

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE N. NAGARESH

TUESDAY, THE 2ND DAY OF MAY 2023 / 12TH VAISAKHA, 1945

WP(C) NO. 27667 OF 2022

WRIT PETITIONER:

SUJITH SREERENGUM,
AGED 45 YEARS
S/O P.K KRISHNA PILLAI, SREERENGUM,
KURATTIKKADU, MANNAR P.O, ALAPPUZHA-689622.

BY ADVS.
SRI.S.SREEKUMAR (SR.)
SRI.ARUN.B.VARGHESE
SMT.AISWARYA V.S.

RESPONDENTS:

- 1 SUNIL SRADHEYAM
AGED 51 YEARS
S/O GANGADHARAN,
SRADHEYAM, KUTTAMPEROOR P.O,
MANNAR P.O ALAPPUZHA-689623.
- 2 THE KERALA STATE ELECTION COMMISSION
VIKAS BHAVAN, THIRUVANANTHAPURAM-695033.

BY ADVS.
SRI.NANDAGOPAL S.KURUP
SRI.DEEPULAL MOHAN
SRI.ABHIRAM T.K.

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR
ADMISSION ON 02.05.2023, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

CR

N. NAGARESH, J.

.....
W.P.(C) No.27667 of 2022
.....

Dated this the 2nd day of May, 2023

J U D G M E N T

~ ~ ~ ~ ~ ~ ~ ~ ~

Aggrieved by Ext.P1 order of the State Election Commission of Kerala dismissing Ext.P1 petition for declaration of disqualification filed under Sections 3 and 4(1) of the Kerala Local Authorities (Prohibition of Defection) Act, 1999, the petitioner is before this Court.

2. The writ petitioner and the 1st respondent were elected as Members of Ward No.7 and Ward No.11 respectively of the Mannar Grama Panchayat, in the General Elections to the Local Self Government Institutions held

during December, 2020. According to the petitioner, both of them were official candidates of Indian National Congress (INC), a constituent of United Democratic Front (UDF). After the elections, the petitioner and the 3rd respondent filed Form-2 Declarations showing their allegiance to Indian National Congress party.

3. There are 18 Wards in the Panchayat. Nine wards were won by the UDF, eight by the LDF and one by the BJP. One Radhamani Saseendran was the official candidate of the UDF, for the post of President. The Alappuzha District Congress Committee gave direction in writing/whip on 29.12.2020 to the members of the INC directing them to attend the meeting on 30.12.2020 and to vote in favour of Radhamani Saseendran.

4. The petitioner states that the 1st respondent, in spite of the whip, voted in favour of the LDF candidate, who won the post of President. Furthermore, the 1st respondent contested to the post of Vice President and was elected as Vice President with the support of LDF members. The

1st respondent thereby voluntarily abandoned the membership of INC which fielded him as a candidate in the General Election.

5. The petitioner therefore filed OP No.1 of 2021 before the the State Election Commission of Kerala seeking to declare the 1st respondent as disqualified under Sections 3 and 4(1) of the Kerala Local Authorities (Prohibition of Defection) Act, 1999. The petitioner also sought for a declaration that the 1st respondent is disqualified to contest in any election to Local Body for a period of 6 years.

6. The Election Commission found that the receipt signed by the 1st respondent in acknowledgement of the direction in writing/whip does not contain the date of the receipt and service of whip is hence invalid. Copy of the direction was not served on the Secretary directly and it was received by someone 'for Secretary' without proper name and office seal. Ext.A4 and Ext.X1 proof of communication of whip produced by the petitioner and the Secretary contradict. The oral evidence adduced by PW1-petitioner and

PW2-Secretary is also contradictory and hence existence of a valid whip is not established.

7. The Election Commission further found that two distinct dates appearing in two different places in the whip negative the authenticity of whip. Whip should be issued by a person authorised, in letter head and with dated signature. This requirement is also not satisfied. The Election Commission found that the petitioner has failed to adhere to the procedure under Rule 4 of the Kerala Local Authorities (Disqualification of Defected Members) Rules, 2000 with respect to the service of whip to the members and consequently dismissed the OP as per Ext.P15 Order dated 02.08.2022.

8. The counsel for the petitioner argued that the petitioner has a specific case that the 1st respondent has voluntarily abandoned his membership from the INC by supporting another political party and by becoming Vice President with the support of a rival party. The Election Commission failed to adjudicate this issue. The 1st

respondent was aware of the decision taken by INC. This Court has held in the judgment in ***Eruthavoor Chandran and another v. Kerala State Election Commission [2018 (5) KHC 964]*** that where a member of a political party is aware of the decision taken by the political party but failed to act in accordance with the political directive, it would amount to voluntarily abandoning the membership. The 1st respondent has voluntarily given up his membership by supporting a rival party candidate and by winning the post of Vice President with the help of the rival party.

9. This Court has held in ***Biju R.S. and others v. Kerala State Election Commission and others [2009 (2) KHC 839]*** that disqualification for voluntarily giving up the membership of one's party is not dependent on violation of whip, urged the counsel for the petitioner.

10. The whip was issued in accordance with Rule 4 of the Rules, 2000. The projected discrepancy in the dates appearing in the whip was well explained. The whip was prepared by the District Congress Committee on 24.12.2020

and it was received on 29.12.2020. The whip was admittedly received by the 1st respondent and the Secretary to the Panchayat. Hence, the Election Commission ought not have relied on technicalities to dismiss the OP.

11. The counsel for the petitioner further relied on the judgment of this Court in ***Pallikkal Naseer v. T. Manikandan Nair and another*** [2015 KHC 929] to contend that what is to be looked into is the substantial compliance of Section 3(1) (a) read with Rule 4 and not verbatim reproduction of statutory provisions. In the case of the direction given to the 1st respondent, there was substantial compliance and hence the Election Commission committed a grave error in dismissing the OP, urged the counsel for the petitioner.

12. The 1st respondent resisted the writ petition. Ext.P4 whip produced by the petitioner deferred from Ext.X1 produced by the Secretary. Hence, the Election Commission rightly found the same as invalid. The whip was not directly communicated to the Secretary. Ext.P1 did not contain a direction to vote, the 1st respondent pointed out. The

so-called whip does not contain dated signature of the District President of INC who alone is competent to issue a whip. Lack of dated signature also makes the whip invalid. In effect, there was no official candidate for the INC to the post of President or Vice President.

13. There are no pleadings to establish that the 1st respondent has voluntarily given up membership of the political party. The petitioner confined his case to the 2nd limb of Section 3(1)(a). The petitioner cannot raise a fresh plea in the writ petition. There is no legally admissible evidence to show that the 1st respondent acted contrary to the directions of INC.

14. In view of Section 4(2) of the Act, an order passed by the Election Commissioner is final and not appealable. This Court can interfere with the order of the Commissioner only if the order suffers from patent illegality or infirmity. As the findings of the Election Commissioner are plausible findings which can be arrived at from the evidence on record, interference by this Court under Article 226 is not warranted.

The writ petition is therefore liable to be dismissed, contended the 1st respondent.

15. Standing Counsel entered appearance on behalf of the 2nd respondent-Election Commission. On behalf of the 2nd respondent, it is submitted that in view of Section 4(2) of the Act, the decision taken by the Election Commission is final and it cannot be reopened on the basis of reappraisal of evidence, under Article 226 of the Constitution of India.

16. The OP filed by the petitioner was considered by the Election Commission. Issues were framed. Oral and documentary evidence were adduced. Arguments were heard and the order was passed on impartial appreciation of evidence on record. Ext.P15 order is perfectly legal and justified.

17. The petitioner rested his case solely on the issue of disobeyal of whip. The case of voluntarily giving up membership of the party, was not urged. Issues were framed accordingly. The petitioner did not object to framing of issues, nor did he require to include any other issue than

those framed. The petitioner cannot be permitted to raise the issue of voluntary giving up of membership, for the first time in this writ petition. The writ petition therefore is of no merit and it is only to be dismissed, insisted the Standing Counsel.

18. I have heard the learned Senior Counsel assisted by the counsel for the petitioner, the learned counsel appearing for the 1st respondent and the learned Standing Counsel representing the 2nd respondent.

19. The petitioner filed Ext.P1 OP No.1 of 2021 invoking Sections 3 and 4(1) of the Kerala Local Authorities (Prohibition of Defection) Act, 1999 seeking for a declaration of disqualification against the 1st respondent. In the OP, the petitioner alleged that the 1st respondent is a member of the INC and contested and won general election to the Mannar Grama Panchayat of Alappuzha District on INC ticket. After the general elections, defying the direction in writing/whip issued by the INC, the 1st respondent voted in favour of a candidate put up by the rival party/Front in the election for President of the Panchayat. The petitioner further alleged

that the 1st respondent with the support of rival party/front was elected as the Vice President of the Panchayat defeating the INC/UDF candidate.

20. In Ext.P1 OP, the petitioner has pleaded that the 1st respondent has turned disloyal to the INC/UDF, he has voluntarily given up his membership in the INC by his conduct and thereby he has rendered himself liable for disqualification. The petitioner has further pleaded in Ext.P1 OP that by violating the direction in writing/whip issued by the INC, the petitioner has become liable for disqualification under the Act, 1999.

21. The provisions relating to disqualification on the ground of defection as contained in Section 3 of the Act, 1999 are as follows:

3. Disqualification on ground of Defection.—

(1)Notwithstanding anything contained in the Kerala Panchayat Raj Act, 1994 (13 of 1994), or in the Kerala Municipality Act, 1994 (20 of 1994), or in any other law for the time being in force, subject to the other provisions of this Act,-

(a) if a member of local authority belonging to any political party voluntarily gives up his membership of such political party, or if such member, contrary to

any direction in writing issued by the political party to which he belongs or by a person or authority authorised by it in this behalf in the manner prescribed, votes or abstains from voting,-

(i) in a meeting of a Municipality, in an election of its Chairperson, Deputy Chairperson, a member of standing Committee or the Chairman of a standing committee; or

(ii) in a meeting of a Panchayat, in an election of its President, Vice President, a member of a Standing Committee; or the Chairman of the Standing Committee; or

in an voting on a no-confidence motion against any one of them except a member of a Standing Committee;

(b) if an independent member belong to any coalition withdraws from such coalition or joins any political party or any other coalition, or if such a member, contrary to any direction in writing issued by a person or authority authorised by the coalition in its behalf in the manner prescribed, votes or abstains from voting,-

(i) in a meeting of a Municipality, in an election of its President, Vice President, a member of Standing Committee or the Chairman of the Standing Committee; or

(ii) in a meeting of a Panchayat in an election of its President/ Vice President, a member of a Standing Committee or the Chairman of the Standing Committee; or in a voting on a no confidence motion against any one of them except a member of a Standing Committee;

(c) if an independent member not belonging to any coalition, joins any political party or coalition; he shall be disqualified for being a member of that local authority.

(2) The direction in writing issued for the purpose of clauses (a) and (b) of sub-section (1) shall be given to the members concerned in the manner as may be prescribed and copy of such direction in writing

shall be given to the Secretary of the Local Self Government Institution concerned.

(3)Where any dispute arises regarding the direction issued under this section between the political party or coalition concerned and the member authorised in this behalf as prescribed under sub-section (2), the direction in writing issued in this regard by the person authorised by the political party from time to time to recommend the symbol of the political party concerned for contesting in election shall be deemed to be valid.]

Explanation — For the purpose of this section an elected member of a local authority shall be deemed to be a member belonging to the political party, if there is any such party, by which he was 3[set up or given support] as a candidate for the election.

22. The manner in which a political party or coalition has to give direction to its members is as per Rule 4 of the Rules, 2000 which reads as follows:

4. The manner in which a Political party or Coalition may give direction to its members.—

(1) If a political party or coalition gives any direction in respect of the casting of vote in an election or in a voting as has been mentioned in clause (a) or clause (b) of Section 3, it shall be in writing and such a direction shall be given,-

- (i) ഒരു രാഷ്ട്രീയ കക്ഷിയിൽപ്പെട്ട അംഗത്തിന്റേയോ അതിലുൾപ്പെട്ടതായി കണക്കാക്കുന്ന അംഗത്തിന്റേയോ കാര്യത്തിൽ പ്രസ്തുത അംഗത്തിന് തിരഞ്ഞെടുപ്പിൽ മത്സരിക്കുന്നതിനായി ആ രാഷ്ട്രീയകക്ഷിയുടേതായ ചിഹ്നം ശുപാർശ ചെയ്യുന്നതിന്, അത്തരം കാലങ്ങളിൽ, രാഷ്ട്രീയ കക്ഷി അതികാരപ്പെടുത്തിയിട്ടുള്ള ആൾ ആയിരിക്കേണ്ടതാണ്. എന്നാൽ, മേൽപ്പറഞ്ഞ നിർദ്ദേശം ആ രാഷ്ട്രീയ കക്ഷിയുടെ ലെറ്റർ ഹെഡിൽ തീയതി വച്ച് ഒപ്പിട്ട് അതിന്റേ മുദ്രയോടുകൂടി ആയിരിക്കേണ്ടതാണ്.

(ii) In the case of a member who belongs to a coalition or considered to be included in it; by the member whom the members of the said coalition and the members considered to be included in it in the local authority concerned elect for the purpose, on majority basis from among themselves.

4[(2)] While issuing a direction under sub-rule (1) directly, the person who gives it shall obtain a receipt from the member and while sending it by registered post it shall be done along with acknowledgement due and while effecting it by affixing it shall be done in the presence of at least two witnesses. Copy of the direction in writing shall also be given to the Secretary.

23. The Election Commission in Ext.P15 order has considered the issue of the alleged violation of the direction in writing/whip by the 1st respondent. As per Section 3, a member is liable to be disqualified if such member, contrary to any direction in writing issued by the political party to which he belongs or by a person or authority authorised by it in this behalf in the manner prescribed, votes or abstains from voting.

24. Rule 4 of the Rules, 2000 requires that a direction contemplated under Section 3 of the Act shall be in writing. Such direction should be given by the person authorised by the party to recommend allotment of symbols. The direction

should be on the letter head of the party and should contain date and seal. The person who issues direction in writing shall obtain receipt from the member. A copy of the direction in writing shall be given to the Secretary. Ext.P6 in the writ petition is a copy of Ext.A4 direction in writing/whip produced by the petitioner before the Election Commission. Ext.P6 direction in writing is on letter head of INC, District Congress (I) Committee and bears the seal of the INC. But, Ext.P6 contains two dates 24.12.2020 and 29.12.2020. The contention of the petitioner is that 24.12.2020 is the date of the direction and 29.12.2020 is the date of receipt thereof by the 1st respondent. Ext.P6 would show that though the 1st respondent has signed in Ext.P6 by way of acknowledgment, the 1st respondent has not written the date beneath his signature. The 1st respondent in his deposition has denied issuance of any direction in writing to him on 29.12.2020.

25. The Election Commission found that there is no date of receipt of the direction in writing/whip, by the 1st respondent. Though the Rule 4 does not specifically require

that the receipt should contain a date, the two dates appearing in Ext.P6 makes the document unreliable.

26. The Election Commission also noted that the Ext.X1 document submitted as required under Rule 4(2) and produced by the Secretary, was not given to the Secretary as required under the provisions and Ext.X1 was received 'for Secretary' without proper name seal and office seal. The Election Commission therefore found that there was no direction in writing/whip, as contemplated under law and hence the 1st respondent cannot be disqualified for violation of the whip. The conclusions arrived at by the Election Commission in this regard are based on evidence on record and cannot be said to be illegal or perverse.

27. The petitioner has a further case that the 1st respondent has voluntarily given up membership in the party. Admittedly, the Election Commission has not considered this issue. The Standing Counsel for the respondent would contend that the petitioner has not prosecuted that ground.

28. Paragraph 25 of Ext.P1 OP would show that the petitioner has pleaded that the 1st respondent turned disloyal to the party and that he has voluntarily given up his membership. The petitioner has further pleaded in Ext.P1 that the 1st respondent who won the General Election as a candidate of INC, has contested for the post of Vice President and won that post with the support of the LDF faction.

29. In Ext.P2 Objection filed before the Election Commission, the 1st respondent has submitted that he has no party membership but admitted that he has contested as official candidate of INC. According to the 1st respondent, he contested as official candidate based on an assurance that the 1st respondent will be made Vice President of the Panchayat. But after the general elections, the petitioner and others have ditched him.

30. Whether a formal membership in a political party is a prerequisite for applying the provisions for disqualifying one for voluntarily giving up membership of his party? The

Explanation to Section 2(ii) of the Act, 1999 provides that a member who stood as a candidate in an election with the support of any one of the political parties or coalition shall be deemed to be a member included in that political party or coalition. In view of the afore statutory fiction enacted as a deeming provision, a member though has no formal membership in a political party, can be still treated as a member of the party in order to apply Section 3(a) of the Act, 1999. The reason or consideration of the member for contesting as a party candidate is irrelevant.

31. The concept 'voluntary giving up the membership' was explained by a Division Bench of this Court in **Varghese V.V. and another v. Kerala State Election Commission and another** [2009 (3) KLT 1]. After considering the issue in the context of the decision of the Hon'ble Apex Court in **Ravi. S. Naik v. Union of India** [1994 (1) KLT OnLine 1140 (SC)], the Division Bench held:

“ The expression 'defection' as such is not denied in the Act. Probably the expression does not require a definition since the concept is so plain. But the

Legislature has left the disqualification to be decided on the defined conduct of the member. We are concerned with the conduct of voluntarily giving up membership in the political party. It is now settled law that in order to attract the disqualification on the ground of voluntary giving up membership in the political party, the elected member need not resign from the party. In *Ravi.S. Naik v. Union of India* [1994 (1) KLT OnLine 1140 (SC)=AIR 1994 SC 1558] it was held that voluntarily giving up membership is not synonymous with resignation. Voluntary giving up membership has a wider meaning than resignation as observed by a Division Bench of this Court in *Shajahan v. Chathannoor Grama Panchayat* [2002 (2) KLJ 451]. In *Ravi.S.Naik's* case the Apex Court made it clear that “Even in the absence of a formal resignation from membership an inference can be drawn from the conduct of a member that he has voluntarily given up his membership of the political party to which he belongs”. In *Rajendra Singh v. Swami Prasad Maurya* [2007 (2) KLT OnLine 1119 (SC)] = [(2007) 4 SCC 270] also the Supreme Court held that it is the conduct of the elected members that is to be looked into while considering whether an elected member has become disqualified on the ground of defection based on voluntary giving up membership in the political party. In *G.Viswanathan v. Speaker, Tamil Nadu Legislative Assembly*, [(1996) 2 SCC 353] the Apex Court held that “the Act of voluntary giving up the membership of the political party may be either express or implied”. In *Faisal v. Abdulla Kunhi* [2008 (3) KLT 534] a learned Single Judge of this Court has taken the view that the expression “voluntarily giving up be inferred from the conduct of the member. It was also held therein that the relevant date for deciding the question of disqualification is the date on which the member voluntarily giving up the membership.”

32. In **Varghese's** case (supra), the Division Bench considered the decision in **Kihoto Hollohan v. Zachillhu and others** [1992 Supp (2) SCC 651] wherein it was held that the principle “Loyalty to the parties is the norm and voting against the party is disloyalty as stated in Griffith and Ryle on Parliamentary Function, Practice and Procedure. Any freedom of its members to vote as they please independently of the political party's declared policies will not only embarrass its public image and popularity but also undermine public confidence in it which, in the ultimate analysis, is its source of sustenance nay, indeed, its very survival.” Finally, considering all such aspects and the object of the Act, the Division Bench held that if a member or group of the elected members of the political party takes a different stand from that of the political party as such, and acts against the policies of the political party in which they are members, it is nothing but disloyalty. Further, it was found that the moment one becomes disloyal by his conduct to the political party, the inevitable inference is that he has

voluntarily given up his membership.

33. A Division Bench of this court considered the law in this regard again in ***Tissy v. State Election Commission*** [2022 (3) KLT OnLine 1200] and held that when a member stood for the election to contest against a candidate of his own coalition, it can be deemed that the member has voluntarily given up his membership of the political party.

34. The Standing Counsel for the Election Commission would submit that the petitioner has not prosecuted the case on the ground of voluntarily giving up membership of the party and has not objected to the issues framed by the Election Commission which did not include the said ground. The OP filed by the petitioner would show that the petitioner had urged that ground and the Objection filed by the 1st respondent before the Election Commission would show that the 1st respondent was aware of the pleadings of the petitioner. Paragraphs 2 and 19 of Ext.P3 Deposition of the petitioner as PW1 would establish that the petitioner has adduced evidence in this regard. There is nothing on record

to show that the issues to be decided were framed by the Election Commission in advance and the petitioner had opportunity to make objection in that regard.

In view of the above, I am of the considered view that the 2nd respondent-Election Commission ought to have considered and adjudicated the issue raised by the petitioner as regards the disqualification of the 1st respondent on the ground of voluntarily giving up membership. Therefore, while upholding the findings of the Election Commission on the issue of disqualification of the 1st respondent for violation of direction in writing/whip, the writ petition is disposed of remitting back Ext.P1 OP No.1 of 2021 to the Election Commission for adjudication of the issue of disqualification of the 1st respondent on the ground of voluntarily giving up membership. Order in this regard shall be passed within a period of six weeks.

Sd/-

N. NAGARESH, JUDGE

aks/02.05.2023

APPENDIX OF WP(C) 27667/2022

PETITIONER'S EXHIBITS

- Exhibit P1 TRUE COPY OF THE MEMORANDUM OF PETITION IN OP NO: 1/2021 FILED BY THE WRIT PETITIONER BEFORE THE 2ND RESPONDENT.
- Exhibit P2 TRUE COPY OF THE OBJECTION FILED BY THE 1ST RESPONDENT BEFORE THE 2ND RESPONDENT.
- Exhibit P3 TRUE COPY OF THE DEPOSITION OF THE WRIT PETITIONER (PW1) TENDERED BEFORE THE 2ND RESPONDENT.
- Exhibit P4 TRUE COPY OF DECLARATION GIVEN BY THE 1ST RESPONDENT IN FORM NO: 2 BEFORE THE SECRETARY OF THE GRAMA PANCHAYATH (EXHIBIT A1 BEFORE 2ND RESPONDENT).
- Exhibit P5 TRUE COPY OF REGISTER OF THE GRAMA PANCHAYATH SHOWING THE POLITICAL RELATION OF THE 1ST RESPONDENT (EXHIBIT A2 BEFORE 2ND RESPONDENT).
- Exhibit P6 TRUE COPY OF WHIP WHICH WAS MARKED AS EXHIBIT A4 BEFORE 2ND RESPONDENT.
- Exhibit P7 TRUE COPY OF MINUTES OF THE MEETING HELD ON 30.12.2020 FOR ELECTION OF THE POST OF PRESIDENT (WHICH IS MARKED AS EXHIBIT A 6 BEFORE 2ND RESPONDENT) .
- Exhibit P8 TRUE COPY OF MINUTES OF THE MEETING HELD ON 30.12.2020 FOR ELECTION OF THE POST OF VICE PRESIDENT (WHICH IS MARKED AS EXHIBIT A 7 BEFORE 2ND RESPONDENT) .
- Exhibit P9 TRUE COPY OF THE DEPOSITION OF PW2.
- Exhibit P10 TRUE COPY OF THE DEPOSITION OF PW3.
- Exhibit P11 TRUE COPY OF DOCUMENT MARKED AS EXHIBIT X1 BEFORE THE 2ND RESPONDENT.
- Exhibit P12 TRUE COPY OF THE DEPOSITION OF RW1.
- Exhibit P13 TRUE COPY OF THE DEPOSITION OF RW2 .
- Exhibit P14 TRUE COPY OF THE DEPOSITION OF RW3 .

W.P.(C) No.27667/2022

: 24 :

Exhibit P15 TRUE COPY OF THE ORDER DATED 02.08.202
IN OP NO: 1/2021 PASSED BY THE 2ND
RESPONDENT.

RESPONDENTS' EXHIBITS:

Exhibit R1(A) CERTIFIED COPY OF Ext.X1 MARKED BEFORE
THE 2ND RESPONENT.