismissed the application. I.A. No. 3 of 1957 which asked for certain amendments of the petition was allowed, the Election Tribunal having come to the conclusion that the first respondent never meant to include the portions sought to be deleted in the petition the

same having been so included by reason of an accidental mistake by his legal advisers.

8. On July 14, 1957, the appellant filed two Writ Petitions in the High Court of Judicature at Madras; Writ Petition No. 531 of 1957 for the issue of a writ of Certiorari and Writ Petition No. 532 of 1957 for the issue of a writ of Prohibition for quashing the common order passed by the Election Tribunal in I.A. Nos. 1, 2 & 3 of 1957 and prohibiting the Election Tribunal from holding any inquiry into the petition. These writ petitions came up for hearing before the High Court along with two other writ petitions being writ petitions Nos. 573 of 1957 and 574 of 1957 (hereinafter referred to) and were all dismissed by it by a common judgment delivered on September 24, 1957.

9. The appellant thereafter applied for and obtained from the High Court a certificate under Art. 133(1)(c) of the Constitution to appeal to this Court against the decision in Writ Petitions Nos. 531 of 1957 and 532 of 1957 and hence Civil Appeal No. 763 of 1957.

10. Civil Appeal No. 764 of 1957.

11. Civil Appeal No. 764 of 1957 is concerned only with section 82 of the Act and the appellant therein was declared duly elected to the Madras State Legislative Assembly from the Single Member Salem (1) constituency on March 8, 1957, having obtained 24,920 valid votes as against 24,713 valid votes obtained by his rival the first respondent. There were 10 candidates who had been duly nominated for election; but 5 of them withdrew their candidature on February 5, 1957, which was the last date for such withdrawal and two retired before February 23, 1957. Thus only three candidates were left, viz., the appellant, the 1st respondent and the 2nd respondent in the appeal. When the list of contesting candidates was prepared and published by the Returning Officer under section 38 of the Act there were on that list besides these, two more candidates who had retired from the contest between February 5, 1957, and February 23, 1957. On April 18, 1957, the first respondent who was a defeated candidate filed an Election Petition, being Election Petition No. 74 of 1957, containing two prayers :- (1) that the election of the appellant be set aside and (2) that he be declared duly elected under section 101 of the Act inasmuch as he would have obtained the majority of the valid votes but for the corrupt practices committed by the appellant and others. The two candidates who had been included by the Returning Officer in the list of contesting candidates but had subsequently retired from the contest were not made party respondents to this petition and on April 25, 1957, a notice was issued by the Election Commission to the first respondent calling upon him to show cause by May 6, 1957, as to why his petition should not be dismissed summarily for such non-joinder of two of the necessary parties. An explanation was rendered by the first respondent on May 2, 1957, but the Election Commission appears to have referred the decision of this question to the Election Tribunal appointed by it and on June 24, 1957, the appellant filed before the Election Tribunal an application being I.A. No. 103 of 1957 asking the Tribunal to dismiss the said petition as required by section 90(3) of the Act. The Election Tribunal passed an order on this application on July 13, 1957, holding that the said two candidates had ceased to be contesting candidates within the meaning of that term as used in section 82 of the Act on their retirement from the contest and that the petition as framed was maintainable.

12. The appellant thereupon filed two writ petitions being Writ Petitions Nos. 573 of 1957 and 574 of 1957 in the High Court of Judicature at Madras, one for a writ of certiorari and the other for a writ of Prohibition asking respectively that the said order of the Election Tribunal be quashed and the Tribunal be prohibited from proceeding with the enquiry in the Election Petition No. 74 of 1957. These two writ petitions came up for hearing before the High Court on September 24, 1957, along with Writ Petitions Nos. 531 of 1957 and 532 of 1957 aforementioned and by a common judgment bearing the said date the High Court dismissed the same. The appellant was granted a certificate under Art. 133(1)(c) of the Constitution against this decision and that is how Civil Appeal No. 764 of 1957 has come before us.

13. Civil Appeal No. 48 of 1958.

14. The appellant in Civil Appeal No. 48 of 1958 is only concerned with section 117 of the Act. He was declared duly elected to the House of the People from Ranchi East reserved constituency on March 15, 1957, having secured 39,025 votes as against the 2nd respondent who secured only 36,785 votes. On April 27, 1957, the 2nd respondent filed an election petition being Election Petition No. 341 of 1957 against the appellant praying that his election to the House of the People be declared void and that the 2nd respondent be declared to have been duly elected from the said constituency. All the contesting candidates were made party respondents to that petition; but it appears that the 2nd respondent enclosed with the petition a government treasury receipt showing a deposit of Rs. 1,000 by him in the State Bank of India, Ranchi Branch, as security for the costs of the petition which did not mention that it had been made "in favour of the Secretary to the Election Commission". He had merely written in the Chalan the words "security for the costs of the Election Petition, Ranchi East Parliamentary Constituency". On May 14, 1957, the Election Commission made an order admitting the petition but on the question whether the defect in the deposit was fatal or may be cured, e.g., by a fresh deposit or otherwise so as to safeguard the appellants' right to costs, if any, awarded in his favour, it reserved the same for decision by the Election Tribunal. On July 31, 1957, the appellant filed a petition before the Election Tribunal under section 90(3) of the Act urging that the omission of the words "in favour of the Secretary to the Election Commission" from the Chalan was fatal and that the petition be dismissed. He also urged that this petition should be heard and disposed of before any further hearing of the Election Petition took place. The preliminary objection was accordingly heard on August 26 and 27, 1957, and by its order dated August 31, 1957, the Election Tribunal expressed the opinion that the matter was not free from doubt and the Election Tribunal being an Ad Hoc body, it was essential that it should decide the case as a whole and not piecemeal, inasmuch as there was no easy provision for remand if its view was not accepted by the appellate authority. The Election Tribunal therefore did not consider it proper to give its decision on the preliminary objection at that stage and ordered that the trial of the Election Petition do proceed.

15. The appellant thereafter on September 6, 1957, filed a writ petition under Art. 226 of the Constitution in the High Court Judicature at Patna being M.J.C. No. 480 of 1957 asking for a writ of certiorari to quash the order of the Election Tribunal and also a writ of Prohibition to stop the continuance of the proceedings before the Election Tribunal. This petition was dismissed by the High Court on September 9, 1957, as the High Court thought that the matter could be decided at the time of the hearing of the Election Petition itself. The appellant thereafter applied for and obtained

on December 16, 1957, from this Court special leave to appeal under Art. 136 of the Constitution against the said order of the High Court and that is how Civil Appeal No. 48 of 1958 is before us.

16. The two sections of the Act which fall to be construed by us are :

Section 82. "Parties to the petition : A petitioner shall join as respondents to his petition :-

(a) where the petitioner, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and

(b) any other candidate against whom allegations of any corrupt practice are made in the petition."

Section 117. "Deposit of Security : The petitioner shall enclose with the petition a Government Treasury receipt showing that a deposit of one thousand rupees has been made by him either in a Government Treasury or in the Reserve Bank of India in favour of the Secretary to the Election Commission as security for the costs of the petition."

17. The main question for our determination is what is the exact connotation of the expression "contesting candidate" in section 82 and whether a candidate whose name was included in the list of contesting candidates published by the Returning Officer under section 38 but who retired from the contest under section 55A(2) is included in that expression.

18. It will be helpful in this context to survey the scheme of the Act in regard to the conduct of elections, contained in Part V of the Act. Under section 30 as soon as the notification calling upon a constituency to elect a member or members is issued, the Election Commission is to appoint, (1) the last date for making nominations, (2) the date for the scrutiny of nominations, (3) the last date for the withdrawal of candidatures, (4) the date or dates on which a poll shall, if necessary, be taken, and (5) the date before which the election is to be completed. A candidate for Election has to be validly nominated to start with and after such nominations are made the Returning Officer is to hold a scrutiny of nominations on the appointed day. Immediately after all the nomination papers have been scrutinized and decisions accepting or rejecting the same have been recorded by the Returning Officer, he is to prepare a list of validly nominated candidates and affix it to his notice board. Any of these candidates may, however, withdraw his candidature on or before the last date for the withdrawal of candidatures and the Returning Officer is enjoined on receiving a notice of withdrawal to cause the same to be affixed in some conspicuous place in his office. Section 38 provides that immediately after the expiry of the period within which candidatures may be withdrawn as aforesaid the returning officer is to prepare and publish a list of contesting candidates, that is to say, candidates who were included in the list of validly nominated candidates and who have not withdrawn their candidatures within the said period. Section 52 provides for the

consequences of death of a candidate before the poll and says that if a contesting candidate dies and a report of his death is received before the commencement of the poll, the returning officer upon being satisfied of the fact of the death is to countermand the poll and thereupon all proceedings with reference to the election are to commence anew in all respects as if for a new election. There are however two provisos to this section : (1) that no further nomination is necessary in the case of a person who was a contesting candidate at the time of the countermanding of the poll and (2) that no person who has given a notice of withdrawal of his candidature under section 37(1) or a notice of retirement from the contest under section 55A(2) before the counter manding of the poll is ineligible for being nominated as a candidate for the election after such countermanding. Sections 53 and 54 prescribe the procedure in contested and uncontested elections. If the number of contesting candidates is more than the number of seats to be filled a poll is to be taken; if the number of such candidates is equal to the number of seats to be filled, the returning officer is to forthwith declare all such candidates to be duly elected to fill these seats and if the number of such candidates is less than the number of seats to be filled, the returning officer is to forthwith declare all such candidates to be elected and the Election Commission is to call upon the constituency to elect a person or persons to fill the remaining seat or seats. Section 55A provides for retirement from contest at elections in Parliamentary and Assembly constituencies, and the consequences thereof. Under section 55A(2) a contesting candidate may retire from the contest by a notice in the prescribed form delivered in the manner therein specified and the returning officer upon receiving such notice of retirement is to cause a copy thereof to be affixed to his notice board and also to be published in the manner prescribed. Sub-section 5 enacts a legal fiction. It states that any person who has given a notice of retirement under sub-section 2 shall thereafter be deemed not to be a contesting candidate for the purposes of section 52. Sub-sections 6 and 7 provide for the consequences of such retirement on the poll. Before such retirement the list of contesting candidates prepared by the returning officer under section 38 is to determine whether there should be a poll or not. Sections 53 and 54 of the Act provide for all possibilities but if by reason of the number of contesting candidates being more than the number of seats to be filled a poll has to be taken and one or more of such contesting candidates retire before the commencement of the poll leaving in the field only such number of candidates as is equal to the number of seats to be filled, sub-sections 6 and 7 provide that the returning officer is to forthwith declare all the remaining contesting candidates to be duly elected to fill those seats and countermand the poll.

19. Then follows Part VI which deals with disputes regarding elections. Section 80 provides that no election is to be called in question except by an election petition presented in accordance with the provisions of this part. Under section 81 an election petition calling in question any election may be presented on one or more of the grounds specified in section 100(1) and section 101 to the Election Commission by any candidate at such election or any elector within forty-five days from, but not earlier than, the date of election of the returned candidate. Section 82 prescribes who are the necessary parties to such petition. The petitioner may merely claim a declaration that the election of all or any of the returned candidates is void. If he does so he must join as respondents to his petition all the returned candidates and any other candidate against whom allegations of any corrupt practice are made in the petition. If, however, in addition to claiming such a declaration the petitioner claims a further declaration that the himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and any other candidate against whom

allegations of corrupt practices are made in the petition must be joined as respondents to that petition. Section 84 provides for the reliefs that may be claimed by the petitioner. It states that in addition to claiming a declaration that the election of all or any of the returned candidates is void, the petitioner may claim a further declaration that he himself or any other candidate has been duly elected. This is really the foundation of the provisions contained in section 82(a) of the Act which prescribes who are the necessary parties to such a petition. Section 85 enjoins the Election Commission to dismiss the petition if the provisions of section 81 or section 82 or section 117 have not been complied with provided, however, that the petition is not to be dismissed without giving the petitioner an opportunity of being heard. Section 90 prescribes the procedure to be followed by the Election Tribunal and section 90(3) enjoins the Tribunal to dismiss an election petition which does not comply with the provisions of sections 81, 82 or 117, notwithstanding that it has not been dismissed by the Election Commission under section 85. Section 117 refers to the deposit of security by the petitioner for the costs of the petition, and has already been set out above.

20. It is clear from the above that the procedure for elections has been thought out with meticulous detail and all the steps from the issue of the notification calling upon a constituency to elect a member or members up to the publication of the results of elections are laid down therein.

21. Article 329(b) of the Constitution provides that no election to either House of Parliament or to the Houses or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature, and Part VI of the Act enacts provisions for disputes regarding elections. The orders which can be passed by the Election Tribunal at the conclusion of the Trial of an election petition are set out in section 98 of the Act, viz., (a) dismissing the election petition; or (b) declaring the election of all or any of the returned candidates to be void; or (c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected. Under section 99 power is also given to the Election Tribunal to make an order, where any charge is made in the petition of any corrupt practice having been committed at the election, recording (i) a finding whether any corrupt practice has or has not been proved to have been committed by, or with the consent of, any candidate or his agent at the election, and the nature of that corrupt practice; and (ii) the names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice and the nature of that practice.

22. These provisions go to show that "an election contest is not an action at law or a suit an equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power.

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23. It is always to be borne in mind that though the election of successful candidate is not to be lightly interfered with, one of the essentials of that law is also to safeguard the purity of the election process and also to see that the people do not get elected by flagrant breaches of that law or by corrupt practices." (Per Mahajan C.J. in Jagan Nath v. Jaswant Singh ([1954] S.C.R. 892, 895)).

24. To the same effect are the observations in *A. Sreenivasan v. Election Tribunal, Madras* ([1955] 11 E.L.R. 278, 293) :

"An election petition is not a matter in which the only persons interested are candidates who strove against each other at the elections. The public also are substantially interested in it and this is not merely in the sense that an election has news value. An election is an essential part of the democratic process. The citizens at large have an interest in seeing and they are justified in insisting that all elections are fair and free and not vitiated by corrupt or illegal practices. In a civil action the only persons who are interested are the individuals arrayed as plaintiffs or defendants but that is not so in an election petition."

25. In the *Tipperary Case* ([1875] 3 O'M & H. 19, 25) Morris J. expressed himself as follows :

"It was strongly urged that a petition is a mere cause in this Court, and that as an ordinary cause could not be instituted against a dead person, by analogy a petition could not be lodged seeking to set aside the return of a deceased person. I consider this is a fallacious analogy, because a petition is not a suit between two persons, but is a proceeding in which the constituency itself is the principal party interested."

26. The process of election starts from the issue of a notification calling upon a constituency to elect a member or members. The nomination papers filed by the appointed date are scrutinized by the returning officer and a list of validly nominated candidates is prepared. When such a list is prepared a stage is reached when the whole constituency knows who are the validly nominated candidates standing for the election. It very often happens that a particular party in order to avoid the possibility of the nomination papers of its members being rejected by the returning officer and finding itself in a difficulty if no validly nominated candidate or candidates of its own persuasion are left in the field nominates more candidates than what it would otherwise put up for the election; if the nomination papers of these candidates put forward by it are accepted by the returning officer it would find itself in a predicament where the votes which it may canvass in its favour may be divided between the candidates sponsored by it when the poll is taken. In order to avoid such a situation a provision is made for the withdrawal of candidatures by the validly nominated candidates. A candidate who has been validly nominated may also, after the list of the validly nominated candidates is published, re-assess his prospects at the election and may think it worth his while to withdraw his candidature and retire from the field. He may do it sometimes to save his deposit from being forfeited or from various other motives which it is unnecessary to discuss; but a *locus poenitentiae* is given to him to withdraw his candidature within the time prescribed for the same and if such notice of withdrawal is given by any candidate, the returning officer is to cause such notice to be affixed in some conspicuous place in his office. After this date has passed it is definitely known who are the candidates validly nominated as such and who wish to contest the election. These candidates who survive the date of the withdrawal of candidatures are described in section 38 as contesting candidates, that is to say, candidates who were included in the list of validly nominated candidates and who have not withdrawn their candidatures within the said period. A list of the contesting candidates is immediately thereafter prepared and published by the returning

officer. That list contains the names of the contesting candidates in alphabetical order and the addresses of the contesting candidates as given in the nomination papers together with such other particulars as may be prescribed. From 7 A in Schedule to the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1956, indicates how the list of contesting candidates is prepared by the returning officer and it mentions among other things : "The poll will be taken between the hours of..... and.....on.... (date or dates). Postal ballot papers must reach the undersigned before 5 p.m. on..... (date). Place..... Date..... Returning Officer." This is of course the normal procedure when a poll has to be taken. Sections 53 and 54, however, work out the various situations which may develop having regard to the number of contesting candidates in relation to the number of seats to be filled. If the number of contesting candidates is more than the number of seats to be filled, then and then only a poll has to be taken. If, however, the number of such candidates is equal to the number of seats to be filled or is less than the number of seats to be filled, the list of contesting candidates need not mention the above particulars as regards the poll being taken and the postal ballot papers reaching the returning officer at the time or on the days therein specified. The returning officer then forthwith declares all such contesting candidates duly elected to fill those seats. The Election Commission no doubt in the latter event has to call upon the constituency to elect a person or persons to fill the remaining seat or seats; but that is a separate election. The process of election which has started with the issue of notification calling upon the constituency to elect a member or members, comes to an end. It is only in those cases where the number of contesting candidates is more than the number of seats to be filled that the poll becomes necessary and the process to election continues. The list of contesting candidates prepared by the returning officer is affixed in same conspicuous place in his office and a copy thereof is supplied to each one of the contesting candidates or his agent and the list of contesting candidates is also published by the returning officer in the official gazette. This procedure really declares not only to the contesting candidates but also to the whole constituency, who are the contesting candidates at the election and who will go to the poll. These contesting candidates within the phraseology which has been used in section 38 are candidates who were included in the list of validly nominated candidates and who have not withdrawn their candidatures within the period prescribed for such withdrawal. These are the contesting candidates within the meaning of that term as used in the Act and they are normally expected to go to the poll.

27. If any of such candidates dies and the report of his death is received before the commencement of the poll, the returning officer upon being satisfied of the death of such candidate is bound to countermand the poll and report the fact to the Election Commission and also to the appropriate authority. The process of election here again comes to an end and proceedings with reference to the election are to commence anew in all respects as if for a new election including the nominations of candidates for such election. In that event, it is provided that in the case of a candidate who was a contesting candidate at the time of the countermanding of the poll no further nomination shall be necessary. A contesting candidate was necessarily a validly nominated candidate and his nomination would continue as such. A candidate may, however, have given notice of withdrawal of his candidature under section 37 and he may have thus retired from the field. He might have so withdrawn in favour of the candidate since deceased because he realised that his prospects at the election were meagre as compared with those of the deceased or for any reason whatever. The death of the deceased would however create a situation where the candidate who had thus given notice of

withdrawal of his candidature might think better of his prospects and might just as well on reconsideration like to contest the election again. He would in that event be entitled to be nominated as a candidate for the election after such countermanding and section 52 declares that such a person shall be eligible for being nominated as a candidate for such election.

28. The same ratio would apply also to a contesting candidate who has given notice of his retirement from the contest under section 55A(2). Such a person might have retired from the contest on a re-appraisal of his prospects at the election as compared with those of the deceased contesting candidate. When death removed that contesting candidate from the field, a person who had given notice of retirement from the contest as aforesaid may as well re-consider his position and feel that as compared with the other surviving candidates he would have fair prospects of success at the election and if an election is held after the countermanding of the poll by the returning officer, he might just as well put forward his candidature and it is provided that in that event he shall not be ineligible for being nominated as a candidate for election after such countermanding; and there is perfectly good reason for the same, because otherwise, withdrawal or retirement might possibly be considered a disqualification or refusal to seek election.

29. This brings us to the provisions as to retirement from contest under section 55A. A candidate might not have withdrawn his candidature within the period prescribed and his name might have been included in the list of contesting candidates published by the returning officer under section 38. Being thus a contesting candidate duly declared as such he would be entitled to go to the poll. He may, however, as a result of the election campaign find himself in the predicament that his prospects at the election are meagre and he might even have to face the situation of having to forfeit his security deposit if he went to the poll. There may be a number of motives operating in his mind which it is not necessary to discuss and he may just as well withdraw his candidature and retire from the field. A locus poenitentiae is therefore given to him under section 55A to retire from the contest by giving notice in the prescribed form which has to be delivered to the returning officer on any day not later than 10 days prior to the date fixed for the poll. If a candidate thus retires from the contest, he decides not to go to the poll and the provision is made in the rules for the correction of the list of contesting candidates so that no elector shall in the absence of necessary information waste his vote upon him. A copy of such notice is to be affixed by the returning officer to his notice board and in the polling station and each of the remaining contesting candidates or his agent is to be supplied with such copy and the notice has also got to be published in the official gazette.

30. Such retirement from contest might result in the number of remaining contesting candidates becoming equal to the number of seats to be filled and section 55A(6) and (7) work out the situation as it would then obtain with reference to sections 53 and 54 and provide that in that event the returning officer is to forthwith declare such candidates to be duly elected to fill those seats and countermand the poll - a fresh election being necessary only in the event of filling the remaining seat or seats, if any.

31. If, however, a poll has to be taken under section 53(1) in spite of the retirement of a contesting candidate or candidates from contest as aforesaid the process of election continues in spite of such retirement and the question may arise as to what would happen if any of the contesting candidates

who has thus retired dies before the commencement of the poll. If there was nothing more section 52 would apply and the returning officer upon being satisfied of the fact of the death of the candidate would have to countermand the poll and report the fact to the Election Commission and also to the appropriate authority. Provision is therefore made in section 55A(5) that any person who has given a notice of retirement under section 55A(2) is deemed not to be a contesting candidate for the purposes of section 52. This is a deeming provision and creates a legal fiction. The effect of such a legal fiction however is that a position which otherwise would not obtain is deemed to obtain under those circumstances. Unless a contesting candidate who had thus retired from the contest continued to be a contesting candidate for the purposes of election and the effect of the death of such contesting candidate was as contemplated in section 52, it would not have been found necessary to enact section 55A(5). It is because such a contesting candidate who retires from the contest under section 55A(2) continues to be a contesting candidate for the purposes of election that it has been considered necessary to provide for the consequence of his death and to exclude such a candidate from the category of contesting candidates within the meaning of the term as used in section 38 of the Act, that is to say, candidates who were included in the list of validly nominated candidates and who had not withdrawn their candidature within the period prescribed and who had been included in the list of candidates prepared and published by the returning officer in the manner prescribed. This provision, therefore, warrants the conclusion that a contesting candidate whose name was included in the list under section 38 but who retires from the contest under section 55A(2) continues to be a contesting candidate for the purposes of the Act though by reason of such retirement it would be unnecessary for the constituency to cast its votes in his favour at the poll. Such a candidate continues to be contesting candidate for the purposes of the Act, notwithstanding his retirement from the contest under section 55A(2).

32. When we come to the provisions of Part VI of the Act relating to disputes regarding elections, we find that there is no definition given in section 79 of the expression "contesting candidate", though there are definitions of "candidate" and "returned candidate" to be found therein. An election petition calling in question any election can be presented by any candidate at such election or any elector on one or more of the grounds specified in sections 100(i) and 101 to the Election Commission and a petitioner in addition to calling in question the election of the returned candidate or candidates may further claim a declaration that he himself or any other candidate has been duly elected. Where the petitioner claims such further declaration, he must join as respondents to his petition all the contesting candidates other than the petitioner and also any other candidate against whom allegations of any corrupt practices are made in the petition. The words "other than the petitioner" are meant to exclude the petitioner when he happens to be one of the contesting candidates who has been defeated at the polls and would not apply where the petition is filed for instance by an elector. An elector filing such a petition would have to join all the contesting candidates whose names were included in the list of contesting candidates prepared and published by the returning officer in the manner prescribed under section 38, that is to say, candidates who were included in the list of validly nominated candidates and who had not withdrawn their candidature within the period prescribed. Such contesting candidates will have to be joined as respondents to such petition irrespective of the fact that one or more of them had retired from the contest under section 55A(2). If the provisions of section 82 which prescribes who shall be joined as respondents to the petition are not complied with, the Election Commission is enjoined under

section 85 of the Act to dismiss the petition and similar are the consequences of non-compliance with the provisions of section 117 relating to deposit of security of costs. If the Election Commission however does not do so and accepts the petition, it has to cause a copy of the petition to be published in the official gazette and a copy thereof to be served by post on each of the respondents and then refer the petition to an election tribunal for trial. Section 90(3) similarly enjoins the Election Tribunal to dismiss an election petition which does not comply with the provisions of section 82 or section 117 notwithstanding that it has not been dismissed by the Election Commission under section 85. Section 90(3) is mandatory and the Election Tribunal is bound to dismiss such a petition if an application is made before it for the purpose.

33. Turning now to section 117, we find that it is a provision relating to the deposit of security for the costs of the petition. When a petitioner presents an election petition to the Election Commission under section 81 he is to enclose with the petition a Government Treasury receipt showing that a deposit of one thousand rupees has been made by him either in a Government Treasury or in the Reserve Bank of India in favour of the Secretary to the Election Commission as security for the costs of the petition. The Government Treasury receipt must show that such deposit has been actually made by him either in a Government Treasury or in the Reserve Bank of India; it must also show that it has been so made in favour of the Secretary to the Election Commission and it must further show that it has been made as security for the costs of the petition. These are the three requirements of the section which have to be fulfilled. The question, however, arises whether the words "in favour of the Secretary to the Election Commission" are mandatory in character so that if the deposit has not been made in favour of the Secretary to the Election Commission as therein specified the deposit even though made in a Government Treasury or in the Reserve Bank of India and as security for the costs of the petition would be invalid and of no avail. If, for instance, the petitioner made the deposit either in a Government Treasury or in the Reserve Bank of India in favour of the Election Commission itself and obtained a Government Treasury receipt in regard to the same, could it be contended that in spite of such a deposit having been made, the said Government Treasury receipt was not in conformity with the requirements of section 117 and the petitioner could be said not to have complied with the requirements of that section so as to involve a dismissal of his petition under section 85 or section 90(3) ?

34. The extreme case illustrated above has been taken by us only in order to demonstrate to what lengths a literal compliance with the provisions of section 117 can be pushed. The petition is to be presented to the Election Commission, the security for the costs of the petition has to be given to the Election Commission and section 121 provides for an application to be made in writing to the Election Commission for payment of costs by the person in whose favour the costs have been awarded and yet, even though the deposit may have been made by a petitioner in favour of the Election Commission and a Government Treasury receipt evidencing the same be enclosed along with his petition the provisions of section 117 of the Act can be said not to have been complied with merely because the deposit was made in favour of the Election Commission and not in favour of the Secretary to the Election Commission. The relationship between the Election Commission on the one hand and the Secretary to the Election Commission on the other need not be scrutinized for the purposes of negating this contention. It is enough to say that such a contention has only got to be stated in order to be negated. It would be absurd to imagine that a deposit made either in a

Government Treasury or in the Reserve Bank of India in favour of the Election Commission itself would not be sufficient compliance with the provisions of section 117 and would involve a dismissal of the petition under section 85 or section 90(3). The above illustration is sufficient to demonstrate that the words "in favour of the Secretary to the election commission" used in section 117 are directory and not mandatory in their character. What is of the essence of the provision contained in section 117 is that the petitioner should furnish security for the costs of the petition, and should enclose along with the petition a Government Treasury receipt showing that a deposit of one thousand rupees had been made by him either in a Government Treasury or in the Reserve Bank of India, is at the disposal of the Election Commission to be utilised by it in the manner authorised by law and is under its control and payable on a proper application being made in that behalf to the Election Commission or to any person duly authorised by it to receive the same, be he the Secretary to the Election Commission or any one else.

35. If, therefore it can be shown by evidence led before the Election Tribunal that the Government Treasury receipt or the chalan which was obtained by the petitioner and enclosed by him along with his petition presented to the Election Commission was such that the Election Commission could on a necessary application in that behalf be in a position to realise the said sum of rupees one thousand for payment of the costs to the successful party it would be sufficient compliance with the requirements of section 117. No such literal compliance with the terms of section 117 is at all necessary as is contended for on behalf of the appellant before us.

36. As regards the amendment of a petition by deleting the averments and the prayer regarding the declaration that either the petitioner or any other candidate has been duly elected, so as to cure the defect of non-joinder of the necessary parties as respondents, we may only refer to our judgment (*Basappa v. Ayyappa*, see p. 611, post) about to be delivered in Civil Appeal No. 76 of 1958, where the question is discussed at considerable length. Suffice it to say here that the Election Tribunal has no power to grant such an amendment, be it by way of withdrawal or abandonment of a part of the claim or otherwise, once Election Petition has been presented to the Election Commission claiming such further declaration.

37. Considering Civil Appeal No. 763 of 1957 in the light of the observations made above, we find that Sundararaja Pillai whose name was included in the list of contesting candidates prepared and published by the returning officer under section 38 but who retired from the contest under section 55A(2) before the commencement of the poll was included in the expression "contesting candidate" used in section 82 and was by reason of the first respondent claiming a further declaration that the second respondent had been duly elected, a necessary party to the petition. Inasmuch as he was not joined as a respondent, the petition was liable to be dismissed under section 90(3) of the Act.

38. This defect could not be cured by any amendment of the petition seeking to delete the claim for such further declaration and the Election Tribunal was clearly in error in allowing such amendment on the grounds disclosed in I.A. No. 3 of 1957 or otherwise.

39. In regard to the deposit of security, however, the position was quite different. According to the evidence given by K. Nataraja Mudaliar, head accountant in charge of the Madurai Taluk

Sub-Treasury, the amount was kept in the Election Revenue deposit and the monies were at the disposal of the Election Commission; also that the Election Commission or anyone authorised by the Election Commission in that behalf could draw the said monies and no one else could withdraw the same without such authority. If that was so, there was sufficient compliance with the requirements of section 117 and there could be no question of dismissing the petition for non-compliance with the provisions of that section.

40. Having regard therefore to the conclusion reached above in regard to the non-compliance with the provisions of section 82, Civil Appeal No. 763 of 1957 will be allowed, the orders of dismissal made by the High Court on the writ petitions Nos. 531 of 1957 and 532 of 1957 will be set aside, the orders passed by the Election Tribunal dated July 5, 1957, will be vacated and the Election Petition No. 147 of 1957 will be dismissed with costs. As the appellant has failed in his contention in regard to the provisions of section 117, we feel that the proper order for costs should be that each party do bear and pay his own costs here as well as in the High Court.

41. Civil Appeal No. 764 of 1957 also shares a similar fate. The first respondent therein did not join as party respondents to his petition the two candidates whose names had been included by the returning officer in the list of contesting candidates but who had subsequently retired from the contest before the commencement of the poll. They were necessary parties to the petition in so far as the first respondent had claimed a further declaration that he himself be declared duly elected under section 101. The Election Petition No. 74 of 1957 filed by him was thus liable to be dismissed for non-joinder of necessary parties under section 90(3) of the Act.

42. This appeal will also be accordingly allowed, the orders passed by the High Court in Writ Petitions Nos. 573 and 574 of 1957 will be set aside, the orders passed by the Election Tribunal on July 13, 1957, will be vacated and Election Petition No. 74 of 1957 will be dismissed. The first respondent will pay the appellant's costs throughout.

43. So far as Civil Appeal No. 48 of 1958 is concerned, the difficulty which faces the appellant is that we have nothing on the record of the appeal to show what were the exact terms of the deposit made by the second respondent under section 117. The copy of the chalan which is cyclostyled at p. 45 of the record is deficient in material particulars and does not throw any light on the question. The appellant no doubt made an application to the Election Tribunal to try his objection as regards the non-compliance with the provisions of that section as a preliminary objection and determine whether the second respondent had complied with the provisions of section 117 and if not to dismiss his petition. The Election Tribunal, however, did not decide this preliminary objection but ordered that the trial of the petition do proceed. The High Court before whom the Writ Petition M.J.C. No. 480 of 1957 was filed also came to the same conclusion as it thought that the matter could be decided at the time of hearing itself and dismissed the application.

44. We are of opinion that both the Election Tribunal and the High Court were wrong in the view they took. If the preliminary objection was not entertained and a decision reached thereupon, further proceedings taken in the Election Petition would mean a full fledged trial involving examination of a large number of witnesses on behalf of the 2nd respondent in support of the

numerous allegations of corrupt practices attributed by him to the appellant, his agents or others working on his behalf; examination of a large number of witnesses by or on behalf of the appellant controverting the allegations made against him; examination of witnesses in support of the recrimination submitted by the appellant against the 2nd respondent; and a large number of visits by the appellant from distant places like Delhi and Bombay to Ranchi resulting in not only heavy expenses and loss of time and diversion of the appellant from his public duty in the various fields of activity including those in the House of the People. It would mean unnecessary harassment and expenses for the appellant which could certainly be avoided if the preliminary objection urged by him was decided at the initial stage by the Election Tribunal.

45. We are therefore of the opinion that the orders passed by the High Court in M.J.C. No. 480 of 1957 and by the Election Tribunal in Election Petition No. 341 of 1957 were wrong and ought to be set aside. The Election Tribunal will decide the preliminary objection in regard to the non-compliance with the provisions of section 117 by the 2nd respondent in the light of the observations made above and deal with the same according to law. The parties will be at liberty to lead such further evidence before the Election Tribunal as they may be advised. The costs of both the parties, here, as well as in the courts below will be costs in the Election Petition to be dealt with by the Election Tribunal hereafter and will abide the result of its decision on the preliminary objection.

46. Appeals allowed.

47. Appeal No. 48 of 1958 remanded.