

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

MONDAY, THE 14TH DAY OF DECEMBER 2015/23RD AGRAHAYANA, 1937

WP(C).No. 9959 of 2014 (T)

PETITIONER(S):

**ALEX
S/O.JOSEPH, PADAMTTUMMEL HOUSE, RAIL ROAD
ALUVA, ERNAKULAM-683 108.**

BY ADV. SRI.T.R.RAJAN

RESPONDENT(S):

**1. THE KERALA STATE ELECTION COMMISSION
REPRESENTED BY ITS SECRETARY
THIRUVANANTHAPURAM-695 033.**

**2. K.V.SARALA
COUNCILOR, WARD NO.8, ALUVA MUNICIPALITY
RESIDING AT KUNDALA HOUSE, MANAPPURAM ROAD
THOTTAKKATTUKARA P.O., ALUVA, PIN-683 108.**

**R1 BY ADV. SRI.MURALI PURUSHOTHAMAN, SC,K.S.E.COMMISSION
R2 BY ADV. SRI.MANOJ RAMASWAMY
R2 BY ADV. SRI.S.SREEKUMAR (SR.)**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 3/11/2015,
THE COURT ON 14/12/2015 DELIVERED THE FOLLOWING:**

WP(C).No. 9959 of 2014 (T)

APPENDIX

PETITIONER(S)' EXHIBITS

EXHIBIT P1.THE TRUE COPY OF THE OP 47/2013 FILED BY THE PETITIONER BEFORE THE 1ST RESPONDENT

EXHIBIT P2.THE TRUE COPY OF THE COUNTER AFFIDAVIT DATED 17/8/2013 FILED BY THE 2ND RESPONDENT IN OP NO.47/2013.

EXHIBIT P3.THE TRUE COPY OF THE ORDER DATED 1/3/2014 OF THE 1ST RESPONDENT IN OP 47/2013.

EXHIBIT P4.THE TRUE COPY OF THE TENDER NOTICE DATED 13/12/2011 ISSUED BY THE SECRETARY TO ALUVA MUNICIPALITY

EXHIBIT P5.THE TRUE COPY OF THE TENDER NOTICE DATED 13/12/2011 PUBLISHED IN GHE VEEKSHANAM EDITION DATED 15/12/2011.

EXHIBIT P6.THE TRUE COPY OF THE RE-TENDER NOTICE DATED 10/1/2012 PUBLISHED BY THE SECRETARY, ALUVA MUNICIPALITY

EXHIBIT P7.THE TRUE COPY OF THE OFFICE NOTE DATED 28/1/2012.

EXHIBIT P8.THE TRUE COPY OF THE RESOLUTION NO.22 DATED 28/1/2012 OF THE MUNICIPAL COUNCIL OF THE ALUVA MUNICIPALITY

EXHIBIT P9. TRUE COPY OF THE SUIT IN OS NO.131/2015 ON THE FILES OF THE MUNSIF COURT, ALUVA FILED BY ALUVA MUNICIPALITY.

EXHIBIT P10. TRUE COPY OF THE APPLICATION FOR ATTACHMENT BEFORE JUDGMENT FILED ALONG WITH OS NO.131/2015 ON THE FILES OF THE MUNSIF COURT, ALUVA.

2ND RESPONDENT(S)' EXHIBITS

EXT.R2(a): TRUE COPY OF THE AGREEMENT DT 31.1.2012.

EXT.R2(b): TRUE COPY OF THE ORDER DATED 8.2.2012 IN DBP NO.29 OF 2009.

EXT.R2(c): TRUE COPY OF THE AFFIDAVIT DATED 9.2.2012 FILED THIS RESPONDENT IN DBP NO.29 OF 2009.

EXT.R2(d): TRUE COPY OF THE ORDER DT 10.2.2012 IN DBP NO.29 OF 2009 BEFORE THIS HON'BLE COURT.

EXT.R2(e): TRUE COPY OF THE AGREEMENT DATED 17/2/2012.

EXT.R2(f): TRUE COPY of THE ORDER NO.GO(RT) NO.509/2012/LSGD DATED 18.2.2012.

EXT.R2(g): TRUE COPY OF THE NOTICE DT 25.3.2012.

EXT.R2(h): TRUE COPY OF THE COUNTER AFFIDAVIT DATED 18.3.2013 IN WPC NO.14306 OF 2012.

EXT.R2(i): TRUE COPY OF THE JUDGMENT DT 5.3.2015 INW PC NO.14306/2012 BEFORE THIS HON'BLE COURT.

EXT.R2(j): TRUE COPY OF THE ORDER DATED 10.4.2015 IN IA NO.380 OF 2015 IN OS NO.131 OF 2015 OF THE HON'BLE MUNSIF COURT, ALUVA.

Rp

//True Copy//

PS to Judge

“C.R.”

A.M. SHAFFIQUE, J.

=====

W.P. (C) No. 9959 of 2014

=====

Dated this, the 14th day of December, 2015

J U D G M E N T

Writ petition has been filed challenging order dated 1/3/2014 in OP No.47/2013 of the Kerala State Election Commission (Ext.P3) by the petitioner in OP No.47/2013. He alleged that the 2nd respondent herein has incurred disqualification as provided under Section 91(1)(f) of the Kerala Municipality Act, 1994 (hereinafter referred to as 'the Act') and thereby disqualified from holding the office of Councillor of Aluva Municipality representing ward No.8.

2. The petitioner preferred a complaint before the Election Commission *inter alia* stating that the 2nd respondent entered into an agreement on 7/10/2012 with the Secretary of the Municipality whereby a charge was created in the property of the 2nd respondent which was offered as security for repayment of the amounts advanced for the work undertaken by the Sreekrishna Swamy Temple Advisory Ad hoc Committee. It is alleged that the

said Committee is not a registered body and the fact that 2nd respondent has an interest in the said body, which has entered into an agreement with the Municipality, clearly amounts to disqualification in terms of Section 91(1)(f) of the Act.

3. The 2nd respondent filed a counter affidavit *inter alia* stating that in 2012, there arose a situation where the contractors declined to undertake the work of construction of the temporary pedestrian bridge across river Periyar in connection with Sivarathri festival. Due to urgency of the matter, Municipality requested the *ad hoc* committee to take over the construction. It is to tide over the situation and as directed by the High Court as per order dated 10/2/2012 in DBP No.29/2009 that the Committee took over construction of the foot over bridge and completed the same. The 2nd respondent was the President of the *ad hoc* committee and she stated that she had no individual profit motive or other contractual interest in the matter. She also contended that her actions were exempted in terms of Rule 3(iii) of the Kerala Municipality (Removal of Disqualification of Candidates and Councillors in Certain Matters) Rules, 1995 (hereinafter referred to

as 'the Rules').

4. The Election Commission after detailed consideration of the factual and legal issues involved the matter dismissed the original petition on the finding that Section 91(1)(f) of the Act is not attracted and that even if there was disqualification, the same is removed as provided under Rule 3(iii) of the Rules.

5. While coming to the aforesaid conclusion, the Election Commission found that the undertaking given by the 2nd respondent cannot be construed as a contract made between the Municipality and the 2nd respondent. She had offered her property as security in larger public interest which was to provide basic amenities for the devotees who gathered at Sivarathri festival. In so far as it is not a pedestrian bridge considered as a work of the Municipality, the disqualification does not arise. It was also held that even assuming that there is disqualification, the 2nd respondent was exempted under Rule 3(iii) of the aforesaid rules.

6. It is impugning the aforesaid order that this writ petition has been filed *inter alia* contending that the Commission has committed serious error of law in arriving at a finding that the

2nd respondent is not disqualified and is exempted under Rule 3 (iii).

7. Counter affidavit has been filed by the 2nd respondent supporting the stand taken in the matter. Reliance is placed on the agreement executed based on directions issued by this Court in DBP No.29/2009.

8. Heard Sri.T.R.Rajan, learned counsel for the petitioner, learned senior counsel, Sri.S.Sreekumar appearing on behalf of the 2nd respondent and Sri.Murali Purhushothaman, learned standing counsel appearing for the Election Commission.

9. Two specific issues arise for consideration in the above writ petition. One is whether the 2nd respondent has vacated her office on account of disqualification as provided under Section 91 (1)(f) of the Act and secondly, whether the 2nd respondent is entitled for any benefit under Rule 3(iii) of the Rules.

10. Section 91(1) (f) reads as under;

“91. Disqualification of Councillors - (1) Subject to the provisions of section 92 or Section 178, a Councillor shall cease to hold office as such if he-
(a) xxx

(aa)xxx

(b)xxx

(c)xxx

(d)xxx

(e)xxx

(f) *acquires any interest in any subsisting contract made with, or work being done for the Government or the [any Local Self Government Institution] except as a shareholder (other than a director) in a company or except as permitted by rules made under this Act [or enters into the contract or work [with the Local Self Government Institution] as a Convener of the beneficiary committee which undertake the project or work [of any Local Self Government Institution], as per any rules made under this Act."*

The above provision apparently creates an embargo for a Councillor to hold office if he/she acquires any interest in any subsisting contract or work being done for the Government or any Local Self Government Institution. The exception is to become a share holder other than a director in a company or if it is permitted by Rules framed under the Act. The exception equally applies if the Councillor enters into the contract or work with the Local Self Government Institution as a Convener of the beneficiary

committee which undertake the project or work of any such institution as per rules made under the Act.

11. The complaint of the petitioner is that the 2nd respondent, being the Councillor of Aluva Municipality, has entered into an agreement dated 7/10/2012, whereby charge has been created with reference to her property offering the same as security for repayment of the amounts collected by her. It is alleged that the 2nd respondent has acquired interest in the contract made with the Municipality which amounts to disqualification. An agreement dated 31/1/2012 is produced along with the petition which is executed between the *ad hoc* Committee of Sree Krishna Swami Kshethra Upadesaka Samithi represented by its Secretary with the Secretary of Aluva Municipality. It is stated that the offer of the *ad hoc* Committee for construction of a temporary pedestrian bridge was accepted by the Municipality in its decision of the Municipal Council dated 28/1/2012. The agreement is for constructing the bridge for the period 2012, 2013 and 2014. The other terms and conditions are also specified. The licensee was also entitled to collect certain fee

-:7:-

from the users of the said bridge. Other terms and conditions are also specified which includes exhibiting advertisements in the said structure on payment of tax to the Municipality. An amount of ₹7.5 lakhs was given as advance from the total amount of ₹15 lakhs which has to be remitted back to the Municipality after collecting the amount. Another agreement which is relevant is dated 17/2/2012. This is executed by the President of the *ad hoc* Committee, the 2nd respondent, with the Secretary of Aluva Municipality. It is indicated that the Municipality had offered to pay the advance amount of ₹7.5 lakhs on providing a bank guarantee. Since the bank guarantee could not be given by the *ad hoc* Committee, the matter was placed before this Court in DBP No.29/2009 and by order dated 10/2/2012, direction was issued to pay the amount to the President of the *ad hoc* Committee by virtue of which the 2nd respondent received ₹7.5 lakhs. It was also mentioned that if there is failure to repay the amount, the money could be recovered as a charge on the properties of the 2nd respondent. One Sri.Khalid Mundapilly had sought for certain information from the Municipality under the

Right to Information Act and answers had been provided as per letter dated 28/2/2013 wherein it is stated that the contract had been entered into with the *ad hoc* Committee on BOT basis. In the order dated 10/2/2012 in DBP No.29/2009, Division Bench of this Court observed that the work of putting up the temporary pedestrian bridge across the Periyar river at Aluva in connection with the Sivarathri festival shall be completed well in time by the Temple Advisory Committee and its President shall be personally responsible for carrying out that work and for repaying to the Devaswom Board and the Municipality, the amounts that will be advanced by those two institutions. The material available on record clearly indicates that the *ad hoc* Committee had no relationship with the Municipality. The 2nd respondent as the President of the *ad hoc* Committee had entered into the contract and had received certain amount from the Municipality by giving security. It is therefore apparent that the work was done at the instance of the Municipality and funds were received from the Devaswom Board as well as the Municipality. This clearly amounts to entering into a contract with the Municipality. Unless the 2nd

respondent is able to establish that it comes under any of the exceptions as provided under Section 91(1)(f), the disqualification arises.

12. The Election Commission proceeded on the basis that since the work is done by the *ad hoc* Committee and she has only given guarantee as President of the *ad hoc* Committee, the disqualification does not arise. I do not think so. A Councillor of a Municipality is not entitled to enter into any contract with the Municipality. The *ad hoc* Committee had undertaken a contract from the Municipality. The 2nd respondent admittedly is the President of the *ad hoc* Committee. They were entitled to collect a fee for usage of the pedestrian over bridge and they were entitled to make advertisements and get revenue out of it. It is from the amount collected that the advance amount is to be repaid back. This clearly amounts to a commercial transaction and merely for the reason that an office bearer will not gain anything from it or it is not intended for any gain will not justify the action. No Councillor is expected to enter into any contract with the Municipality. This work had been tendered earlier and

had been awarded in favour of the *ad hoc* Committee. Being a commercial venture, the prohibition under Section 91(1)(f) clearly applies. The finding of the Commission that the construction of temporary pedestrian bridge is not considered as a work of Municipality is without any basis. It is the Municipality who had awarded the work to the *ad hoc* Committee and they had even paid advance. The construction was made on BOT basis and the *ad hoc* Committee was permitted to collect fee for a period of three years.

13. The next question is whether the 2nd respondent is entitled for any benefit in terms of Rule 3(iii) of the Rules, which reads as under;

“3. Removal of Disqualification of Candidates

and Councillors- *A person shall not be deemed to have any interest, for the purposes of clause (g) of sub-section (1) of section 90 or clause (f) of Section 91, in a subsisting contract made with or a work being done for the concerned Municipality by reason of only having share or interest in the following cases,-*

(iii) undertaking any contribution work in the Municipality for the benefit of the community, not as a contractor, but as a representative of the

community of as sponsor."

14. A bare reading of the aforesaid provision does not indicate that the 2nd respondent was entitled to any benefit under the above provision. It is neither a contribution work in the Municipality for the benefit of the community nor is it as a representative of the community or of as Councillor. The judgment in **Somasekharan Nair v. Divakaran Pillai** (2010 (2) KLT 1022) which has been relied upon by the Commission has no application to the facts of the present case. That was a case with reference to a contract with the local authority on behalf of a beneficiary committee. That is not the situation here. The *ad hoc* Committee is not the beneficiary committee in terms of the statutory provisions. It is an independent body and has ventured into a commercial contract in terms of agreement dated 31/1/2012 and admittedly the 2nd respondent is the President of the said *ad hoc* Committee. It is however pointed out that the disqualification if any is co-terminus with the term of office of the Committee and since the period of Committee had already expired, no useful purpose will be served in agitating the issue.

15. But the fact remains that at the time when the petition was filed, 2nd respondent was a Councillor and therefore, I am concerned with the validity of the order passed by the Election Commission. Having regard to the aforesaid findings, I am of the view that the order passed by the Election Commission is liable to be set aside.

Accordingly, the writ petition is allowed. Ext.P3 is set aside and it is declared that the 2nd respondent was disqualified from being a Councillor in terms of Section 91(1)(f) of the Act.

Sd/-
A.M. SHAFFIQUE, JUDGE

Rp

//True Copy//

PS to Judge