

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&**

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

FRIDAY, THE 9TH DAY OF OCTOBER 2015/17TH ASWINA, 1937

WA.No. 1001 of 2010 () IN WP(C).311/2010

**AGAINST THE ORDER/JUDGMENT IN WP(C) 311/2010 of HIGH COURT OF KERALA
DATED 11-01-2010**

APPELLANT(S)/PETITIONER:

**VIJAYAKUMARI, W/O.REGHUVARAN,
AGED 40 YEARS, CHAIRPERSON, NEYYATTINKARA MUNICIPALITY
NOW RESIDING AT, KANNETTUPUTHEN VEEDU, KANICHAMKODU
KOOTTAPPANA, NEYYATTINKARA P.O.**

**BY ADVS.SRI.R.T.PRADEEP
SRI.V.VIJULAL**

RESPONDENT(S)/RESPONDENTS:

- 1. KERALA STATE ELECTION COMMISSION
REPRESENTED BY ITS SECRETARY, OFFICE OF KERALA
STATE ELECTION COMMISSION, THIRUVANANTHAPURAM.**
- 2. MUNICIPALITY OF NEYYATTINKARA,
REPRESENTED BY ITS SECRETARY, NEYYATTINKARA
MUNICIPALITY.**
- 3. S.K.JAYACHANDRAN, COUNCILLOR WARD NO.13
MUNICIPAL COUNCIL OF NEYYATTINKARA
THIRUVANANTHAPURAM DISTRICT NOW RESIDING AT
SHEEJA NIVAS, MAMBAZHAKKARA, PERUMPAZHUTHOOR
VILLAGE.**

**R1 BY ADV. SRI.MURALI PURUSHOTHAMAN, SC,K.S.E.COMM
R2 BY ADV. SRI.PIRAPPANCODE V.SREEDHARAN NAIR
R2 BY ADV. SRI.PIRAPPANCODE V.S.SUDHIR
R3 BY ADV. ADV.T.RAVIKUMAR**

**THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 30-09-2015, , THE
COURT ON 09-10-2015 DELIVERED THE FOLLOWING:**

ASHOK BHUSHAN, C.J.

&

A.M. SHAFFIQUE, J.

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W.A. No. 1001 of 2010

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Dated this, the 9th day of October, 2015

J U D G M E N T

Shaffique, J.

This appeal is filed by the writ petitioner challenging judgment dated 11/1/2010 in WP(C) No.311/2010 by which learned Single Judge refused to interfere with an order passed by the Kerala State Election Commission, thereby dismissing the writ petition.

2. The short facts involved in the writ petition would disclose that during the election held in September, 2005, petitioner contested and was elected as the member of the Neyyattinkara Municipality. She was sponsored by Indian National Congress (INC) party. Among the total members in the Municipal Council, Left Democratic Front (LDF) had 21 members, United Democratic Front (UDF) had 19 members and Bharatiya Janatha Party (BJP) had one member. Out of the 19 members belonging to UDF, 15 were INC candidates, two were

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independents and one belonged to Kerala Congress (M) (KCM) and the other Communist Marxist Party (CMP). It is stated that there was an understanding between the elected members of the Council that petitioner and one Priyamvada were to be the Chairperson which is to be shared between them for 2½ years. For the first half, Smt.Priyamvada was elected as Chairperson. In fact, the Chairperson post was reserved for Scheduled Caste woman and there were no other candidates other than the aforesaid two UDF members. After the first 2½ year term, Smt.Priyamvada did not vacate the post and therefore, the petitioner along with six members of the Congress party gave a No Confidence Motion for removal of Smt.Priyamvada. The motion was moved on 2/2/2009 and was carried with votes of members of LDF and six members of Congress party including the petitioner. Thereafter, petitioner stood as a candidate against Smt.Priyamvada. Petitioner's candidature was proposed by the LDF members and she won in the election with the votes of LDF members and six members of the Congress Party.

3. The 3rd respondent, who is another member of the Congress Party filed a petition under Section 4 of the Kerala Local

Authorities (Prohibition of Defection) Act, (hereinafter referred to as 'the Act') before the Kerala State Election Commission *inter alia* contending that the action of the petitioner in moving the No Confidence Motion and voting in favour of the No Confidence Motion disobeying the whip issued by the Congress Party clearly amounted to defection and that she had voluntarily given up her membership in the Congress Party, by acting against the wish of the political party.

4. Written statement was filed by the petitioner *inter alia* contending that there was no valid whip in terms of the provisions of the Act and that no eventuality as provided under the Act for voluntarily giving up membership had arisen in the case.

5. The Election Commission after detailed consideration of the factual and legal issues involved in the matter allowed the petition. Ext.P5 is the order passed by the State Election Commissioner. It is challenging Ext.P5 that the writ petition was filed by the petitioner.

6. Before this Court, petitioner contended that the Election Commissioner has committed serious error of law in arriving at a conclusion that she had voluntarily given up

membership from the political party. It was further contended that the petition was barred by limitation in terms of Rule 4A of the Kerala Local Authorities (Disqualification of Defected Members) Rules, (hereinafter referred to as 'the Rules'). Another argument taken was that there were no pleadings to indicate that the petitioner had voluntarily given up her membership from the political party and the materials on record were not sufficient to hold so. Learned Single Judge after evaluation of the entire factual and legal issues involved in the matter formed an opinion that from the conduct of the petitioner itself, it can be concluded that she has voluntarily given up her membership in the political party in which she belonged and absence of whip will not make any difference. Accordingly, rejecting the contentions urged on behalf of the petitioner, the writ petition was dismissed.

7. Learned counsel for the appellant impugning the aforesaid judgment submits that there cannot be any reason for forming an opinion that she had voluntarily given up membership from the political party. It is argued that there were only two candidates for the post of Chairperson and therefore merely for the reason that members of LDF supported petitioner does not

mean that she had voluntarily obtained support of LDF. The members of both the groups had no option other than to elect either Smt.Priyamvada or the petitioner as Chairperson. When the law is well settled that giving notice of No Confidence *per se* is not an activity attracting disqualification on the ground of defection, the mere fact that LDF members supported the petitioner during No Confidence Motion and thereafter while she was elected, cannot be taken as a reason for the defection. Learned counsel also argued that the materials on record were not properly considered by the Election Commission to arrive at the aforesaid finding.

8. Heard the learned counsel for the appellant and the learned counsel appearing for the respondents.

9. Ext.P1 is the petition filed by the 3rd respondent before the Kerala State Election Commission. Two specific contentions were urged. One is that the 3rd respondent was duly elected whip of Congress Parliamentary party and that direction was issued to the Councillors of Congress to vote against the No Confidence Motion which was tabled for discussion on 2/2/2009. It was also stated that the whip was served in the residential address of the

petitioner by affixture and it was sent by post as well and that she was having sufficient notice of the direction of the Parliamentary Party and the Congress. It is contended that contrary to the said whip, she voted in favour of the motion, supported the LDF and out seated the Chairperson of her own party. Another contention urged is that purposefully disobeying the directions issued by the political party and voting against the Chairperson of the Congress Party with the support of LDF would amount to voluntarily abandoning her membership from the Congress Party.

10. In the objection filed by the petitioner, it was contended that No Confidence Motion was moved against the Chairperson with the support of the Congress Party and in terms of the prior agreement. However, it was denied that there was no whip issued in terms with the Rules. Petitioner however admits the fact that she had participated in the No Confidence Motion and that she had voted in favour of the No Confidence Motion.

11. The Election Commission held that the 3rd respondent was unable to prove that he is the duly elected whip of the Congress Parliamentary Party and was competent to issue whip to the writ petitioner. However, on the question whether the

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petitioner has voluntarily given up membership from the political party, after evaluating the evidence on record, it was found that when the petitioner herself has admitted that the No Confidence Motion was supported by all the LDF Councillors along with the petitioner and five other UDF Councillors and the materials on record clearly indicated that LDF Councillors who supported No Confidence Motion had voted in favour of the writ petitioner in the subsequent election, there is enough material to indicate that she had changed her loyalty. Learned Single Judge also considered the contentions urged by either parties. It is held at para 14 as under;

“14. The next question to be considered is whether the finding in Ext.P5 order that the petitioner has voluntarily given up her membership of the party to which she belonged is legally sustainable. In this case following facts are not in dispute. The petitioner contested and was elected as a member of the Congress Party. The notice for No Confidence Motion was signed by the petitioner and a member of the LDF and was filed on 20/1/2009. In the election that was held on 2.2.2009, with the votes of the members of the LDF and the 6 members of the Congress party including herself, the no-confidence motion

against her own party member was carried and the remaining members of the UDF and the BJP opposed the motion. In the election that was held on 19.2.2009 to the office of Chairperson, her candidature was proposed by Appu Pillai, a member of the LDF. This has been admitted by her while tendering evidence before the 1st respondent as RW6. It is also not in dispute that she contested against Smt.Priyamvada, the official candidate of the Congress Party and won the election with the votes of the entire members of the LDF and 6 members of the Congress party."

12. On the basis of the aforesaid finding, relying upon the judgment in **Nazeer Khan. S v. Kerala State Election Commission and anor.** (2008 (3) KHC 322), the Division Bench judgment in the very same case reported in (2009 (1) KHC 681), another judgment in **Faisal v. Abdulla Kunhi** (2008 (3) KLT 534) and **Dharma Mani v. Parassala Block Panchayat** (2009 (3) KLT 29), it was held that from the conduct of the petitioner, it can safely be concluded that she has voluntarily given up membership in the political party.

13. The law in this regard is well settled. As per Section 3 (1)(a) of the Act, a member of local authority is treated to have defected, if he acts contrary to any direction in writing issued by

the political party in a voting on a No Confidence Motion or by his conduct he voluntarily gives up his membership from the political party. It is the settled position of law that voluntarily giving up membership from the political party is an instance of becoming disloyal to the party as held by the Division Bench in **Varghese v. Kerala State Election Commission** (2009 (3) KLT 1). Therefore, what is to be considered is whether by the action of the petitioner while supporting the No Confidence Motion against her own party member, she had become disloyal to the political party in which she was a member. When after evaluation of the evidence, the Election Commission has come to such a finding, which finding of fact has already been approved by the learned Single Judge, we do not think that the same issues can be re agitated in this appeal unless of course, there is any perversity in the said finding of fact. No such perversity could be pointed out by the learned counsel for the appellant to justify setting aside the judgment of the learned Single Judge and that of the Election Commission. Learned counsel for appellant relied upon the Division Bench judgment of this Court in **Chinnamma Varghese v. State Election Commission** (2010 (3) KLT 426). Paragraphs

22 and 23 are relevant, which read as under;

"22. Taking the case on hand, the activity of the appellant which was found to tantamount to withdrawal from the coalition is stated to be signing of the notice in the no confidence motion by the appellant herein. Even in the matter of an elected representative belonging to a political party such a signing of the notice of no confidence motion per se is not declared under the above mentioned Act to be an activity attracting disqualification on the ground of defection. It is only the specific overt act of voting or abstaining from voting contrary to any written directions issued by the political party on a no confidence motion that tantamounts to defection. If that is the legal position with regard to a member of the Panchayat belonging to a political party, a member of a coalition, in our opinion, cannot be logically said to have committed an act of withdrawal from the coalition which has the serious consequence of rendering such a member disqualified from being a member of the Panchayat, on the mere ground that he or she has signed the notice of no confidence motion.

23. No doubt in the case of the appellant, the appellant not only signed the notice of no confidence motion but also voted in favour of the no confidence motion which eventually resulted in the ouster of the President of the Panchayat

who belonged to the L.D.F. coalition. But coming to the question of voting there is nothing in the law which binds the appellant who is established to be an independent member of the Panchayat to vote in accordance with the desires of the coalition partners. No binding legal direction was ever issued against the appellant. A no confidence motion is essentially a matter of conscience of the voter (member of the Panchayat). The Kerala Local Authorities (Prohibition of Defection) Act, 1999, to some extent, restricts the free choice of the voter (member of the Panchayat) in this regard. Such restriction first came to be introduced by the amendment to the Constitution and introduction of the Tenth Schedule to the Constitution with reference to the Members of the Parliament and the State Legislatures. The law makers thought it fit to bring in such restrictions on the free choice of the holders of the elected offices to vote in any manner as they please during their tenure. The perceived distortions in the political morality prompted the law makers to introduce such provisions which curtail the right of the elected representatives of the various bodies to exercise their voting rights freely in certain contingencies. In the ultimate analysis voting is nothing but a mode of expression of the opinion. Such restrictions, in our view, are required to be enforced strictly in accordance with the tenor of

the law. If under the scheme of the Act voting or abstaining from voting contrary to the specific direction of either the political party or the coalition renders the person violating the whip disqualified on the ground of defection, the same conclusion cannot be logically reached in the cases of persons who are not obliged to obey such directions or against whom no direction whatsoever was ever legally issued on the ground that such a conduct would render such a person disqualified on the ground that the conduct would tantamount to withdrawing from the coalition."

14. It is therefore evident that every member has a right to participate in the process of administration of the Panchayat and a meeting of No Confidence Motion is also one among the requirements which has to be complied with. As held by the Division Bench in ***Chinnama Varghese's case*** (supra), voting is nothing but a mode of expression of the opinion which has to be enforced strictly in accordance with the tenor of the law as held by the Division Bench. When voting or abstaining from voting contrary to specific direction of the political party renders the person violating the whip disqualified on the ground of defection, the same conclusion cannot be logically reached in the cases of

persons who are not obliged to obey such directions or against whom no direction whatsoever was legally issued on the ground that such a conduct would render such a person disqualified. That was a case in which the appellant contested the election as an independent supported by CPI(M). The coalition of UDF moved a No Confidence Motion against the President and Vice President who were LDF candidates. No Confidence Motion was carried. Thereafter, the appellant contested in the election as President and was elected. In the meantime, petition under Section 4 was filed against the appellant on the allegation that she was disqualified under Section 3 of the Act. The Election Commission held that the appellant became disqualified on the ground that she supported the No Confidence Motion against the LDF candidates. Writ petition was filed challenging the same which was dismissed by judgment dated 19/3/2010 against which the appeal was filed. The appeal was allowed mainly on the ground that since the appellant was an independent candidate, she was not bound by any direction of any political party.

15. Having regard to the factual circumstances involved in the case, we do not think that the facts as available in

Chinnamma Varghese (supra) can be imported to the present case. However, as held in para 23 of the said judgment, when independent evidence is available to prove the disqualification of a member of the political party, the Election Commission was justified in declaring the petitioner as disqualified in terms of Section 3 of the Act.

In the light of the aforesaid findings, we do not find any ground to interfere with the judgment of the learned Single Judge and accordingly, this appeal is dismissed.

Sd/-

ASHOK BHUSHAN, CHIEF JUSTICE

Sd/-

A.M. SHAFFIQUE, JUDGE

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PS to Judge