



2023/KER/74935

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

WEDNESDAY, THE 29TH DAY OF NOVEMBER 2023/8TH AGRAHAYANA,

1945

WP (C) NO. 33740 OF 2022

PETITIONER:

M.LIJU
AGED 42 YEARS,

BY ADVS.
SRI.T.ASAFALI
SMT.T.Y.LALIZA

RESPONDENTS:

- 1 KERALA STATE ELECTION COMMISSION
REP. BY ITS SECRETARY
VIKAS BHAVAN, JANAHITHAM,
NEAR LEGISLATIVE ASSEMBLY,
THIRUVANANTHAPURAM,
KERALA, PIN - 695033
- 2 SAJEEV.M.P.

BY ADVS.
SHRI.DEEPU LAL MOHAN, SC, STATE ELECTION
COMMISSION, KERALA
SRI.B.MOHANLAL
SRI.ABIJITH M.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 21.11.2023, THE COURT ON 29.11.2023 DELIVERED THE
FOLLOWING:



BECHU KURIAN THOMAS, J.

W.P.(C) No.33740 of 2022

Dated this the 29th day of November, 2023

JUDGMENT

The writ petitioner was the President of the Indian National Congress, Alappuzha District Committee (for short 'INC') and the authorised office bearer to allot the official symbol to the candidates of his political party. In the election held to the Local Self Government Institutions of Alappuzha District on 18.11.2015, petitioner is alleged to have allotted the official symbol of 'hand' to its candidates. The second respondent was elected as a member of Ward No.9 of Veliyanadu Grama Panchayat. Alleging that the second respondent had, contrary to a whip issued by the petitioner, acted in defiance of the same at a no-confidence motion moved by the opposition party CPI(M), against the then President of Veliyanadu Grama Panchayat, O.P. No.42 of 2019 was filed seeking his disqualification. By the impugned order dated 02.08.2022, the petition was dismissed, challenging which this writ petition is preferred.

2. According to the writ petitioner, the second respondent



was the elected member of Veliyanadu Grama Panchayat from Ward No.9, having been the official candidate of INC. The coalition of UDF in Veliyanadu Grama Panchayat consisted of INC, Kerala Congress (M) and other political parties, while the coalition of LDF included the CPI(M) and the CPI. The second respondent was initially the President of the Panchayat, and after he stepped down, Sri. Sabu Chacko of the UDF itself became the President of the Panchayat. In the meanwhile, a no-confidence motion was moved by the CPI(M), against Sri. Sabu Chacko, the then President of the Panchayat, for which a meeting was scheduled to be held on 27.09.2019.

3. Petitioner alleged that INC decided to abstain from the meeting that was called to discuss the no-confidence motion against Mr.Sabu Chacko-the President. The writ petitioner, being the authorised person, issued a whip to all the INC members, including the second respondent, to abstain from the meeting on 27.09.2019. However, since the second respondent refused to accept the whip issued to him, it (whip) was sent by registered post. Even after receiving the whip on the previous day of the meeting, the second respondent, in defiance of the directions issued, not only attended the meeting but also voted in favour of



the no-confidence motion, thereby incurring disqualification on the ground of defection under section 3(1)(a)(ii) of the Kerala Local Authorities (Prohibition of Defection) Act, 1999 (for short 'the Act'). Petitioner further alleged that after being disloyal to INC and as a reward for defiance of the whip, the second respondent was made the President of the Panchayat in the year 2019 in support of the CPI(M). It was in such circumstances that O.P. No.42 of 2019 was filed before the Kerala State Election Commission by the petitioner seeking to disqualify the second respondent.

4. In the objections filed by the second respondent, he alleged that the petitioner is not the authorized personnel of INC and, as a nominated President, he cannot possess the powers of an elected President and, therefore, cannot issue a whip. It was further stated that on 25.02.2017, a no-confidence motion was moved against the second respondent himself and that the INC had expelled him from the coalition afterwards. Subsequent to the said incident, the second respondent was never intimated of any of the meetings of the party, and he was not aware of the political developments. After questioning the petitioner's competency to issue the whip, the second respondent stated that



he was not served with any whip in accordance with the law, and therefore, the question of defection or disqualification does not arise.

5. The petitioner examined PW1 to PW5 and marked Ext.A1 to Ext.A23, while court exhibits were marked as Ext.X1 to Ext.X3. The second respondent did not examine any witness, nor did he cause the marking of any document in evidence. However, after analysing the materials, the Election Commission concluded that there was no evidence to prove any whip or direction issued to the second respondent to indicate that he acted contrary to the directions issued by his political party. The Election Commission also found that though the second respondent voted in favour of the motion, there was nothing to indicate a conscious decision of the INC to enforce upon its members the decision not to participate in the discussions for the no-confidence motion on 27.09.2019. On the above basis, it was held that there was no evidence to prove voluntarily giving up of membership by the second respondent and thus dismissed the original petition.

6. Sri. T.Asaf Ali, the learned counsel for the petitioner, contended that the Election Commission had failed to appreciate



the specific contentions advanced on behalf of the petitioner. It was argued that the finding of the Election Commission that there was no valid whip issued is without any basis, especially since the delivery of the whip was proved by Ext. A21 and Ext.A22 indicate that the postal cover was delivered to the second respondent on 26-09-2019 at 13.51.45. The learned counsel also submitted that the failure to deliver a copy of the whip to the Secretary of the Panchayat as required under law is also legally not correct since none had such a case including the Secretary of the Panchayat when he was examined as PW2. It was further contended that, in any event, the second respondent had become disloyal to the party under whose banner he was elected by voting in favour of the no-confidence motion and also by becoming the President subsequently under the support of the opposition party.

7. Sri.R.T.Pradeep, the learned counsel for the second respondent, on the other hand, submitted that the pleadings in the election petition were confined only to violation of the whip. As far as voluntary giving up of memberships is concerned, it was submitted that no specific pleading had been raised and no circumstance has also been pointed out to conclude that the



second respondent had voluntarily given up membership.

8. Sri. Deepu Lal Mohan, the learned Standing Counsel for the Election Commission, submitted that section 3(2) of the Act stipulates that the direction in writing must be served in the manner and must also be given to the Secretary of the Panchayat. The learned Standing Counsel handed over to the Court copies of the records relating to the case

9. The pleadings in the instant case reveal that the petition for defection was filed alleging that the second respondent had disobeyed the whip issued by the political party. Subsequently, on 21-01-2020, an amendment was carried out incorporating that the respondent had defected due to voluntarily giving up of membership of the political party under which he contested as a candidate and got elected as a member of the panchayat. Therefore, the two questions that arise for consideration are (i) whether the second respondent had defected due to a violation of a direction in writing issued to him and (ii) whether he had voluntarily given up membership of the party under whose banner he was elected.

10. The evidence in the case indicates that the whip was served upon the second respondent the day before the election.



Though the acknowledgement card was not received after service, the postal tracking of the consignment, produced as Ext. A21 and Ext. A22, indicates that the postal article was served on the second respondent. The reliability or otherwise of Ext. A21 and Ext. A22 as sufficient evidence of service of the whip need not be considered in the instant case since the petitioner failed to adduce evidence to show that the said direction in writing was served on the Panchayat Secretary.

11. In the decision in **George Elamplakkadu @ Vakkachan Powathil v. A.V. Mathew @ Samkutty Vettupalam and Others** [2020 (5) KHC 297] this Court had held that the service of a copy of the direction in writing (whip) to the Secretary of the local authority concerned is the only method by which a member of that local authority belonging to any other political party will come to know about the whip. It was further observed that the service of the whip to the Secretary is mandatory, and non-compliance with the said provision is fatal. The said decision was followed in **Moly George v. Benny Thomas and Another** [AIR 2021 Ker. 1] as well as in **Sulfath Noufal Khan v. Kerala State Election Commission** [2021 (1) KLT 75].



12. In the instant case, there is no evidence of any nature to indicate that the whip was served on the Secretary of the Panchayat. Neither the petitioner in his evidence as PW1 nor the Secretary in his evidence as PW2 deposed that the copy of the direction in writing issued by the petitioner was served on the Secretary. Even in the pleadings, petitioner has not made any averment that there was such a service. In view of the above, the finding of the Election Commission that there was no valid whip needs no interference.

13. Voluntarily giving up of membership of the party under whose banner a person was elected as a member is different from failure to abide by the whip. It is settled by a catena of decisions that voluntarily giving up of membership and failure to abide by the direction in writing are not synonymous. Even if there is a failure to prove a valid whip, still the petitioner can prove that the person against whom defection is alleged had by his conduct, voluntarily given up membership of the party under whose banner he was elected.

14. In the instant case, as mentioned earlier, an amendment was effected to the pleadings that the second respondent voluntarily gave up his membership by becoming



disloyal to the party. In paragraph 18 of the proof affidavit filed by the petitioner he has alleged that “ടി എതിർകക്ഷി എതിർ കക്ഷിയുടെ പാർട്ടി നിർദേശം ലംഘിച്ച് എതിർ പാർട്ടിയിൽ പെട്ട ആളുകളുമായി രഹസ്യ ധാരണ ഉണ്ടാക്കി, അവർ അവതരിപ്പിച്ച അവിശ്വാസ പ്രമേയത്തെ അനുകൂലിച്ചും, വോട്ട് ചെയ്തു പ്രവർത്തിച്ചതിനുള്ള പ്രതിഫലമായി ഇന്ത്യൻ നാഷണൽ കോൺഗ്രസ് പാർട്ടിയുടെ രാഷ്ട്രീയ എതിരാളികളായ സി.പി.ഐ(എം) അംഗങ്ങളുടെ പിന്തുണയോടെ ടി എതിർകക്ഷി ഇപ്പോൾ വെളിയനാട് പഞ്ചായത്ത് പ്രസിഡൻ്റ് പദവി വഹിച്ചു വരികയാണ്”. There is no cross-examination on the above evidence. The above statement thus remains uncontroverted. Even in the pleadings, the only objection raised by the second respondent is that the allegation of voluntary giving up membership was pleaded beyond the statutory time and cannot be considered.

15. The conduct of the second respondent, as alleged in the evidence, must be viewed in the light of the circumstance specifically alleged and deposed that the second respondent had supported the no-confidence motion moved against the candidate of his own political party. The second respondent has no case that he had not voted in support of the no-confidence motion. The Election Commission had even found at page 13 of



the Order that the second respondent had voted in favour of the motion. In the objection filed by the second respondent, his contention was that his party had expelled him from the coalition, but no evidence was adduced in that regard. Therefore, the second respondent, though disputed the service of a valid whip on him, had not disputed the circumstances that he had supported the no-confidence motion moved by the opposition members against his own party member.

16. If the conduct of a particular member indicates that he had, after being elected under the banner of one party, supported the opposite party, the same is sufficient to attract the disqualification of voluntarily giving up membership. The evidence in the present case brings to the fore the circumstance that the second respondent had supported the no-confidence motion against the President of the Panchayat who was a member of his own party. After the President of the Panchayat was voted out, the second respondent himself stood for the Presidentship of the Panchayat with the support of the opposite party members. This conduct by itself indicates, with certainty, that the second respondent became disloyal to his party. The said conduct can only be at the risk of inviting disqualification for



voluntarily giving up membership of the party under whose banner he was elected.

17. In this context, it is relevant to refer to the decision in **Biju R.S. and Others v. Kerala State Election Commission and Others** [2009 (4) KHC 527], wherein this court had observed that disqualification for voluntarily giving up the membership of one's party is not dependent only on the violation of the whip. The facts of the aforementioned case also indicate that supporting a no-confidence motion against the member's own political party was treated as conduct sufficient to fall within the scope of voluntarily giving up membership.

18. The second respondent had not adduced any evidence to disprove the allegations raised in the election petition and brought out in evidence. Therefore, it is evident that by his conduct, the second respondent had voluntarily given up membership of the party under whose banner he was elected.

19. The order of the Election Commission to the extent it held that there was no evidence of voluntarily giving up of membership by the second respondent is hence perverse and is liable to be interfered with.

20. In view of the above discussion, the order of the Kerala



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-:13:-

State Election Commission in OP No. 42/2019 is hereby set aside. It is declared that the second respondent herein has become disqualified due to voluntary giving up of membership under section 3(1)(a) of the Kerala Local Authorities (Prohibition of Defection) Act, 1999. The consequences as contemplated under law shall follow.

The writ petition is allowed as above.

Sd/-

**BECHU KURIAN THOMAS
JUDGE**

vps



APPENDIX

PETITIONER'S/S' EXHIBITS

EXHIBIT P-1 CERTIFIED COPY OF THE ORDER DATED 2ND
AUGUST 2022 MADE IN O.P.NO.42/2019 ON
THE FILE OF THE KERALA STATE ELECTION
COMMISSION, THIRUVANANTHAPURAM.

RESPONDENT'S/S' EXHIBITS

EXHIBIT-R2 (A) THE TRUE COPY OF OBJECTION DATED
07/02/2020 SUBMITTED BY THE 2ND
RESPONDENT BEFORE THE 1ST RESPONDENT