

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFIQUE**

MONDAY, THE 1ST DAY OF JUNE 2015/11TH JYASHTA, 1937

WP(C).No. 7933 of 2015 (N)

PETITIONER(S) :

- 1. SURYAPRAKASH,
SON OF KUNJUKRISHNAN, PRABHAVATHI MANDIRAM, MUNDAIL,
VARKALA, COUNCILLOR, WARD NO.25,
VARKALA MUNICIPALITY, VARKALA,
THIRUVANANTHAPURAM- 695 141.**
- 2. A.DAVOOD, S/O.ABU SHAIMAN,
A.S.VILLA, ERAKKAM, CHILAKOOR,
VARKALA, COUNCILLOR, WARD NO.23,
(KOTTUMoola), VARKALA MUNICIPALITY,
THIRUVANANTHAPURAM- 695 141.**
- 3. P.S.VINAYAKUMARI,
D/O.SAROJINI, PUTHENVILA VEEDU, THACHAMKONAM,
VARKALA, COUNCILLOR, WARD NO.19,
(RAMANATHALA), VARKALA MUNICIPALITY,
THIRUVANANTHAPURAM- 695 141.**
- 4. K.G.SURESH,
SON OF GOVINDAN, RAMA SADANAM, THACHAKONAM,
VARKALA, COUNCILLOR, WARD NO.18,
VARKALA MUNICIPALITY, THIRUVANANTHAPURAM- 695 141.**
- 5. S.SANUSH,
S/O.SATHYANESAN, THENGUVILA VEEDU, KORAKANNI,
VARKALA, COUNCILLOR, WARD NO.28,
VARKALA MUNICIPALITY, THIRUVANANTHAPURM- 695 141.**

**BY SRI.K.RAMAKUMAR (SENIOR ADVOCATE)
ADVS.SRI.S.M.PRASANTH
SRI.C.DINESH
SRI.G.RENJITH
SMT.ASHA BABU
SMT.AMMU CHARLES
SRI.JINNU SARA GEORGE**

WP(C).No. 7933 of 2015 (N)

RESPONDENT(S):

- 1. THE KERALA STATE ELECTION COMMISSION,
THIRUVANANTHAPURAM- 695 001.**
- 2. MR.N.ASOKAN, , AGED 62 YEARS
SON OF NARAYANAN NAIR, "ARCHANA", NEAR RAILWAY STATION,
VARKALA (MEMBER, WARD NO.31 OF VARKALA MUNICIPALITY),
THIRUVANANTHAPURAM- 695 141.**
- 3. THE VARKALA MUNICIPALITY,
VARKALA, THIRUVANANTHAPURAM- 695 141,
REPRESENTED BY ITS SECRETARY.**

**R1 BY ADV. SRI.MURALI PURUSHOTHAMAN, S.C
R2 BY ADV. SRI.G.S.REGHUNATH
R3 BY ADV. SRI.M.R.RAJESH, S.C**

**THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION
ON 01-04-2015, ALONG WITH W.A.NO.661 OF 2015, THE COURT
ON 01-06-2015 DELIVERED THE FOLLOWING:**

Msd.

APPENDIX

PETITIONER(S)' EXHIBITS

- EXHIBIT P1: TRUE COPY OF PETITION OMITTING THE ANNEXURES DATED 29.04.2014 FILED BY R2 BEFORE R1 AGAINST THE 1ST PETITIONER.**
- EXHIBIT P2: TRUE COPY OF PETITION DATED 29.04.2014 OMITTING THE ANNEXURES FILED BY R2 BEFORE R1 AGAINST THE 2ND PETITIONER.**
- EXHIBIT P3: TRUE COPY OF PETITION DATED 29.04.2014 FILED BY R2 BEFORE R1 AGAINST THE 3RD PETITIONER.**
- EXHIBIT P4: TRUE COPY OF PETITION DATED 29.04.2014 FILED BY R2 BEFORE R1 AGAINST THE 4TH PETITIONER.**
- EXHIBIT P5: TRUE COPY OF PETITION DATED 29.04.2014 FILED BY R2 BEFORE R1 AGAINST THE 5TH PETITIONER.**
- EXHIBIT P6: TRUE COPY OF NOTICE DATED 24.03.2014 ISSUED BY DCC SECRETARY TO THE 1ST PETITIONER ALONG WITH TRANSLATION.**
- EXHIBIT P7: TRUE COPY OF NOTICE DATED 27.03.2014 ISSUED BY THE DISTRICT CONGRESS COMMITTEE ALONG WITH ENGLISH TRANSLATION.**
- EXHIBIT P8: TRUE COPY OF NOTICE DATED 27.03.2014 ISSUED BY THE SECRETARY, DISTRICT CONGRESS COMMITTEE ALONG WITH ENGLISH TRANSLATION.**
- EXHIBIT P9: TRUE COPY OF NOTICE DATED 27.03.2014 ISSUED BY THE DCC SECRETARY ALONG WITH TRANSLATION.**
- EXHIBIT P10: TRUE COPY OF OBJECTION DATED 30.05.2014 FILED BY THE 1ST PETITIONER BEFORE R1.**
- EXHIBIT P11: TRUE COPY OF OBJECTION DATED 30.05.2014 FILED BY THE 2ND PETITIONER BEFORE R1.**
- EXHIBIT P12: TRUE COPY OF OBJECTION DATED 30.05.2014 FILED BY THE 3RD PETITIONER BEFORE R1.**
- EXHIBIT P13: TRUE COPY OF OBJECTION DATED 30.05.2014 FILED BY THE 4TH PETITIONER BEFORE R1.**
- EXHIBIT P14: TRUE COPY OF OBJECTION DATED 30.05.2014 FILED BY THE 5TH PETITIONER BEFORE R1.**

WP(C).No. 7933 of 2015 (N)

**EXHIBIT P15: TRUE COPY OF COMMON ORDER DATED 10.03.2015 IN
O.P.NOS.31, 32, 33, 35 & 36/2014 ON THE FILE OF
THE 1ST RESPONDENT.**

RESPONDENT(S)' EXHIBITS

NIL

//TRUE COPY//

P.A.TO JUDGE.

Msd.

**ASHOK BHUSHAN, CJ
& A.M.SHAFFIQUE, J.**

W.P.C.No.7933 of 2015 &
W.A.No.661 of 2015

Dated this the 1st day of June 2015

J U D G M E N T

Shaffique,J

The Writ Appeal is filed by the petitioners in W.P.C.No.7933/2015 challenging an interim order dated 12/03/2015 of the learned Single Judge declining to suspend the operation of Ext.P15 order dated 10/03/2015 by which the petitioners were declared as disqualified for being Councilors of Varkala Municipality and from contesting as candidates in any election to local authorities for a period of six years. When the appeal came up for hearing before this Court, it was contended by the learned senior counsel for petitioners that some observations were made by the learned Single Judge touching the merits of the case as well. Hence on consent of parties, the writ petition as well as the Writ Appeal are heard and decided together.

2. The writ petition is filed challenging Ext.P15 order passed by the Kerala State Election Commission (hereinafter referred to as 'the Commission') deciding O.P.Nos.31,32,33,35 and 36 of 2014 by a common order dated 10/03/2015. The common petitioner in the original petition before the Election Commission is the 2nd respondent herein. The petitioners were respondents in the separate original petitions filed by the 2nd respondent herein.

3. The parties are referred to as described in the writ petition. The facts as described in the original petitions disclose as under:

4. Petitioners and 2nd respondent were elected candidates of Varkala Municipality in the general election held in 2010. They were candidates of Indian National Congress (for short 'INC'). Out of 33 seats, INC secured 17 seats and Kerala Congress (M) (for short 'KCM'), another constituent of United Democratic Front (for short 'UDF'), secured one seat. After the elections, Sri.Surya Prakash, the

1st petitioner was elected as the Chairman. It is contended that the understanding was that he will have to resign after one year and another person will be elected as Chairman. The 1st petitioner did not resign and therefore at the instance of District Congress Committee (for short 'DCC'), a no-confidence motion was moved and he was removed from the position of Chairman. Since petitioners 1, 4 and 5 did not attend the said meeting, they were suspended from the Congress Party. However, subsequently, the DCC decided to restore their status as members of INC. A decision was taken by the DCC to elect a new chairman and one Sri.A.A.Rouf was the candidate. Election was scheduled on 22/04/2014. Whip was sent by registered post and by way of affixture to the petitioners. However, the 1st petitioner contested against the official candidate by disobeying the whip issued by the DCC President and with the help of LDF councilors, he became the Chairman. This according to the 2nd respondent amounts to disloyalty and therefore the 1st

petitioner committed deliberate defection. The petitioners contended that since they were already expelled from the political party, they are not bound to comply with any whip issued by the political party. It is also contended that Sri.A.A.Rouf was not the official candidate of DCC and no meeting was held for that purpose. No whip was issued as alleged and no such whip had been communicated to the petitioners. It is after the election that certain postal articles were received by the petitioners and most of the said documents did not contain the signature of the DCC president. It is stated that the 1st petitioner was not a rebel candidate. They denied the fact that a whip had been issued, that they had voluntarily abandoned their membership from the party and have violated any of the directions of the party.

5. The following points had arisen for consideration before the Election Commission:

“(i) Whether the petitions are not maintainable?”

(ii) Whether Sri.A.A.Rouf was decided as the candidate for the post of Chairman by the Congress party in the election held on 22/04/2014?

(iii) Whether the DCC President had issued direction to the respondents to vote in favour of Sri.A.A.Rouf in the election to the post of Chairman held on 22/04/2014?

(iv) Whether the respondents in O.P.Nos.31/2014, 35/2014 and 36/2014 were bound to obey the decision and direction of the Congress party in the election to the post of Chairman held on 22/04/2014?

(v) Whether the respondents have disobeyed the decision and direction of the Congress party in the election to the post of Chairman as alleged?

vi) Whether the respondents have become subject to disqualification for being Councilors of Varkala Municipality?"

6. Evidence was adduced by either parties. Six witnesses were examined on the side of the 2nd respondent and Rws 1 and 2 were examined by the petitioners. Exts.P1

to P13, Exts.R1 to R5 and X1 to X14 are the documents relied upon by the Commission.

7. On an overall evaluation of the facts and circumstances involved in the case, the Commission came to the finding that the petitioners have violated the whip and they have voluntarily abandoned their membership from the political party and hence they were disqualified from being Councilors of the Municipality.

8. The petitioners contend that the findings of the Commission are bad in law specifically for the following reasons:

i) That the original petitions were filed only on the ground of disobedience of the whip, which has not been established by evidence and therefore the Commission lacks jurisdiction to decide that the petitioners are disqualified.

ii) The signature of the DCC President is not found in one of the alleged whip, and therefore there was no whip as per law. The whip, if any, had not been read in the meeting

as provided under the rules and the service of the whip is not proved.

iii) Since three of the petitioners have been expelled from the party, there was no question of disloyalty to the party.

iv) There is no pleading to the effect that the petitioners have voluntarily given up membership of the party and that the Commission has arrived at the said finding without sufficient pleadings.

9. Sri.K.Ramakumar, the learned senior counsel appearing for the petitioners also relied upon the judgments in **Chinnamma Varghese v. State Election Commission** [2010(3) KLT 426], **Joseph K.M. v. Babychan Mulangasserri and others** [2015(1) KHC 111] and **Anitha Baby v. Kunjappan Painkily** [2015(1) KLT SN 112]. The propositions, according to the learned counsel, is that the signing of no-confidence motion by itself will not amount to voluntarily giving up of membership in a political party and

that unless the whip is properly issued, it is not binding on the petitioners. It is argued that in the absence of any pleading to indicate that the petitioners had voluntarily given up their membership in the political party and there is no pleading to indicate that they have acted against the interest of the political party, question of disqualification does not arise at all.

10. On the other hand, learned counsel Sri.G.S.Reghunath, appearing on behalf of the 2nd respondent supports the view taken by the Commission and contended that sufficient pleadings were available to arrive at a finding that a whip had been issued and that the petitioners committed disloyalty to the political party. He also relied upon the judgments in **G.Viswanathan v. Speaker, Tamilnadu Legislative Assembly** [(1996) 2 SCC 353], **Nazeerkhan.S v. Kerala State Election Commission** [2008(3) KHC 322], **Nazeerkhan.S v. Kerala State Election Commission** [2009(1) KHC 681 (DB)],

Varghese v. Kerala State Election Commission [2009(3) KLT 1], **Kedar Shashikant Deshpande v. Bhor Municipal Council and Others** [AIR 2011 SC 463], **Muhammedkunhi v. Abdulla** [2010(4) KLT 736], **Chandigarh Administration and another v. Manpreet Singh and others** [AIR 1992 SC 435], **Kihoto Hollohan v. Zachillhu** [1992 Supp (2) SCC 651]. It is argued that sufficient pleadings were available to enable the Commission to arrive at the findings which are supported by evidence on record. The very fact that the 1st petitioner stood against the official candidate of INC party by itself would indicate disloyalty and the other petitioners supporting him for the election of chairman contrary to the whip issued warrants disqualification.

11. Having regard to the nature of contentions urged, the first question to be decided is whether sufficient pleadings were available in the case in order to enable the Commission to adjudicate on the issue regarding voluntarily

giving up membership in a political party. It is stated that the DCC entrusted Sri.A.A.Rouf, the senior member of INC councilors to elect a new Chairman. He convened the parliamentary committee of INC councilors and a decision was taken to entrust the DCC to decide and suggest a new Chairman candidate for the Council. DCC suggested the name of Sri.A.A.Rouf as Chairman candidate. After complying with the usual procedure, the Commission decided to conduct the election on 22/04/2014. The decision was to inform all INC councilors and another member of KCM. At the instance of DCC President, Sri.A.A.Rouf convened the meeting of all INC councilors on 19/04/2014 at 3 p.m. Only 10 councilors were present. DCC President therefore gave specific instruction and whip to those persons for voting in favour of A.A.Rouf as Chairman of the Municipality and to inform the decision to other members who did not attend the meeting, by registered post. The whip has been communicated to the petitioners on

19/04/2014. The issuance of the whip had been informed personally but it was not received by the petitioners and hence a copy was affixed at the outer door of their residence in the presence of witnesses. It is pleaded in O.P.No.31/2014 that *“but violating the said whip and interest of the Congress (I) Parliamentary party, respondent has decided to stand as a rebel candidate with the active support of LDF members.”* Further it is pleaded in paragraphs 15 and 16 as under:

“15) But on the election of Chairman held on 22/04/2014 the respondent deliberately with the sole motive of flouting and violating the specific whip given by the DCC President voted in favour of the respondent. The said act of the respondent is wilful and evil motivated. Thus the respondent has committed defection and is disqualified to continue as a member in the council.

16. Since the respondent who were elected as Councilor under the leadership of a political party is bound to show loyalty to that part. But the respondents committed deliberate defection to that and committed deliberate violation for their personal

gain and motive.”

12. Though it is argued by the learned senior counsel for the petitioners that the only ground taken is violation of whip, the pleadings also suggest that the petitioners have violated the whip and interest of the Congress (I) Parliamentary party. First petitioner also stood as the rebel candidate with the support of the LDF members. Further, it is stated in paragraph 16 that the petitioners were elected under the leadership of a political party and were bound to show loyalty to the party. As far as other petitions are concerned, paragraphs 15 and 16 reads as under:

“15. But on the election of Chairman held on 22/04/2014 the respondent deliberately with the sole motive of flouting and violating the specific whip given by the DCC president voted in favour of Sri.Surya Prakash. The said act of the respondent is wilful and evil motivated. Thus the respondent has committed defection and is disqualified to continue as a member in the council.

16. Since the respondent who was elected as Councilor under the leadership of a political party is bound to show loyalty to that party. But the

respondent committed deliberate defection to that and committed deliberate violation for his personal gain and motive."

13. Section 3 of The Kerala Local Authorities (Prohibition of Defection) Act, 1999 (hereinafter referred to as 'the 1999 Act') provides for disqualification on the ground of defection, if a member of local authority belonging to any political party voluntarily gives up his membership of such political party, or if such member votes or abstains from voting in a meeting of a Municipality or in the election of its Chairperson, Deputy Chairperson, Member of a Standing Committee or the Chairman of the Standing Committee, contrary to any direction in writing issued by the political party to which he belongs. Section 4 of the 1999 Act enables any person to file a petition before the State Election Commission if a question arises as to whether a member of a local authority has become subject to disqualification under the provisions of Section 3. Therefore Section 3 contemplates two situations. One is voluntarily

giving up membership of such political party or acting contrary to the direction in writing by the political party in a meeting of a Municipality, in an election. In the present case, the 2nd respondent had filed the election petitions by narrating the facts leading to disqualification and filed a petition under Section 4 which apparently enables the Commission to decide whether the elected member is disqualified or not. In the present case, the facts indicate that as against the official candidate of INC, 1st petitioner stood as a candidate and he was supported by other petitioners and LDF members. Further it is stated that the 1st petitioner again became the Chairman with the support of LDF members. The question to be looked into by the Commission is whether such an act amounts to disqualification or not. Disqualification, as already stated, may arise under two contingencies. One is voluntarily giving up membership and two is voting contrary to the direction in writing by the political party. True that the emphasis by the

petitioner is on the 2nd part where the pleadings suggest issuance of a whip and service of the same to all the members of the political party. But, it was stated that the 1st petitioner has stood as a candidate against the official candidate of Congress (I) and the other petitioners had supported him. Whether such an act on the part of the 1st petitioner in standing as a candidate against the official candidate of the INC party, amounts to voluntarily giving up membership of political party and the act of other petitioners in supporting the 1st petitioner and voting in his favour falls within Section 3 is definitely a matter that could be considered by the Commission. What is to be considered under Section 3 is regarding disqualification on the ground of defection which could be on two separate grounds and when the facts disclose that the grounds are made out, it cannot be stated that there is no pleading. Pleading is based on the factual circumstances and it is for the Commission to consider in a petition under Section 4

whether such facts exist to arrive at a conclusion as to whether a particular member is to be declared as disqualified in terms with Section 3 or not. Therefore, we are of the view that the pleadings available in the above original petitions are sufficient enough for consideration of an application under Section 4 of the 1999 Act in respect of disqualification of a member in terms of Section 3(1)(a) of the Act.

14. Another ground urged by the petitioners is that they were not bound to obey the directions issued by the political party or the alleged whip since petitioners 1, 5 and 6 were already expelled from the party. The factual finding made by the Commission in this regard is that though the said petitioners were expelled, during Lok Sabha elections, all such members were taken back to the party by issuing notifications at Exts.P9 and P11 which are newspaper items which appeared in the Malayala Manorama daily and Kerala Kaumudi daily dated 08/04/2014. Further, the Commission

found that the reports were given on the basis of the press release given by PW6, the DCC president who had given evidence that they have been re-inducted as instructed by the KPCC and AICC member Sri.Deepak Babaria. Further, RW2 who had issued the expulsion notices to the said petitioners 1, 5 and 6 has given evidence stating that all persons who were expelled or suspended were inducted on the basis of the common decision of the party and they are allowed to work in the party consequent to the notification regarding the Lok Sabha Election. Though RW2 was a witness on behalf of the petitioners and he had deposed the same during chief examination itself, he was neither declared hostile nor was he cross-examined on that point.

15. Further, as rightly found by the Commission, in **G.Viswanathan's** case (supra) it is clearly held that merely for the reason that a person is expelled from the political party, he does not cease to be a member of the political party that had set him up as a candidate for the election

unless he resigns by voluntarily giving up his membership or he joins another party. Paragraphs 11 and 12 of the said judgment are relevant which reads as under:

"11. *It appears that since the explanation to para 2 (1) of the Tenth Schedule provides that an elected member of a House shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member, such person so set up as a candidate and elected as a member, shall continue to belong to that party. Even if such a member is thrown out or expelled from the party, for the purposes of the Tenth Schedule he will not cease to be a member of the political party that had set him up as a candidate for the election. He will continue to belong to that political party even if he is treated as 'unattached'. The further question is when does a person "voluntarily give up" his membership of such political party, as provided in para 2(1)(a)? The act of voluntarily giving up the membership of the political party may be either express or implied. When a person who has been thrown out or expelled from the party which set him up as a candidate and got elected, joins another (new) party, it will certainly amount to his voluntarily giving up the membership of the*

political party which had set him up as a candidate for election as such member.

12. *We are of the view that labelling of a member as 'unattached' finds no place nor has any recognition in the Tenth Schedule. It appears to us that the classification of the members in the Tenth Schedule proceeds only on the manner of their entry into the House, (1) one who has been elected on his being set up by a political party as a candidate for election as such member; (2) one who has been elected as a member otherwise than as a candidate set up by any political party — usually referred to as an 'independent' candidate in an election; and (3) one who has been nominated. The categories mentioned are exhaustive. In our view, it is impermissible to invent a new category or clause other than the one envisaged or provided in the Tenth Schedule of the Constitution. If a person belonging to a political party that had set him up as a candidate, gets elected to the House and thereafter joins another political party for whatever reasons, either because of his expulsion from the party or otherwise, he voluntarily gives up his membership of the political party and incurs the disqualification. Being treated as 'unattached' is a matter of mere convenience outside the Tenth*

Schedule and does not alter the fact to be assumed under the explanation to para 2(1). Such an arrangement and labelling has no legal bearing so far as the Tenth Schedule is concerned. If the contention urged on behalf of the appellant is accepted it will defeat the very purpose for which the Tenth Schedule came to be introduced and would fail to suppress the mischief, namely, breach of faith of the electorate. We are, therefore, of the opinion that the deeming fiction must be given full effect for otherwise the expelled member would escape the rigour of the law which was intended to curb the evil of defections which has polluted our democratic polity.

16. The next issue projected by the learned counsel for the petitioners is regarding the validity of the whip. It is argued that though there is no valid whip and assuming that a whip had been issued, it was not served on the petitioners. Reference is made to Rule 4 of The Kerala Local Authorities (Disqualification of Defected Members) Rules, 2000. Rule 4 (1) indicates that if a political party gives any direction for casting of vote in an election as has been mentioned in Clause (a) or Clause (b) of Section 3, it shall be given by the

person who has the authority to give the emblem to the candidate. The instruction issued shall be in the letter head and seal of the political party. That apart, the decision so taken as per majority has to be read over in the said meeting which will be considered as valid instruction. The Commission found on the basis of the evidence of PW6, the DCC President, that there was consensus to elect PW2 Mr.Rouf as Chairman after the expiry of the period of one year since the date of election of the 1st petitioner. PW2 has to continue for two years and the last two years by the 1st petitioner. The said understanding was frustrated on account of the 1st petitioner's inaction to resign from the said post. The 1st petitioner did not enter the box. The 4th petitioner alone was examined as RW1. Commission came to a finding that RW1's evidence would substantially prove that before the election on 22/04/2014, they were fully aware that PW2 was the candidate decided by the Congress Party for the post of Chairman and it was thereafter that

they voted in favour of the 1st petitioner. The Commission also found that the petitioners were keeping away from their houses as written instruction of the whip was sent by registered post and were attempted to be served on 21/04/2014 itself. On materials available on record, the Commission had come to a finding that the petitioners were fully aware of the decision of the Congress Party to elect PW2 as Chairman and they were also fully aware of the whip issued by the DCC president in this behalf. Therefore this is not a case in which whip was not issued by a political party. They have taken a decision on 19/04/2014 and was sent by registered post with acknowledgment due which was intimated to the petitioners on 21/04/2014 by the Post Office. The petitioners rely upon the judgment in **Anitha Baby's** case (supra) to contend that Rule 4 had not been complied with as there is no material to indicate that whip had been served on the petitioners and there is non-compliance of Rule 4. In fact, this aspect had been well

considered by the Commission in paragraph 15 of Ext.P15 in which it is indicated that directions issued by the DCC President were sent to the petitioners by speed post on 19/04/2014 as per Ext.R3 series postal covers which contain Ext.R2 series. The postal articles were received on 23/04/2014 or 24/04/2014. PW4 is the Post Master of Varkala Post Office. His evidence indicates that the articles were sent on 19/04/2014 and the postman attempted to deliver the same in the addresses on 21/04/2014. But service could not be made since the door was locked and intimation was served on the same day. One postal article was refused by the addressee Sri.K.G.Suresh, that is PW1, on 22/04/2014. It is therefore apparent that petitioners were deliberately avoiding service of whip by keeping away from their house. The 4th petitioner has a case that the whip issued to him was not signed by the DCC President. Ext.R2 (d) is the said document. The Commission formed an opinion that absence of signature in Ext.R2(d) is not very

significant for the reason that the ground alleged is not violation of whip but voluntarily giving up membership from the party. Commission therefore proceeded to consider whether the conduct of the petitioners would constitute disloyalty. Further, reference was also made to the service of whip by affixture in the presence of witnesses. Commission relied upon the oral testimony of PWs 2 and 3. Therefore, it is clear from the findings aforesaid that the Commission had considered the entire evidence on record and had come to the finding that whip was served by affixture on the petitioners. It is also in evidence that communication regarding the whip was issued by the postal authorities on 21/04/2014.

17. Having regard to the finding of fact by the Commission that the petitioners were deliberately avoiding service of whip by them, we do not think that in exercise of jurisdiction under Article 226, we should interfere with the said finding of fact. It is, taking into account the entire

evidence on record that the Commission found that the petitioners have violated the whip as they were fully aware of the candidature of PW2 as the Chairman of the Municipality.

18. The next question is whether the petitioners have voluntarily given up their membership. As already indicated, the pleadings with reference to the factual situation are brought on record. What is to be looked into is whether the action on the part of the 1st petitioner in standing as a candidate against the official candidate of INC party and petitioners 2 to 6 supporting him will amount to defection or voluntarily abandoning the membership of a political party. It is not in dispute that the 1st petitioner again became the Chairman with the support of LDF candidates. This is a case in which the 1st petitioner became a rebel candidate which is established by admission of facts. The petitioners also admit that they have voted in favour of the 1st petitioner and the LDF members supported them. As rightly argued by the

learned counsel for the 2nd respondent, the decision in **Varghese'** case (supra) will answer the issue. Paragraphs 8 and 9 of the said judgment are relevant which reads as under:

“8. However, placing heavy reliance on another Single Bench decision in Naseera Beevi v. State Election Commission (2004 (1) KLT 1108), the learned Senior Counsel for the appellants would contend that every objectionable conduct does not automatically lead to the inference of voluntarily leaving the political party. In the above case a few members of a political party decided to form a separate group in the “parliamentary party” of that political party and that was informed to the Secretary of the Grama Panchayat. It was in that context the learned single Judge took the view that “there is a distinction between membership in the parliamentary party and the membership in the political party. What has been made objectionable under law is the voluntary leaving of the membership in the political party. Leaving the parliamentary party may be a circumstance, which may indicate that the incumbent has left the political party”. It is to be noted that the letter of the group was dated 8.1.2003 and the No Confidence Motion was on 13.1.2003. The members who had decided to sit as a

separate block had voted in favour of the no confidence motion moved by the rival political parties and thereafter those members had been removed from the primary membership of the political party on 18.1.2003. The petitions for disqualification was filed on 24.1.2003 before the State Election Commission. A subsequent election to the posts of President and Vice President of the Panchayat was held on 7.2.2003, wherein the aforementioned members were elected as the President and the Vice President with the support of the rival political parties. It appears the learned single Judge had omitted to take note of the fact that the conduct of the revolting members was not the letter given to the Secretary to the Grama Panchayat to form a separate block; those members had in fact supported the no confidence motion moved by the rival political parties. Thus the inevitably inferential conduct was the shifting of loyalty. Loyalty to the party is the norm. To vote against the party is disloyalty. It was this principle as stated in Griffith and Ryle on Parliamentary Functions, Practice and Procedure which was taken note of by the Supreme Court in the celebrated decision in Kohoto Hollohan v. Zachillhu (1992 Supp. (2) SCC 651). The Apex Court held that “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.” Referring to the object behind the 10th Schedule to the Constitution of India dealing with disqualification on the ground of defection, it was held therein that, “the provision is to curb the evil of political defection motivated by lure of office or other similar considerations which endanger the foundations of our democracy. The only remedy would be to disqualify the member...” The Father of our Nation had foreseen the possibility of such cancerous and endangering tendencies in the practice of democracy and hence only the Mahatma said that politics without principle is a vice. No doubt politics is an art. But the beauty of the art is lost when no value is attached to the art. It is to check erosion of the values in democracy the 10th Schedule to the Constitution of India and the Kerala Local Authorities (Prohibition of Defection) Act, 1999 were brought into force. Looking from that angle we find it difficult to agree with the dictum in Naseera Beevi's case. Not only that, there is no party as 'parliamentary party'. That expression only denotes the wing of the elected members of the political party. Therefore, if a member or a 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. The moment one becomes disloyal by his conduct to the political party, the inevitable inference is that he has voluntarily given up his membership. In Naseera Beevi's case the rebel group in the parliamentary wing of the political party concerned had not only formed a separate group, but they had voted in favour of the no confidence motion moved by the rival political party. Thus, by their conduct of being disloyal to the political party in which they were members and by voting as they pleased independent of the political party's declared policy, they had incurred the disqualification. In view of both factual and legal position as above, the dictum laid in Naseera Beevi's case that leaving the parliamentary party and exercising the right to vote according to the choice of the elected member would not attract the disqualification on the ground of voluntarily giving up membership in the political party is not good law. Hence the same is overruled. We also take note of the fact that the judgment of the single Judge in Naseera Beevi's case had been set aside by the Division Bench by judgment dated 13.7.2005 in W.A.No.1127/2004, though on a different ground.

9. The learned Senior Counsel Sri.Ramakumar contends that in modern democracy the elected

member is free to vote according to his conscience, in the absence of a specific whip, particularly in view of the modern trends in democracy - intra party groups. We are afraid, the court will not be justified in taking judicial notice of such developments and in re-writing the law. The court shall only analyse the facts and decide the case in accordance with law and upholding the spirit of laws. The law, as it stands now, is unambiguously clear that one has to be loyal to his political party. The situation would be different if the political party itself, taking note of such strange realities, permits the elected members to cast conscience vote. In such situations the whip itself is for decision by the individual concerned according to his conscience. The Oxford dictionary defines conscience to mean "the part of your mind that tells you whether your actions are right or wrong". In the absence of a specific whip for conscience vote, an elected member, under law, is entitled and liable to cast only a conscious vote, being aware of the consequences of his decision, in terms of S.3 of the Kerala Local Authorities (Prohibition of Defection) Act, 1999 on disqualification on the ground of defection on account of voluntarily giving up membership in the political party. Conscience vote is hence a matter of express whip in the absence of which an elected member is bound by the policies of his political party

and he can cast only a conscious vote. That is nothing but an expected..expression of his obligation to the political party and responsiveness to the people, by doing things carefully and correctly and if not the conduct would amount to betrayal of the political conscience which is impermissible under law. According to Harry S.Truman "Democracy is based on the conviction that man has the moral and intellectual capacity, as well as the inalienable right, to govern himself with reason and justice". The reason and justice are the two mandates of the conscious vote under S.3 of the Act. There is no case that the political party in which they belonged had given them the whip to vote according to their conscience."

19. On facts, when it is an admitted position that 1st petitioner stood as a candidate against the official candidate of Congress party while being a member of the same political party and obtained the support of LDF members is a situation which can clearly be termed as disloyal to the political party and therefore the Commission was justified in arriving at such a conclusion. Having regard to the overall factual situation arising in the case and the law that has

been applied to the factual situation, we do not find any error in the order passed by the Commission.

20. In the result, we do not find any ground to interfere with Ext.P15 order passed by the Commission and accordingly the writ petition is dismissed. Having regard to the fact that the Writ Appeal has arisen from an interim order passed by the learned Single Judge in the writ petition declining to grant a stay of operation of Ext.P15 order, since we have already dismissed the writ petition, nothing further survives to be decided in the appeal and hence the Writ Appeal is also dismissed.

(ASHOK BHUSHAN, CHIEF JUSTICE)

(A.M.SHAFFIQUE, JUDGE)

jsr

