

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE SMT. JUSTICE P.V.ASHA

TUESDAY, THE 8TH DAY OF SEPTEMBER 2015/17TH BHADRA, 1937

WP(C).No. 14893 of 2012 (J)

PETITIONERS:

1. N.K.PAVITHRAN, AGED 63
S/O.KUNCHAN N.K, FORMER COUNCILLOR
KALAMASSERY MUNICIPALITY, KALAMASSERY.
2. CHANDRIKA PADMANABHAN
COUNCILLOR, KALAMASSERY MUNICIPALITY, KALAMASSERY.

BY ADVS.SRI.S.SREEKUMAR
SRI.P.MARTIN JOSE
SRI.P.PRIJITH
SRI.ANEESH JAMES

RESPONDENTS:

1. M.NANDAKUMAR
INDIRA NIVAS, NORTH PIPE LINE ROAD, PALLILAM KARA
HMT COLONY P.O, KALAMASSERY 683 503.
2. THE KERALA STATE ELECTION COMMISSION
THIRUVANANTHAPURAM PIN 695 001.

R1 BY ADV. SRI.PHILIP T.VARGHESE
R1 BY ADV. SRI.THOMAS T.VARGHESE
R1 BY ADV. SMT.ACHU SUBHA ABRAHAM
R1 BY ADV. SMT.T.M.BINITHA
R2 BY ADV. SRI.MURALI PURUSHOTHAMAN, SC,K.S.E.COMM
R BY SRI.MURALI PURUSHOTHAMAN, SC,K.S.E.COMM

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
08-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

RKC

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APPENDIX

PETITIONERS' EXHIBITS

EXHIBIT P1. TRUE COPY OF OP NO.174 OF 2004 FILED BY THE 1ST RESPONDENT BEFORE THE 2ND RESPONDENT.

EXHIBIT P2. TRUE COPY OF O.P NO.175 OF 2004 FILED BY THE 1ST RESPONDENT BEFORE THE 2ND RESPONDENT.

EXHIBIT P3. TRUE COPY OF OBJECTION TO EXHIBIT P2 FILED BY THE 2ND RESPONDENT.

EXHIBIT P4. TRUE COPY OF JUDGMENT IN WPC NO.34626 OF 2006 DTD.09.01.2007 OF THIS HONOURABLE COURT.

EXHIBIT P5. TRUE COPY OF DEPOSITION OF PW1.

EXHIBIT P6. TRUE COPY OF DEPOSITION OF PW5.

EXHIBIT P7. TRUE COPY OF DEPOSITION OF PW8.

EXHIBIT P8. TRUE COPY OF DEPOSITION OF RW1.

EXHIBIT P9. TRUE COPY OF DEPOSITION OF RW2.

EXHIBIT P10.TRUE COPY OF DEPOSITION OF RW3.

EXHIBIT P11.TRUE COPY OF DECISION OF THE 2ND RESPONDENT DTD.12.06.2012.

RESPONDENTS' EXHIBITS :NIL

RKC

TRUE COPY

PA TO JUDGE

P.V.ASHA, J.

W.P.(C) No.14893 of 2012

Dated this the 8th day of September, 2015

JUDGMENT

Exts.P1 and P2 petitions were filed under Sections 3 and 4 of Kerala Local Authorities (Prohibition of Defection) Act XI of 1999 (hereinafter referred to as Act for short), seeking a declaration that the respondent in those cases have committed defection and have become disqualified for contesting as candidates in any election for a period of six years. By Ext.P11 order the Election Commission found that there was no evidence for violation of whip. At the same time it was found that the petitioners herein had committed defection as such, as they voluntarily gave up their membership from the party.

2. The first respondent herein -Sri.M.Nandakumar filed separate election petitions-O.P. 174/2004 and 175/2004 against M/s.N.K.Pavithran and Chandrika Padmanabahn respectively, alleging that they committed defection at the time of election of the Chairman of the Kalamasseri Municipality on 6.12.2004 and hence they were liable to be declared as disqualified from

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continuing in membership of the municipal council and from contesting in any election to any local authority. The allegations in the O.P were as follows: The petitioner as well as the respondents were councillors of Kalamassery Municipality. They contested and got elected as Councillors in the the election held in 2000 as official candidates of Indian National Congress (INC), a constituent of United Democratic Front (UDF). Out of the total number of 33 wards in the Municipality, UDF secured 19 seats. Out of the 19, 13 were won by INC, 5 by Union Muslim League and 1 by CMP. There was an arrangement in between them to the effect that term of 5 years of the Chairmanship would be apportioned equally and Sri.N.K.Pavithran and Sri.M.B.Prakash – both of INC would be the Chairman for 2½ years each consecutively. Accordingly first term was allotted to Sri.N.K.Pavithran who is the first petitioner in this writ petition and respondent in O.P.174/2004. On account of certain disputes Sri.N.K.Pavithran resigned on 3.3.2003. Thereupon it was

decided that the remaining portion of the term would be apportioned between Sri.Jamal Mancaud, who got elected in between in a bye-election, as INC candidate and Sri.M.B.Prakash. Accordingly Sri.Jamal Mancaud became Chairman on 21.3.2003. He did not vacate the post after the the agreed period. Finally at the instance of Congress party, he resigned on 16.11.2004. For the remaining 11 months the congress party decided that Sri.M.B.Prakash would be the Chairman. Since there were certain internal disputes within INC, the District Congress Committee had summoned the councillors belonging to INC to the office on 3.12.2004. Out of 30 councillors of INC only six of them appeared before the DCC supporting Sri.M.B.Prakash. Thereupon the DCC called the remaining 7 councillors separately for a meeting on 4.12.2004. But those councillors did not appear in the DCC office. At the relevant time Sri.N.K.Pavithran, who was the parliamentary party leader and chief whip of UDF. on 3.12.2004, declared himself as a contestant for the Chairmanship

and issued a whip to the members of UDF to vote for him in the election to be held on 6.12.2004. As the action of Sri. Pavithran was found to be in derogation of the understanding, consensus and the agreement arrived at, Sri.K.P.Dhanapalan, the President of the DCC suspended him from the Congress Party and removed him from the leadership of the parliamentary party and chief whip of UDF. On 4.12.2004 the parliamentary party, which met under the leadership of Sri. Abdul rahiman, decided that Sri.M.B.Prakash would be the parliamentary party leader and Chief Whip of UDF and that decision was intimated to the Secretary of the Council on 6.12.2004. On 5.12.2004, Sri.M.B.Prakash issued notices to the councillors of the UDF to vote for him-the UDF nominated candidate in the election. M/s N.K.Pavithran, Chandrika Padmanabhan and Sri.Jamal Mancaud refused to accept the notices and accordingly the notices were affixed in their respective residences. In the election held on 6.12.2004 for the Chairmanship, Sri.M.B.Prakash was defeated

by Sri.N.K.Pavithran. The respondents, who had won the election with the support of UDF, violated the direction and decision of parliamentary party and whip issued by the leader. After being elected as councillors belonging to INC, the respondents formed in a coalition styled UDF along with other political parties and they violated the directions of the said party and whip issued by the UDF parliamentary leader and voted against the candidate of INC Party and UDF and thereby committed defection defeating the candidate sponsored by UDF. Respondents changed their loyalty towards UDF whereunder they were elected to the council and thus were liable to be disqualified became subject to disqualification.

3. The petitioners herein who were the respondents in the respective election petitions filed separate counter affidavits denying the allegations. They stated that Sri.M.B.Prakash was not proposed as a candidate for the post of Chairperson by the Congress Party. The election of Sri.N.K.Pavithran as a

Chairperson was as per the majority decision of the UDF parliamentary party which was approved by the Congress party. There was no decision as to apportionment of the term and there was no consensus to share the term of chairmanship with Sri. M.B. Prakash. Sri.Jamal Mancaud won the bye election in ward No.28. There was no decision for apportionment of the tenure of Chairmanship between Sri.Jamal Mancaud and Sri.M.B.Prakash. The name of Sri.Jamal Mancaud was proposed by majority of congress members. They denied the claim that DCC had summoned the Congress party councillors to its office on 3.12.2004 and stated that they did not have any information regarding any such meeting. It was stated that the parliamentary party had unanimously decided to elect Sri.N.K.Pavithran as Chairman and accordingly whip was given to all the UDF councillors with the support of KPCC and DCC. It was stated that there was no decision either by DCC or by parliamentary party of UDF to propose Sri.M.B.Prakash as Chairman at any time.

Similarly it was also stated that the petitioners did not have any knowledge regarding election of Sri.M.B.Prakash either as parliamentary party leader or whip of UDF. At the same time there was a direction from Sri.N.K.Pavithran on 3.12.2004 to vote in his favour for the post of Chairman. The affixture of the whip on the residence was also denied. In the election Sri.N.K.Pavithran secured majority and he was elected. It was stated that the respondents never vote against candidate of INC or UDF and they had not violated any of the direction of any competent person of the Congress party.

4. The Commission had passed an ex-parte order against the 1st petitioner here on 19.12.2006 finding that he committed defection and declaring him as disqualified for further contesting/getting nominated to the municipal council for a period of 6 years. 1st petitioner thereupon filed a petition for setting aside the ex-parte order and as it was not taken up, he filed W.P.(c) No. 34626/2006 before this court. By Ext P4

judgment dated 9.1.2007 directed the Election Commission to consider the petition within a period of 2 months. Thereafter the Commission set aside the ex-parte order and considered both the cases-O.P.174 & 175/2015 together.

5. Evidence before the Tribunal consists of oral testimony of PW1 to PW8 on behalf of petitioners; that of RW1 to 3 on behalf of respondents and documentary evidence covered by Ext P1 to P12 and R1 and X1 to X4 on behalf of petitioner and respondents respectively.

6. After finding that petition was maintainable, Commission considered whether respondents committed any act of defection and were liable to be disqualified to continue as members of Kalamassery Municipality. The Election Commission went into the questions regarding defection, if any, committed by the petitioners and as to the whether from the conduct of the party, it can be said that they voluntarily gave up their membership in the party.

7. The petitioner as well as the respondents were elected to the Municipal council as official candidates of INC. Sri. Pavitrn was the Chief whip and leader of the Parlianmentary party also. The allegation is that he acted against the decision of the Congress party; misused his official position and issued a whip to vote for him and contested and defeated an official candidate of INC. It is also alleged that he was suspended on 4.12,2004 and in his place Sri. M.B.Prakash was appointed as whip and parliamentary party leader.

8. The Commission after considering the evidence adduced in the case found that PW5- the DCC President suspended Sri.N.K.Pavithran from the Congress Party on 4.12.2004 and finally removed him from the leadership of the parliamentary party and Chief whip of UDF. At the same time Sri.M.B.Prakash, who was in the meantime elected by the Congress Party as Chief whip had issued notices directing the Congress members to cast vote in his favour. By Ext.P4 letter dated 5.12.2004 the President

of DCC had informed the Commission that Sri.M.B.Prakash was declared as Congress Parliamentary Party Leader and Chief whip. Ext.P3 letter was given by Sri.M.B.Prakash to the Secretary of Kalamassery Municipality in his capacity as UDF parliamentary party leader and whip. The petitioner had produced Ext.P6 decision by which Sri.N.K.Pavithran was removed from the post of parliamentary party leader and whip. The petitioner had also produced Exts.P2, P5 and P8 series and Exts.P9 to P12 to show that Sri.M.B.Prakash had issued directions to the party members of UDF to cast their vote in his favour. It was the case of Sri.N.K.Pavithran that there was no proper election of Sri.M.B.Prakash either as parliamentary party leader or whip of UDF and therefore his directions were not binding on any of the members. The Commission found that the Deputy Chairperson of the Municipality who is the member of standing committee had in a meeting elected Sri.M.B.Prakash as Chief whip.

9. The Commission however found as per Rule 4(1) of the

Local Authorities (Disqualification of Defected Members) Rules, which existed at the relevant time, the direction in the case of a member who belongs to a political party or to a member considered to be included in it is to be issued by the member whom the members of the said political party or the members considered to be included in it in the local authority concerned elected for that purpose on majority basis from among themselves. Accordingly the whip or direction as per these rules was to be issued by a member elected on a majority basis from among the parliamentary members of that political party. It was found that the whip issued by the parliamentary party of a coalition did not have competency to issue any direction. There was no material to show that Sri.M.B.Prakash was elected as whip of the congress party on a majority basis from among the party members or on a decision by the Congress party. Therefore the ground urged that there was violation of the whip issued by the Chief whip was not found proved, since the said

Sri.M.B.Prakash was not competent to issue any whip.

10. Regarding the next question that is whether the conduct of the parties amounted to voluntarily withdrawing of their membership, the Commission found that M/s.N.K.Pavithran and Chandrika Padmanabhan violated the direction of the congress party and acted against the interest of the party. It was found that the original decision at the time of election was that 5 year term will be apportioned among two councillors of INC and original decision itself was that Sri.N.K.Pavithran will be succeeded by Sri.M.B.Prakash after 2½ years and thereafter the subsequent decision was that Jamal Mancaud and Sri.M.B.Prakash will share chairmanship for equal periods. It was found that Sri.Jamal Mancaud did not resign on expiry of his agreed term and did not allow Sri.M.B.Prakash to become Chairperson in accordance with the understanding within the party. Referring to paragraphs 9, 12, 14 and 15 of the petition, Commission found that the DCC President had suspended

Sri.N.K.Pavithran from Congress party and decided to present Sri.M.B.Prakash as candidate for chairmanship of the council, after removing Sri.N.K.Pavithran from the leadership and chief whip of the party. The averments in paragraph 24 show that elected members belonging to congress party had violated directions of the said party and voted against the candidate of INC and hence they committed the act of defection, defeating the official candidate of the congress party. The Commission found that those averments were sufficient to constitute the ground of voluntarily giving up membership from the party. On the basis of the deposition of PW1 that Sri.N.K.Pavithran contested in the post of Chairperson against the decision and direction of the Congress party coupled with the deposition of PW5-the DCC President, who also had deposed that Sri.M.B.Prakash was the official candidate of congress party and Sri.N.K.Pavithran was suspended by him, it was found that Sri.N.K.Pavithran acted in defiance of the direction of the DCC. On the strength of the

deposition of PWs 1, 5 and 8, the Commission found that the version as given in the petition that respondents had acted against interest of the District Congress Party was found true.

11. At the same time respondents had examined RWs 1 to 3. RW1 deposed that he was not aware of the decision regarding sharing of the chairmanship. He also pleaded regarding the election held in which he contested against official candidate of the congress party. Sri.N.K.Pavithran also admitted that he had contested as official candidate of congress party in the election held in 2000. In answer to a question whether he contested as chairperson against the decision of the congress party, RW1 did not agree. From the deposition of RW2 it was found that there was a group rivalry, on account of which Sri.N.K.Pavithran and Sri.M.B.Prakash contested each other. She admitted that she proposed the name of Sri.N.K.Pavithran as Chairperson. However she continues as congress party member. According to her she did not give up membership voluntarily from that party.

Sri.Jamal Mancaud who was examined as RW3 deposed that he voted for M.B.Prakash. The Commission found that Sri.M.B.Prakash was the official candidate of the congress party for election to the post of Chairperson held on 6.12.2004, at a time when Sri. Pavitran was already suspended on the ground that he gave direction to the the UDF members to vote for him misusing his official position. The contest between Sri.M.B.Prakash and first petitioner was at a time when both of them were councillors of congress party. The Commission observed that if a member or group of elected members of a political party takes a different stand from that of the political party as such and as against the policies of political party in which they are members, it amounts to disloyalty and once he becomes disloyal by his conduct to the political party the inevitable inference is that he has voluntarily given up his membership. Relying on the judgment ***Biju R.S. And others V. Kerala State Election Commission*** (2009 (2) KHC 839) and

the decision in W.A.No.2351 of 2005 in which it was held that acceptance of nomination by a member as a candidate against the official candidate of his party amounts to voluntarily abandonment of membership of such party, the Commission held that the petitioners in these writ petition had voluntarily given up the membership. The Commission had also relied on the decisions in **Faisal V.Abdulla Kunhi** (2008 (3) KLT 534), **Varghese V.V. v. Kerala State Election Commission** (2009 (3) KLT 1), **Muhammed Kunhi and another V. A.Abdulla and another** (2010 (4) KHC 307) and **Nazeerkhan's case** (2008 (3) KLT SN 57). It was further found that the councillors are bound by the decision of the political party. Majority in a parliamentary party cannot violate the decision of their political party. The Commission also took note of the fact that Sri.N.K.Pavithran was suspended immediately after he issued direction to the UDF councillors to vote for him and thereafter he contested election as an independent member. Further regarding

the respondent in O.P.No.175 of 2004, who is the second petitioner in this case, the Commission found that the conduct which is to be looked into is with reference to the date of defection and not a subsequent conduct. Therefore it was held that the subsequent continuance of the second petitioner as active member of the congress party or as a councillor in the subsequent election will not affect the decision to be taken on her conduct in the relevant date on which the defection is pointed out.

12. The main contention raised by Sri. S. Sreekumar, the learned Senior Counsel for the petitioners is that there are no pleadings based on which alone evidence can be adduced and acted upon and the Commission can arrive at findings on the basis of only such the evidence which is supported by pleadings. At the same time the learned counsel for the respondents pointed out that the findings of the Commission are referring to the averments in paragraphs 14, 15, 24 and 25 of the petition,

and it is on the basis of the pleadings as well as the evidence adduced in the case as supported by such pleadings that the commission has found that the respondents in the petitions before it had voluntarily given up their membership from the political party, on account of which they have incurred disqualification.

13. The question to be considered is whether the petitioners herein acted against the decision of their political party. It is true, as found by the Commission that the averments in para 3 and 4 of Ext P1 and P2, are to the effect that there was an understanding as to the apportionment of the 5 years term of chairmanship with 2 persons i.e the two names were of M/S Pavitran and that that of M.B. Prakash. Para 9 of the petition also indicates the consensus as to the apportionment of the term. In paragraph 12 it was stated as follows:

"Taking advantage of the said position and misusing the same for his best interest in derogation of the directions of the congress party

and Parliamentary party of the UDF Shri. N.K.IPavithran declared himself as a contestant for Chairmanship of the Council and a whip was issued by him on 03-12-2004 to all members of the UDF Parliamentary party to vote for him on 06-12-2004 and informed them about”.

In paragraph 22, it was stated that the respondent who was the INC candidate and won the election with the support of UDF, has violated the decision and direction of the parliamentary party and the whip issued by its leader.

14. The respondents have denied all these contentions. Now it has to be examined whether there is any evidence in support of these pleadings. PW1 has deposed in terms of the pleadings in the O.P. True that there were no records to prove either the consensus as to the apportionment or the decision as to candidature of Sri.M.B.Prakash for chairmanship, except the oral testimony. PW5 who was the DCC President at the relevant time, deposed that Sri.Pavithran acted against the decision and understanding within the congress party and issued whip to vote

for him when it was decided that Sri.M.B.Prakash should be given the chairmanship and on account of such action on his part, he was suspended. Eventhough no records were produced to show the decision taken with respect to the chairmanship of Sri.M.B.Prakash the oral evidence adduced show that there was an understanding within the Congress party and Sri. Pavitran acted against the decision. In this context the testimony of RW3, Sri. Jamal Mancaud is also relevant that he did not vote for Sri.Pavitran. Though he stated that he voted in favour of M.B. Prakash according to his conscience, he admitted that he has to obey the decision of the KPCC/DCC, which indicates that the decision taken in favour of Sri.M.B.Prakash.

15. There is nothing in the testimony of the defence witnesses which discredits the testimony of the PW1, PW5 or PW8. Going by the deposition of the witnesses on either side, it is seen that there is uncontraverted testimony of the witnesses to the effect that there was a decision by the Congress

party to propose Sri.M.B.Prakash as their official candidate; the 1st petitioner issued a whip contrary to the decision, asking to vote for him; contrary to the said decision, the second petitioner nominated the first petitioner as the candidate; the 1st petitioner contested and won the election defeating the official candidate.

16. In the above circumstances, I am unable to accept the contention of the learned Senior Counsel that the evidence arising in the case are not supported by pleadings. It is clear that the petitioner in O.P. 174/2004 or in O.P. 175/2004 have acted contrary to the decision of the political party, by contesting in the election as Chairman and defeating the official candidate of INC. It is also found that the petitioner in O.P.175/2015, acted against the decision by proposing the name of Sri. Pavitrana for Chairmanship. As rightly observed by the Commission, the conduct of the parties to be looked into is as on the date of election and not the subsequent conduct. In paragraph 8 of the judgment of the Division Bench of this court in **Varghese v.**

Kerala State Election Commission: (2009 (3) KLT 1) is relevant in this context, which reads as follows:

"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".

17. Para 10 of the judgment in Varghese' case supra deals with the issue whether the subsequent conduct of the political party itself towards the elected members allowing their active participation in its activities, would wash off the act of defection and the consequences thereof, where it was held as follows:

"10. Indisputably the writ appellants, who were elected to the Municipal Council as official candidates of the Indian National Congress and having continued so in the Council, have voted in favour of the no confidence motion moved by the rival political parties on 21.4.2008 and by the said

conduct they had incurred the disqualification of voluntarily giving up membership in the political party. Though Sri.Ramakumar, inviting reference to Annexure A minutes of a meeting dated 12.5.2008, canvassed the position that the political party had tried to own up the writ petitioners, the fact remains that on 24.1.2008 on account of the disloyalty and conduct against the policy of the political party, the writ petitioners had already incurred the disqualification on the ground of defection. Subsequent change of heart and remorseful conduct of the member or the reconciliatory attitude of the political party cannot repair or undo the damage caused by the disloyal conduct leading to the disqualification."

18. The above observations in the above judgment, followed in a series of judgments of this court, fortifies the findings of the Commission.

19. Thus it is settled law that acting against the decision of one's own party is nothing but disloyalty and such disloyalty would amount to voluntarily giving up their membership in the political party.

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In such circumstances, I do not find any reason to interfere with Ext.P11 order. The writ petition is therefore dismissed.

Sd/-

**P.V.ASHA,
JUDGE.**

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