

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

MONDAY, THE 12TH DAY OF OCTOBER 2015/20TH ASWINA, 1937

WA.No. 1840 of 2015 ()

AGAINST THE JUDGMENT IN WP(C).NO. 4944/2015 DATED 10-07-2015.

.....

APPELLANTS/PETITIONERS :

- 1. SANDEEP M.T., MEMBER, WARD NO.54,
PANANCHERRY GRAMA PANCHAYAT,
RESIDING AT MALAYAM COLONY, POOVANCHIRA,
THRISSUR DISTRICT.**
- 2. ROY K.DEVASSY, MEMBER, WARD NO.5,
PANANCHERRY GRAMA PANCHAYAT,
RESIDING AT KOLKUNNIL HOUSE, PATTIKKAD P.O.,
THRISSUR DISTRICT.**
- 3. K.P.CHACKOCHAN, MEMBER, WARD NO.9,
PANANCHERRY GRAMA PANCHAYAT,
RESIDING AT KOLLIYOTTIL HOUSE, VAZHUKKUMPARA,
CHUMANNAMANNU P.O., THRISSUR DISTRICT.**
- 4. ROSILY @ SHEEJA BINU,
MEMBER, WARD NO.8, PANANCHERRY GRAMA PANCHAYAT,
RESIDING AT VALAYIL HOUSE, VANILYAMPARA P.O.,
THRISSUR DISTRICT.**
- 5. ELIYAMMA @ SUSEELA RAJAN, MEMBER, WARD NO.21,
PANANCHERRY GRAMA PANCHAYAT,
RESIDING AT PLAVILAYIL HOUSE, KANNARA P.O.,
THRISSUR DISTRICT.**
- 6. SAKUNTHALA UNNIKRISHNAN, MEMBER, WARD NO.16,
PANANCHERRY GRAMA PANCHAYAT,
RESIDING AT POONTHITHODIYIL HOUSE, KANNARA P.O.,
THRISSUR DISTRICT.**

7. SINDHU SURESH, MEMBER, WARD NO.1,
PANANCHERRY GRAMA PANCHAYAT,
RESIDING AT THUPPALI HOUSE, PATTIKKAD P.O.,
THRISSUR DISTRICT.

BY ADVS.SRI.SHAJI THOMAS,
SRI.BINU PAUL,
SRI.T.V.VINU,
SRI.B.RAJESH (KOTTAYAM),
SRI.H.KIRAN.

RESPONDENTS/RESPONDENTS:

-
1. THE KERALA STATE ELECTION COMMISSION,
THIRUVANANTHAPURAM-695 001.
 2. SRI. P.V. PATHROSE,
S/O. VARGHESE, MEMBER, WARD NO.17,
PANANCHERRY GRAMA PANCHAYAT,
RESIDING AT PULIMOOTIL HOUSE,
KANNARA P.O., THRISSUR DISTRICT-680 562.
 3. THE PANANCHERRY GRAMA PANCHAYAT,
PANANCHERRY, KANNARA P.O.,
THRISSUR DISTRICT-680 652,
REPRESENTED BY ITS SECRETARY.
 4. C.M. DAMODARAN, MEMBER, WARD NO.10,
PANANCHERRY GRAMA PANCHAYAT,
RESIDING AT CHELLARY HOUSE,
CHUVANNAMANNU P.O., THRISSUR-680 652.
 5. V.C. SUJITH, MEMBER, WARD NO.20,
PANANCHERRY GRAMA PANCHAYAT,
RESIDING AT VELUTHEDATHU PARAMBIL,
T.K.R. ROAD, KOTTALA P.O., THRISSUR-680 652.
 6. ANNIE JOY, MEMBER, WARD NO.3,
PANANCHERRY GRAMA PANCHAYAT,
RESIDING AT AKKARAPADIKKARAN,
PATTIKKAD P.O., THRISSUR-680 652.
 7. SHYBA KABEER, MEMBER, WARD NO.7,
PANANCHERRY GRAMA PANCHAYATH,
RESIDING AT KOTTEKKATUPARAMBIL, NEELIPARA,
VANIYAMPARA P.O., THRISSUR-680 652.

8. AMBIKA CHIDAMBARAN, MEMBER, WARD NO.12,
PANANCHERRY GRAMA PANCHAYATH,
RESIDING AT KOLLAMKUDIYIL, KANNARA P.O.,
THRISSUR-680 652.
9. K.V. JOSE, MEMBER, WARD NO.11,
PANANCHERRY GRAMA PANCHAYATH,
RESIDING AT KADASSERI HOUSE,
KANNARA P.O., THRISSUR-680 652.
10. SAVITHRI SADANANDAN, MEMBER WARD NO.2,
PANANCHERRY GRAMA PANCHAYAT,
RESIDING AT PUTHENPURAYIL HOUSE,
PATTIKKAD P.O., THRISSUR-680 652.
11. V.A. MOIDEEN, MEMBER, WARD NO.13,
PANANCHERRY GRAMA PANCHAYAT,
RESIDING AT PANANCHERRY VILLAGE,
PANANCHERRY, THRISSUR-680 652.
12. SHYLA VIJAYAKUMAR, MEMBER, WARD NO.22,
PANANCHERRY GRAMA PANCHAYAT,
RESIDING AT CHAMBILLY HOUSE,
PATTIKKAD P.O., THRISSUR-680 652.

R1 BY ADV. SRI.MURALI PURUSHOTHAMAN, SC.

R2 BY ADVS. SRI.P.B.KRISHNAN,
SRI.P.M.NEELAKANDAN,
SRI.P.B.SUBRAMANYAN,
SRI.SABU GEORGE,
SRI.S.NITHIN (ANCHAL).

R3 BY ADV. SRI.A.C.DEVY.

R4 TO R12 BY ADVS. SRI.P.C.SASIDHARAN,
SRI.ARAVINDA KUMAR BABU T.K.

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 08/10/2015
THE COURT ON 12/10/2015 DELIVERED THE FOLLOWING:

rs.

APPENDIX

PETITIONER'S ANNEXURES:-

**ANNEXURE I COPY OF THE DEPOSITION OF DCC PRESIDENT (PW2)
ALONG WITH ITS ENGLISH TRANSLATION.**

**ANNEXURE II COPY OF THE DEPOSITION RW3 (CONG I BLOCK PRESIDENT)
ALONG WITH ITS ENGLISH TRANSLATION.**

RESPONDENT'S ANNEXURES:- NIL.

//TRUE COPY//

P.S. TO JUDGE

rs.

ASHOK BHUSHAN, CJ

&

A.M.SHAFFIQUE, J.

*** * * * ***

W.A.No.1840 of 2015

Dated this the 12th day of October 2015

J U D G M E N T

Shaffique, J

The petitioners in W.P.(C)No.4944/2015 has come up in appeal challenging judgment dated 10/07/2015 by which the learned Single Judge had dismissed the writ petition. The writ petition was filed challenging Ext.P29, an order passed by the Kerala State Election Commission (hereinafter referred to as the 'Commission') inter alia holding that appellants, having moved a no confidence motion against the President of the Panchayat, who was a member of their political party and having voted in favour of the said motion with support of LDF, have become disqualified to continue as members of the Panchayat and from contesting election to any local authority for a period of six years from the date of order in terms with Section 4(3) of the Kerala Local Authorities (Prohibition of Defection) Act.

2. The averments in the case would disclose that separate applications were filed as O.P.Nos.14, 16, 17, 18, 19, 20

and 21 of 2012 by one Sri.P.V.Pathrose, the 2nd respondent herein, inter alia alleging that the writ petitioners, on account of their action in violating the whip issued by the Congress Party and acting against the interest of Indian National Congress (INC) had voluntarily given up their membership from the party.

3. The short facts in the original petition filed before the Commission would disclose that Panancherry Grama Panchayat consisted of 23 divisions, INC won in 13 divisions, the Left Democratic Front (LDF) in 9 Divisions, and one division was won by Kerala Congress (M) [KC(M)] which is a partner of United Democratic Front (UDF) along with INC. The 2nd respondent, an INC member, was elected as President of the Panchayat. On 25/02/2012, the appellants together submitted a no confidence motion to remove the President. The no confidence motion was tabled for consideration by the members of the Panchayat in the meeting on 08/03/2012. 2nd respondent contended that the President of Thrissur District Congress Committee issued whip and direction to the appellants as well as to other members directing its party members from abstaining from the proposed no confidence motion. The whip and direction was affixed in a conspicuous part of the residence of the appellants in the

presence of two witnesses. When the resolution was taken up for consideration in the meeting on 08/03/2012, the 2nd respondent alleges that appellants, in collusion with the rival coalition of LDF, voted in favour of the no confidence motion, thereby unseating him. This, according to the 2nd respondent, amounts to defection and therefore he sought for a declaration that the appellants committed defection.

4. Written Statement was filed by the appellants inter alia contending that out of the 13 members of INC, 7 members submitted no confidence motion as instructed by the District President. They contended that the District Congress Committee (for short 'DCC') gave direction to the 2nd respondent to resign but he disobeyed the direction. They also denied any whip being issued by the DCC President. They also denied that they have obtained support from LDF for passing the no confidence motion. They denied the fact that they have acted against the interest of the political party. The Commission considered all the petitions together and by a common order allowed the same.

5. Commission relied upon the oral testimony of PW1 to PW4 and RWs 1 to 6 and Exts.P1 to P11 and Exts.R1 to R12. On an evaluation of the factual and legal issues involved in the

matter, the Commission found that though there was no violation of whip in terms with the statutory provisions, on account of the petitioner's conduct of obtaining the vote for no confidence along with LDF members, it amounts to defection on the ground of voluntarily giving up membership from the party.

6. The writ petition was filed challenging the order passed by the Commission. Learned Single Judge confirmed the view taken by the Commission against which this appeal has been filed.

7. Sri.Shaji Thomas, learned counsel for the appellants submitted that the Commission has misread the evidence of District Congress Committee (DCC) President as well as the Block Panchayat President, who were examined as PW2 and RW3. He relied upon the fact that the DCC President had clearly indicated that though a whip was prepared, the same was not served on any of the appellants. His evidence was supported by RW3, the Block Panchayat President and therefore there was no decision of the political party by which the appellants were restrained from participating in the no confidence motion and voting in favour of the said motion. Merely for the reason that members of LDF also supported the motion, does not indicate that the appellants had

voluntarily given up membership from the political party. He also relied upon the judgment of one among us (myself) in **Babychan Mulangasseri and others v. State Election Commission and Others** [2013 (3) KLT 633] to contend that moving a no confidence motion will not amount to disqualification under the Act. In order to declare a person as disqualified on the ground that the said person had voluntarily given up membership from the political party, the members have to do something more than exercising their vote in order to come to a conclusion that they had acted contrary to the interest of the political party. He submitted that the aforesaid judgment had been confirmed by a Division Bench in **Joseph.K.M. v. Babychan Mulangasseri & Others** [2015 (1) KHC 111 (DB)] wherein also it was held that moving no confidence motion and voting in its favour, by itself will not amount to voluntarily giving up membership from the political party. He also relied upon the judgment of the Supreme Court in **Balchandra.L.Jarkiholi v. B.S.Yeddyurappa and others** [2011(7) SCC 1] to contend for the proposition that moving a no confidence motion and voting against the office bearer of the same political party does not amount to defection, it is only desertion of the leader and not the party. Another judgment relied

upon is **Varghese v. Kerala State Election Commission** [2009(3) KLT 1] wherein a Division Bench of this Court had occasion to consider what is disloyalty among the party members. It is argued that disloyalty occurs only in instances when a member of a party colludes with the members of rival political party and take steps against the interest of his own political party. It is contended that in so far as the appellants have not indulged in any such activity, the said principle will not apply in the case on hand. He relied upon **Lizy Valsalan v.Suja Salim and Another** [2015(3) KHC 968 (DB)] to content that the facts involved in the said case has no application to the facts of the present case. He also placed reliance on the unreported judgment in W.A.No.2324 of 2009 in **Shyiney Augustine v. Kerala State Election Commission** confirming the Single Judge's view that a member belonging to the political party is not liable to be disqualified merely because he/she has signed the notice of no confidence motion.

8. On the other hand, while supporting the order passed by the Commission and learned Single Judge, Adv.P.B.Krishnan argued that the evidence available on record clearly indicates the fact that the whip was issued, which was served on the appellants

and even assuming that there is non-compliance of Rule 4 of the Kerala Local Authorities (Disqualification of Defected Members) Rules, 2000 (hereinafter referred to as 'the Rules'), still the decision of the political party was well known to the appellants and therefore the Commission was justified in declaring that the appellants have voluntarily given up membership from the political party. He relied upon the judgment in **Lizy Valsalan** (supra) to contend that the disqualification of members in the said case was upheld based on similar set of facts.

9. Sri.P.C.Sasidharan, appearing on behalf of additional respondents, while supporting the arguments of Sri.P.B.Krishnan argued that the single writ petition challenging a common order in separate original petitions could not have been entertained by this Court. That apart, it is submitted that in the absence of any illegality or perversity in the judgment of the learned single Judge, there is no reason for this Court to exercise the appellate jurisdiction.

10. Adv.Sri.Murali Purushothaman, learned Standing counsel for the Commission placed the files relating to the cases and also the judgment in **Shyiney Augustine** (supra) in which Division Bench clarified the decision reported in **Chinnamma**

Varghese v. Kerala State Election Commission [2010(3) KLT 426].

11. Having regard to the factual and legal issues involved in the matter, it is needless to state that each case has to be considered on its own facts. As held in **B.S.Yeddyurappa's** case (supra) and other judgments namely **Babychan Mulangasseri** (supra), **Joseph** (supra) and **Chinnamma Varghese** (supra), submission of a no confidence motion by itself will not attract defection as contemplated under Section 3(1)(a) of the Act. As held in **Lizy** (supra) and **Varghese** (supra), there has to be sufficient material on record to suggest that a whip or a direction in writing to vote or abstain from voting has been issued to the appellants in accordance with Rule 3(1)(a) read with Section 4 of the Rules or that there has to be sufficient material to indicate that the appellants have acted contrary to the directions issued by their political party and by colluding or conniving with the rival political party, have acted against the interest of their own political party and has become disloyal.

12. As far as the allegation of the 2nd respondent regarding service of whip is concerned, it is apparent that the Commission proceeded on the basis that there is no valid whip or that the 2nd

respondent did not have a contention regarding violation of the whip. What was considered by the Commission was regarding the first limb of Section 3(1)(a) that is, whether the appellants have voluntarily given up membership of the political party. To attract the above factual situation, there has to be sufficient evidence to indicate that the appellants have voted in favour of the no confidence motion contrary to the directions issued by the political party and that it was by colluding or conniving with the members of LDF.

13. The learned counsel for the appellants relied upon the evidence of PW2 and RW3 to contend that the evidence was misread by the Commission. PW2 has stated in his evidence that Ext.P1 notice (whip) was given with his knowledge and Ext.P2 series were copies of the notice given to appellants. In cross examination, he has stated that he has not sent Ext.P2 by registered post or on obtaining any receipt. He is not aware of Ext.P2 being served by affixture. It was entrusted to Block Panchayat President. Ext.P2 was not received back after affixture. The Block Panchayat President stated as RW3 that the whip was given and then he added that it was prepared but was not given to any of the members. In order to consider the whip as a valid

document to suggest the wish of the political party, the whip has to be read in the meeting of the members by the parliamentary party leader. Those who are not served with the whip has to be served either by registered post with acknowledgment due or by affixture. A copy of the same has to be given to the Secretary of the Panchayat also. It is evident from the material on record that though a direction in writing has been prepared by the DCC President, a copy of the same has not even been furnished to the Secretary of the Panchayat in terms with Rule 4(2). From this material, it is evident that INC party did not intend to give effect to the direction in writing. Such being the factual circumstances involved in the matter, it has to be assumed that the INC party did not take a decision to be implemented on its members especially the appellants. Under such circumstances, in the absence of any evidence which would indicate a conscious decision of the INC party to enforce upon its members its decision not to participate in the said meeting, we do not think that the Commission was justified in coming to a conclusion that the appellants have voluntarily given up their membership from the political party.

14. Though it is argued by the learned counsel for the respondents that re-appreciation of the evidence is not required

in the matter, when there is apparent inconsistency in the evidence and the findings of the Commission and the set of facts based on evidence, as narrated by the Commission is perverse, it is open for the writ Court to interfere with such findings. The learned Single Judge, however, did not advert its mind to such direct inconsistencies between the evidence adduced by the parties and the findings of the Commission.

15. It is argued by the learned counsel appearing for the 2nd respondent that RW3 has admitted in evidence that DCC president has issued the whip to all the members, but he later retracts from the same and his evidence clearly suggests that all the members were present when such a decision was taken. It is also argued that the position of law is covered by the judgment in **Lizy Valsalan** (supra). In **Lizy Valsalan** (supra) we have observed that whip was issued as borne out from the evidence adduced by the respective political parties. Once the whip is issued, then the question is whether the members were aware of such whip, though it was not served. We have also observed that when the existence of the whip cannot be disputed, what remains is whether the same was communicated to the members or whether the existence of the whip was known to the members or

the knowledge about such a decision taken by the political party. It is found that if either of these factors are proved, Section 3 of the Act squarely applies. In the said case there was substantial evidence relied upon by the Commission to come to a finding regarding the clear instructions given by the respective political parties and also the additional fact that there was substantial compliance of Rule 4 and a copy of the whip was served on the Secretary of the Panchayat in terms of Rule 4(2), who offered to read the same when the meeting was convened. The same set of facts are not available in the present case and therefore judgment in **Lizy Valsalan** (supra) cannot be a proposition that can be used in favour of the second respondent. Hence, we are of the view that the said case has been decided on an entirely different set of facts and the findings thereon are based on such factual circumstances. In paragraph 19 of the said judgment, we were evaluating the respective contentions of the parties especially in regard to the application of the Division Bench judgment in **K.M.Joseph's** case.

16. Two aspects are clear from the factual aspects involved in the present case. One is that there was no valid direction in writing which has been informed to the members in a

parliamentary party meeting regarding the course to be adopted by the members and as such Rule 4 of the Rules have not been complied. Secondly, there is no evidence to indicate the decision of the INC party, as the minutes of the meeting was not produced. The evidence of PW2 does not speak about a decision being taken in the presence of all the members, though RW3 refers to such a decision. Thirdly, there is no evidence to prove any collusion, connivance or nexus between the appellants and LDF other than the oral testimony of PW1. It is true that without LDF support, the no confidence motion could not have been carried. But the question is whether in the facts and circumstances of the present case, the said circumstance alone can be the basis of disqualification on the ground of defection. As already held by us, there is no valid whip issued in terms of the statutory provisions. The pleading of the 2nd respondent does not disclose any decision taken by the DCC President in the presence of all the members. Therefore, when the decision of the political party in regard to the no confidence motion is so unclear on account of the facts narrated above, then the LDF members supported the no confidence motion by itself cannot be treated as a circumstance warranting disqualification. Since a common order was passed by

the Commission, we do not think that the writ petition can be dismissed on the ground of misjoinder of cause of action.

In the light of the aforesaid findings, we are of the view that the writ appeal is liable to be allowed. Accordingly, the writ appeal is allowed, the order passed by the Commission, Ext.P29 is set aside and writ petition stands allowed.

(sd/-)
(ASHOK BHUSHAN, CHIEF JUSTICE)
(sd/-)
(A.M.SHAFFIQUE, JUDGE)

True Copy

PA to Judge

jsr

