

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. 1877 of 2015

WP(C) 21334/2014, DATED 23-07-2015

APPELLANT(S)/1ST RESPONDENT:

**PALLIKKAL NAZEER, WARD MEMBER,
WARD NO.9, CHIRATHALAKKAL WARD,
MANIKKAL GRAMA PANCHAYATH,
THIRUVANANTHAPURAM DISTRICT-695589.**

**BY ADVS.SRI.T.KRISHNANUNNI (SR.)
SRI.VINOD RAVINDRANATH**

RESPONDENT(S)/PETITIONER AND 2ND RESPONDENT:

- 1. T. MANIKANTAN NAIR,
S/O.THANKAPPAN NAIR, M.K.VILASAM,
PULAMTHARA, SANTHIGIRI P.O.,
THIRUVANANTHAPURAM-695607.**
- 2. THE CO-OPERATIVE ELECTION COMMISSION,
THIRUVANANTHAPURAM-695001.**

**R1 BY ADVS. SRI.P.C.SASIDHARAN
SRI.V.G.ARUN**

R2 BY SRI.MURALI PURUSHOTHAMAN, SC,

**THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 6-10-2015
THE COURT ON 12-10-2015, DELIVERED THE FOLLOWING:**

PJ

ASHOK BHUSHAN, C.J.

“C.R.”

&

A.M. SHAFFIQUE, J.

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W.A. No. 1877 of 2015

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Dated this, the 12th day of October, 2015

J U D G M E N T

Shaffique, J.

This appeal is filed by the 1st respondent in WP(C) No.21334/2014 challenging judgment dated 23/7/2015 by which the learned Single Judge had set aside the order passed by the State Election Commission (hereinafter referred to as the Commission), thereby allowing the writ petition.

2. The short facts involved in the writ petition would disclose that the appellant filed O.P.No.3/2013 before the Commission against the writ petitioner/1st respondent herein (who is hereinafter referred to as the 'petitioner') under Section 4 of the Kerala Local Authorities (Prohibition of Defection) Act, 1999 (hereinafter referred to as 'the Act') *inter alia* alleging that on account of the petitioner violating the whip issued by the political party and acting against the interest of the political party, he has voluntarily given up his membership in the political party which amounts to defection in terms of Section 3(1)(a) of the Act. The

appellant alleged that out of 21 seats in Manikkal Panchayat, 9 seats were won by Indian National Congress (I) (for short INC), 10 by Left Democratic Front (LDF) and 2 by independent candidates. INC decided to rule the Panchayat with the help of two independents. The petitioner being a member of INC was elected as the President and Smt.Sudharmani, an independent member was elected as Vice President. The President was removed by a No Confidence Motion brought in at the instance of LDF supported by an independent member Sri.K.Jayan. The LDF members moved a No Confidence Motion against the Vice President. No Confidence Motion was tabled on 4/1/2013. The Parliamentary Party Committee meeting of INC members held on 3/1/2013 decided not to attend the No Confidence Motion which was tabled on 4/1/2013. It is alleged that the petitioner who attended the meeting openly declared that he will vote in the No Confidence Motion against the Vice President even if he loses his membership from the Panchayat or from the party. On 3/1/2013, the District President of INC issued a direction in writing to all the 9 members

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not to attend the meeting of no confidence to be tabled against Smt.Sudharmani. Another emergency meeting was convened on 3/1/2013 to serve the direction in writing to all the members. Though the petitioner attended the meeting and received the direction in writing, he did not sign the acknowledgment. Hence it was decided to affix a copy of the direction in writing at his residence and accordingly affixture was made in the presence of two witnesses at his residence on 3/1/2013. The appellant who was the parliamentary party leader also issued letter in writing to the Secretary of the Panchayat and to the Returning Officer regarding the direction issued to all the members of INC. It is stated that contrary to the aforesaid direction, petitioner attended the meeting on 4/1/2013 and voted in favour of the No Confidence Motion thereby violating the direction in writing of the District President. This action of petitioner, according to the appellant, amounts to acting contrary to the direction in writing of the political party. It is further alleged that he had voted against the Vice President with the support of LDF members to elect his

relative as the next Vice President. It is alleged that by joining LDF Camp, he had voluntarily committed defection.

3. Written statement has been filed by the petitioner denying the aforesaid factual situation. It is contended that the Parliamentary Party meeting was not held on 3/1/2013 and no such notice was given to the petitioner. There was no decision to abstain from attending the meeting on 4/1/2013. Petitioner also denied the fact that the direction in writing was affixed in front of his house. He contended that as per the information received by him, no such direction was issued by the District Congress President and he had not received any such information at all. He further contends that he had participated in the No Confidence Motion to protect the interest of the political party and voted in favour of the motion against an independent candidate who acted against the interest of the official congress candidate. He also denied the allegation that he had voluntarily abandoned membership of the INC and joined LDF.

4. Before the Commission, the parties adduced evidence.

PWs 1 to 3 were examined on the side of the appellant and RWs 1 to 3 on the side of the petitioner. Exts.P1 to P3 and X1 to X2 were the documents relied upon.

5. On an evaluation of the factual and legal issues involved in the petition, the Commission observed that even assuming that no whip was served on the respondent as alleged, it is clear from the facts of the case that the conduct of the respondent in having voted in favour of the No Confidence Motion along with all the LDF members amounts to disloyalty as the decision of the party was to defeat the No Confidence Motion. On this finding, the original petition filed by the appellant was allowed and the petitioner was declared as disqualified for being a member of the Panchayat and he was also disqualified from contesting as candidate in an election to any of the local authorities for a period of six years in terms of Section 4(3) of the Act.

6. While arriving at the above conclusion, the Commission relied on the oral testimony of the District Congress President who

was examined as PW2. He has deposed that he had given direction to all Congress members to abstain from the discussion and voting on the no confidence motion which was tabled for discussion on 4/1/2013. He proved Ext.P1, the document that has been issued as a direction by which members were asked not to participate in the meeting of No Confidence Motion. PW3 is the Congress Mandalam President who had given evidence stating that a meeting of all the members of the Panchayat was convened on 3/1/2013 and Ext.X1(a) is the minutes. He had stated that the decision of the party was to abstain from attending the discussion and voting on the No Confidence Motion. According to him, the petitioner also attended the said meeting and he asserted that he will support the no confidence and that he will not obey the party decision. He did not sign the minutes and left the meeting. He also gave evidence to show that the whip in writing was affixed in the front of the petitioner's house in the presence of witnesses and Ext.X2 is the said document and that necessary SMS message was also given to the petitioner

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regarding the party decision. RW1 is the petitioner. He gave evidence that he was not served with any direction or whip by the DCC President or any other person. RW2 and RW3 are witnesses who had spoken about the actions of Smt.Sudharmani who is alleged to have voted in favour of LDF candidates in the election. The Commission on evidence found that though the signature of the petitioner is not available in Ext.X1(a), the decision of the Congress Mandalam Committee was to oppose the No Confidence Motion against the Vice President. There is also evidence to indicate that Ext.X2, a copy of the written direction, was affixed in the presence of witnesses, in front of the petitioner's house. Hence, it was found that the contention urged by the petitioner that the whip was not served is not correct. However, it was observed that though the whip was not sent by registered post as mentioned in Rule 4(2) of the Kerala Local Authorities (Disqualification of Defected Members) Rules (hereinafter referred to as the Rules), it was found that there is evidence to prove that the whip was issued to the petitioner and served on him by

affixture. The Commission further proceeded to consider the question regarding whether the petitioner had moved to the LDF Camp and after evaluating the evidence, it is found that it was the intention of the LDF members to oust the Vice President who was elected with the support of all the Congress members and by participating in the said meeting and voting in favour of the No Confidence Motion, the petitioner had created a majority for the resolution to be passed. If he had not attended the meeting, the resolution would not have carried. On this basis, Commission found that the petitioner was liable to be disqualified.

7. Learned Single Judge having considered the matter in detail formed an opinion that the whip which was issued and served on the petitioner was not a proper direction in writing as contemplated under the Act and Rules. In regard to the question of voluntarily giving up his membership, it was found that since the Vice President candidate was not a candidate belonging to INC and in the absence of necessary pleadings to indicate that the petitioner had favoured or aligned with LDF, there was no reason

to hold that he had voluntarily given up his membership from the political party.

8. Heard the learned Senior Counsel Sri.T.Krishnanunni appearing on behalf of the appellant, Sri.P.C.Sasidharan, learned counsel appearing on behalf of the petitioner and Sri.Murali Purushothaman, learned counsel appearing on behalf of the Election Commission.

9. The learned counsel for the appellant placed emphasis on the fact that the Act or the Rules do not contemplate any specific form for issuing a direction to the members of the Panchayat. It is contended that the finding in the judgment to the extent that there was no specific direction to refrain from voting in the No Confidence Motion was incorrect in so far as no specific format is prescribed for issuing such direction. The only fact to be looked into is whether any direction in writing has been issued by the DCC President, which was communicated to the petitioner in terms with Rule 4 of the Rules. Once such a direction had been issued and a member acts contrary to such a direction, it amounts

to action contrary to the interest of the political party. Further, it was argued that the will of the political party was clearly known to the petitioner as he was present in the meeting of the parliamentary party and had openly declared that he will favour the No Confidence Motion by attending the meeting. It is argued that when the Commission had come to such definite findings of fact, there was no reason for the learned Single Judge to have arrived at a different finding as long as there is no perversity in the finding of the Commission. The Commission based on the evidence on record had found that the petitioner had acted against the interest of the political party by supporting the No Confidence Motion moved by the LDF and if the petitioner had not attended the meeting, the resolution would not have passed, for want of majority. It is argued that presence of petitioner alone has created the majority for carrying forward the resolution.

10. Learned counsel also relied upon the Division Bench judgment of this Court in ***Lizy Valsalan v. Suja Salim and anor.*** (2015 (3) KHC 968), wherein we had occasion to hold that

the decision making process of the Commission need be interfered only in cases where the decision is either illegal or is in violation of the principles of natural justice or that the finding of fact is so perverse that no reasonable person can arrive at such a finding and that even if a different view is possible on a set of facts, the same cannot be a reason to arrive at a different finding. It is argued that the case on hand is similar to the case decided in **Lizy Valsalan** (supra).

11. On the other hand, learned counsel Sri.P.C.Sasidharan appearing on behalf of the petitioner supported the view taken by the learned Single Judge and contended that the direction in writing to be issued by the political party in terms of Section 3(1) (a) of the Act should be either to vote or abstain from voting. In so far as the alleged whip does not contain any such instruction, the learned Single Judge was justified in rejecting the contention regarding violation of whip. It is argued that if a member fails to attend the meeting, it will have other consequences and therefore, no political party can request a member to abstain from

attending the meeting though it is possible for them to request the member to vote in favour of a person or abstain from voting. It is also argued that there was no evidence to form an opinion that the petitioner had voluntarily given up his membership from the political party and the learned Single Judge was justified in arriving at such a conclusion. He also relied upon the judgment in **Chinnamma Varghese v. State Election Commission** (2010 (3) KLT 426) to contend that the same set of facts for violating the whip cannot be made a ground for disqualification on the ground of voluntarily giving up membership from the political party.

12. Reliance is also placed on judgment of the Single Judge (myself) in **Babychan Mulangasseri v. State Election Commission** (2013 (3) KLT 633) to contend that the parameters specified in the said judgment for disqualification on the ground of voluntarily giving up membership has not arisen in the case on hand. It is also argued on the basis of **Sheo Paul v. Kerala State Election Commission** (2005 KHC 1241) that the person who alleges to have issued the whip has to prove that the whip

has been properly issued as laid down in Section 3(1)(a) of the Act read with the Rules.

13. Having regard to the arguments raised on either side, the short question to be considered is whether the learned Single Judge was justified in setting aside the order passed by the Election Commission on the two specific grounds, namely, whip issued is improper and cannot be the basis of disqualification and that the facts involved in the case do not disclose that the petitioner had voluntarily given up membership from the political party.

14. Section 3(1)(a) reads as under;

“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 a 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

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by a person or authority authorised by it in this behalf in the manner prescribed, votes or abstain from voting,-

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

(ii) in a meeting of 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; or

on a voting on a no-confidence motion against any one of them except a member of a Standing Committee”.

15. It is relevant to note that the word 'whip' is not defined either under the Act or the Rules. Section 3(1)(a) of the Act refers to “any direction in writing by the political party to which he belongs”. Direction in writing is defined under section 2(iva) by way of an amendment brought into force on 10/1/2013, which reads as under:

“2(iva) “direction in writing means a direction in writing, signed with date, issued to a member

belonging to, or having the support of, a political party, by the person authorised by the political party from time to time to recommend the symbol of the said political party for contesting in election, for exercising the vote favourably or unfavourably or to abstain from voting;"

Apparently, Ext.P1(8) is the direction in writing by the President of District Congress (I) Committee which is otherwise termed as the "whip". Based on the decision of Manikkal Mandalam Congress Committee and decision dated 3/1/2013 in the meeting of the members of Manikkal Panchayat Congress (I) Parliamentary party, the members who won the election in the symbol of hand are directed not to participate in the no confidence motion meeting against the Vice President which is to be tabled on 4/1/2013. It is apparent from the above that the decision of the INC party and the members of the Panchayat is to abstain from attending the meeting which is clear indication that they should abstain from voting. Rule 4 of the Rules, only specifies the manner in which the direction in writing has to be prepared and communicated to the members or served, as the case may be. Rule 4 of the aforesaid

Rules reads as under;

“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) in the case of a member belonging to a political party or a member considered as included therein, it shall be the person authorised from time to time to recommend the symbol belonging to the political party in order to contest the said member in the election. Provided, the above said direction shall be in the letterhead and seal of the political party and for information of the members, the contents therein shall be read over by the member who shall be elected by the members belonging to the political party and the members considered as included in the political party jointly, based on majority from among themselves, and the direction so read shall be deemed to have given directly to the members. In any case, in the absence of the member elected by the majority or if the member refuses, and another member belonging to the same party shall read over the said direction.

(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.

(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 be affixing it shall be done in the presence of at least two witnesses."

Rule 4 however indicates that if a political party gives any direction in respect of casting of vote in an election or in a voting, as has been mentioned in Clause (a) of Section 3, it shall be in writing and such directions shall be given by the person authorised from time to time to recommend the symbol belonging to the political party. It has to be in a letter head and seal of the political party. When a direction under sub rule (1) is issued and read over in the meeting of the members, it is deemed to be served on such members who are present. Sub rule (2) provides that while issuing a direction under sub rule (1), a receipt shall be

obtained from the members present. In respect of others, if the service is effected by sending it by registered post, it shall be done along with acknowledgment due and while serving it by affixture, it shall be done in the presence of atleast two witnesses. Copy of the direction in writing shall also be given to the Secretary also.

16. It is true that the direction in writing by the authorised person of the political party should be either to vote or abstain from voting. But when the instruction issued is not to participate in the meeting, can it be said that it does not amount to a valid direction in writing as contemplated under Section 3(1)(a) of the Act. Section 3(1)(a) and Rule 4 contemplate the direction to either vote or abstain from voting. The definition in section 2(iva) indicates that the direction in writing should be to vote favourably or unfavourably or to abstain from voting. As already stated, in the absence of a format which prescribes the manner in which the direction in writing is to be issued, the political party is entitled to take a decision in what manner the voting or abstinence from

voting has to be done. In the case on hand, the members were asked to abstain from attending the meeting when the no confidence motion is being moved against the Vice President. The clear indication is that they should abstain from voting by not attending the meeting. The learned Single Judge observed that in so far as there is no specific direction to refrain from voting in the no confidence motion, it is not one issued in terms of Section 3(1)(a) of the Act and Rule 4. We do not think that the above view is a correct interpretation of the statutory provision. What is to be looked into is the intention behind the decision of the political party by requesting the members not to attend the meeting. It is apparent that they do not want their members to support the motion moved by LDF, by abstaining from voting. If their members abstain from voting, it is not disputed that the no confidence motion will fail. Therefore, what is to be looked into is the substantial compliance of Section 3(1)(a) read with Rule 4 and not a verbatim reproduction of the statutory provisions. The very purpose of bringing in such provision is to ensure that no member

of the political party shall show any disloyalty to the political party during the term which they remain as members of that political party. Therefore, merely for the reason that the direction in writing is not couched in the language as specified under Section 3(1)(a) read with Rule 4 by itself cannot be stated as a reason for discarding the direction in writing.

17. Though the petitioner had a case that the direction in writing was not served on him, the evidence clearly indicated that Ext.P1(8) has been served by affixture at the residence of the petitioner in the presence of two witnesses. Further, PW2, the DCC President, has deposed that he had given direction to all the INC members to abstain from the discussion and voting on the no confidence motion. He had also stated that the direction in writing has been issued based on the decision of Mandalam Congress Committee and the Congress Parliamentary Party. PW3, the Congress Mandalam President also has deposed that the direction in writing was affixed in front of the petitioner's house as he was not available in the house, in the presence of two witnesses. The

above evidence clearly indicates that there was a proper direction in writing to abstain from attending the meeting which itself is sufficient to hold that there was a decision by the INC members to participate in the meeting so that the no confidence motion shall fail. The appellant also relied upon Ext.X1(a), the minutes of the meeting of the Congress Mandalam Committee and Ext.X2, the copy of the affixture made in the front of the house of the petitioner. It is also found that copy of the direction was given to the Secretary of the Panchayat in terms of Rule 4(2) of the Rules even prior to the motion being taken up for discussion. Under such circumstances, we are of the view that the learned Single Judge was not justified in holding that there was no valid whip.

18. Coming to the next question as to whether the petitioner has voluntarily given up membership from the political party, it is evident that the no confidence motion was moved by LDF against an independent member who was Vice President. Out of the 9 members of Congress party, the petitioner alone voted in

favour of the no confidence motion along with LDF members and it is evident that he has acted against the interest of the political party. If the petitioner had not supported the no confidence motion, it is apparent that it would have failed. Under such circumstances, we cannot find fault with the Commission to have formed an opinion that petitioner has also voluntarily given up the membership of the political party by acting against the interest of the political party.

19. Learned Single Judge however observed that since Smt.Sudharmani was an independent candidate and was not a member of INC or of any coalition of INC, the petitioner had not shifted his stand with LDF. It is a well settled proposition of law and as held by the Division Bench of this Court in **Varghese v. Kerala State Election Commission** (2009 (3) KLT 1), that a member of a political party has to be loyal to the said political party. Disloyalty is enough to indicate that he has voluntarily relinquished his membership from the party. In the case on hand, there is evidence to show and as rightly held by the Commission,

that the petitioner deliberately supported the no confidence motion which was moved by LDF, their rival faction and if he had not voted in favour of the no confidence motion, it would have failed. Therefore, it is evident that petitioner was supporting the stand taken by LDF, the rival political party. When a person acts against the interest of his political party and supports the stand taken by the opposite group and that too when the interest of his political party is clear and unambiguous, the action would be deliberate which would amount to disloyalty. The facts being so, we are of the view that the findings of the learned Single Judge in this regard cannot be sustained. In ***Chinnama Varghese's case*** (supra), which is relied upon, a Division Bench held that 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. We are of the view that the said case revolves around a different set of facts which cannot be imported to the present case.

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In the result, we set aside the judgment of the learned Single Judge. We uphold the order passed by the Election Commission. The writ appeal is allowed and the writ petition stands dismissed.

Sd/-

ASHOK BHUSHAN, CHIEF JUSTICE

Sd/-

A.M. SHAFFIQUE, JUDGE

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P.S to Judge