

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE A.M.SHAFIQUE

THURSDAY, THE 30TH DAY OF JULY 2015/8TH SRAVANA, 1937

WP(C).No. 21390 of 2011 (W)

PETITIONER :

**MONCY THUMPUNKAL
AGED 44 YEARS, S/O.T.F. CHACKO, MEMBER WARD NO.5
CHANGANASSERY MUNICIPALITY, KOTTAYAM DISTRICT.**

**BY SENIOR ADVOCATE SRI.K.RAMAKUMAR
BY ADVS.SRI.M.P.MADHAVANKUTTY
SMT.SMITHA GEORGE**

RESPONDENT(S) :

- 1. THE KERALA STATE ELECTION COMMISSION
THIRUVANANTHAPURAM - 695 001.**
- 2. SRI.SANTHOSH ANTONY,
MEMBER WARD NO.31, CHANGANASSERY MUNICIPALITY
KOTTAYAM DISTRICT - 686 101.**

**R1 BY ADV. SRI.MURALI PURUSHOTHAMAN, SC
R2 BY ADV. SRI.P.RAJESH (KOTTAKKAL)**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 23-06-2015,
THE COURT ON 30-07-2015 DELIVERED THE FOLLOWING:**

Mn

...2/-

APPENDIX

PETITIONER'S EXHIBITS :

- EXT.P1 : COPY OF THE ELECTION PETITION NO. 69 OF 2010 FILED BY R2
BEFORE R1 DATED 30.11.2010.
- EXT.P2 COPY OF THE OBJECTION FILED BY THE PETITIONER BEFORE R1.
- EXT.P3 COPY OF THE ORDER DATED 26.7.2011 IN OP NO. 69 OF 2010 ON THE
FILE OF THE KERALA STATE ELECTION COMMISSION.
- EXT.P4 COPY OF THE WHIP ISSUED BY R2 DATED 18.11.2010.
- EXT.P5 COPY OF NOTICE NO. 7058/E/2011/STATE ELE.COM. DT. 30.12.2011.

RESPONDENT'S EXHIBITS :

- EXT.R2(a) : COPY OF THE DECLARATION GIVEN BY THE PETITIONER.
- EXT.R2(b) COPY OF THE RULE 3(2) DECLARATION GIVEN BY THE PETITIONER.
- EXT.R2(c) COPY OF THE REGISTER AS MAINTAINED IN THE MUNICIPALITY AS
PROVIDED UNDER RULE 3(1) OF THE RULES.
- EXT.R2(d) COPY OF THE PROCEEDINGS OF THE RETURNING OFFICER AND
MARKED IN THE COMMISSION AS A DOCUMENT.
- EXT.R2(e) COPY OF LETTER DATED 2-11-2011 ISSUED TO THE 2ND
RESPONDENT.

//TRUE COPY//

P.A. TO JUDGE

A.M.SHAFIQUE, J

* * * * *

W.P.C.No.21390 of 2011

Dated this the 30th day of July 2015

J U D G M E N T

This writ petition is filed challenging Ext.P3, an order passed by the Kerala State Election Commission on 26/07/2011 in O.P. No.69/2010, by which it is declared that the writ petitioner has been disqualified from being Councilor of Changanaserry Municipal Council as provided under section 3 of the Kerala Local Authorities (Prohibition of Defection) Act (hereinafter referred as 'the Act') and from contesting as a candidate in any election to the local authority for a period of six years from the date of order. This order came to be passed in a petition filed by the second respondent herein, under section 4 of the Act.

2. The short facts involved in the filing of Original Petition No.69/2010 before the Commission are as under;

Writ petitioner and the second respondent were elected as members of the Municipality in the year 2010. They belong to the political party, Kerala Congress (M) [hereinafter referred as 'KC(M)']. Out of 37 wards in the said Municipality, 21 were won by

United Democratic Front (for short 'UDF'), a coalition, out of which six were from KC(M). UDF got majority to rule the Municipality. A meeting was convened on 06/11/2010 to elect the parliamentary party office bearers and the whip. Second respondent was elected as the parliamentary party leader and chief whip. Elections were held to the post of Chairperson and Vice-Chairman on 08/11/2010 and the Standing Committees on 18/11/2010. It is alleged that the second respondent, in his capacity as Parliamentary party leader, issued direction to all the KC(M) members to vote in support of members of UDF and its independents. Despite the said direction, petitioner voted in favour of a CPI(M) candidate, in the election to the post of members of Welfare Standing Committee ignoring the whip and therefore it is contended that the petitioner acted in violation of the whip and the said action amounts to defection. It is also alleged that the petitioner had voluntarily given up his membership from KC(M) party, having supported Left Democratic Front (for short 'LDF') and thereby committed defection.

3. Writ petitioner filed written statement, inter alia stating that two whips were issued by the 2nd respondent, one for the post of Chairperson and another to the post of Vice-Chairman. In regard to the Standing Committees for Welfare and Health, the

direction was to cast conscience vote. It is therefore contended that there was no violation of whip and the petitioner had not abandoned his membership in the KC(M) party.

4. The Commission relied upon the oral evidence of PWs 1 to 3 on behalf of the second respondent and DWs 1 to 3 on behalf of the petitioner. Reliance was placed by the second respondent on Exts.P1 to P11 and by the petitioner on Exts.R1 to R13. Exts.X1 to X7 were summoned and marked. The Commission, after evaluating the evidence found that, the second respondent's election as the whip of KC(M) was not disputed, Ext.R1 produced by the writ petitioner as the whip issued for the election on 18/11/2010 is not a genuine document, Exhibit P6(a) the minutes of KC(M) contains the signature of the petitioner which evidences the fact that he had received the whip issued by second respondent, all other KC(M) candidates voted in favour of UDF candidates and on account of the vote casted by the writ petitioner, the UDF candidate lost to CPI(M) candidate. The petitioner also voted in favour of other CPI(M) candidates by giving preferential votes and all of them were elected as members of Welfare Standing Committee. The finding, therefore, is that the petitioner voted in favour of CPI(M) nominees as

against the directions given by the petitioner to vote in favour of UDF candidates. It is also found that though the petitioner was the UDF candidate to the Welfare Standing Committee, he did not cast his vote for him. All his preferential votes were given to nominees of CPI(M) and all of them won in that election. The Commission also relied upon the judgments in **Varghese v. State Election Commission** [2009 (3) KHC 42] and **Faisal v. Abdulla kunhi** [2008 (3) KHC 267]. Further, the Commission had come to a finding that Ext.P8, which is the whip communicated to the Secretary, was fabricated and therefore the same cannot be relied upon for the purpose of the case. It was therefore found that there is non-compliance of Rule 4(2) of the Kerala Local Authorities (Disqualification of Defected Members) Rules 2000, (hereinafter referred as 'the Rules'). However, having found that the ground of violation of whip for disqualification of the respondent is untenable, it was found that voting against the candidates set up by his party and UDF including the writ petitioner to the election to the Welfare Standing Committee amounts to voluntarily giving up membership from the party in which he belonged and therefore he is liable to be disqualified for defection.

5. Heard the learned counsel appearing on behalf of the petitioner and the second respondent. The learned counsel appearing for the Commission places the entire files before this Court for perusal.

6. The Sri.K.Ramakumar, learned senior counsel appearing on behalf of the writ petitioner, submitted that having found that violation of whip cannot be a reason for disqualification of the writ petitioner, the Commission could not have found that the petitioner acted contrary to the direction given by the political party or the coalition and for that reason itself the order passed by the Commission is to be set aside. Further, it was contended that the second respondent had no authority to issue any whip or any direction to the petitioner as he is not a person who is competent to do so. There is no concept of a Parliamentary Party Leader either in the Act or the Rules and it is argued that the direction in writing which is contemplated under the Act and the Rules should be by the person who is empowered to give the symbol to the candidate and the documents relied upon do not satisfy the said requirement. He also relied upon the judgment in **Varghese** (supra) to contend that if the political party itself, taking note of certain strange realities, permits their elected

members to cast conscience vote, in that event, they are entitled to vote in favour of any person of their choice, which will not amount to disloyalty to his political party.

7. Learned counsel for the second respondent, though not in so many words, submits that there is some irregularity in the issuance of the whip especially on account of the finding that Ext.P8 was not a genuine document, supports the view taken by the Commission in relation to the finding on voluntarily giving up membership from the political party.

8. The short question, therefore, to be considered in the facts and circumstances involved in the case is whether the petitioner had voluntarily given up membership from the political party on account of his voting in favour of CPI(M) candidates in the election to the Welfare Standing Committee.

9. The second respondent in the original petition had taken two contentions. One is that he was competent to issue a whip and he had issued a whip to the writ petitioner to vote in favour of all the UDF candidates. The contention urged by the learned counsel for the petitioner is that as per rule 4(1)(i) of the Rules, a direction in respect of casting a vote in an election or in a voting mentioned under section 3 (a) of the Act has to be made

by a person who is competent to issue the symbol to the said candidate. Further, the direction should be in the letter head of the political party and with their seal. The said decision has to be read over by the person who has been elected from among the members for the said purpose, and if so, it amounts to a valid direction. Rule 4(2) further indicates that while issuing a direction under sub rule (1)(i) 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 acknowledgment due and while effecting it by affixture it shall be done in the presence of at least two witnesses and a copy of the same shall be given to the Secretary.

10. The second respondent does not have a case that he was the person competent to provide the symbol of the political party to the candidate. According to him he was elected as the Parliamentary Party Chief Whip. In the light of Rule 4(1)(i) of the Rules, it is apparent that the direction issued by the petitioner cannot be stated as the wish of the political party. In other words, there is no valid whip or direction in accordance with law or as provided under law. Therefore, there is justification on the part of the Commission to have found that no valid whip was issued by

the political party and that cannot be relied upon to find defection against the petitioner.

11. Second contention of the second respondent was that the petitioner had given up his membership in the political party. The Commission had already come to a finding that the petitioner had, by his own act of voting in favour of CPI(M) candidates, voluntarily given up membership from the political party. The fact that the petitioner had voted in favour of CPI(M) candidates in the Welfare Standing Committee election is not in dispute. The main contention of the second respondent was that the petitioner betrayed the political party and the electorate within a month of the elections, by voting against the nominees of KC(M) and UDF to the Welfare Standing Committee.

12. The following is the pleading in this regard:

"The Respondent is aware of the contents of the whip and the intention of the political party and the stand which the political party took in the election of standing committee members. The respondent moved together with LDF to become instrumental to defeat the candidate sponsored by his own party. If the respondent obeyed the instruction of the party or voted as directed as an obedient party worker, the decision of the political party would have protected."

13. It is also averred that the petitioner has voluntarily abandoned his membership from KC(M) and joined the other party and moved with the support of LDF in the Municipality against the will of the party. It is stated that LDF was in the rival front in the general election and the workers of UDF and KC(M) strived hard to get the respondent elected. It is also stated that voting against the nominees of the party with the support of LDF are sufficient to hold that he has voluntarily abandoned his membership.

14. These pleadings are replied in paragraphs 8 to 10 as under:

“8. The averments in para 7, 8, 9 and 10 of the petition are against the real facts and are twisting of facts so as to mislead this Honourable Authority. In connection with the matter of election to the various standing committees the petitioner who is the Whip of Kerala Congress Parliamentary party, Changanasseri Municipality had issued two distinct whips in writing (type written). One among them is directing to vote for Omana George for the post of Chair Person and another is Mathews George for the post of Vice Chair Man dated 08/11/2010. Another one is a direction to vote for UDF Candidates in Finance, development and public works and according to conscience for the

standing committees for welfare and Health, dated 18/11/2010.

9. *It is submitted that the respondent did not do any act in violation of the said Whips.*

10. *Mr.Satheesh lykara and Mrs.Smitha Jayakumar, who are cited as nominees of UDF are actually independent members the respondent has never disobeyed any lawful Whip. The respondent did not abandon his membership in Kerala Congress as alleged. He is still an active worker of Kerala Congress, holding many important positions in the Parliamentary party. The respondent has never done any act or omitted to do his duty so as to allege the offence of defection against him. The allegation that the respondent has joined in another party is baseless, false and intended to harm the respondent. The respondent is fully qualified to continue as a member of Changanassery municipality. There is no reason to disqualify the respondent from contesting in future elections."*

15. On these pleadings, after evaluating the evidence, the Commission found in paragraph 12 as under:

"12. From the evidence on record, it is found that the respondent had voted in favour of CPI(M) nominees as against the direction given by the petitioner to vote in favour of the UDF candidates in

the election held on 18/11/2010 to the members of Welfare Standing Committee. Admittedly, the respondent was a candidate of the UDF to the Welfare Standing Committee. It is surprising to notice that the respondent did not vote for him in the election to the Welfare Standing Committee. Even though he had casted four preferential votes, he did not cast his vote to him. It is further seen from Ext.X5 that he had casted all his preferential votes to CPI(M) nominees in the election to the Health Standing Committee members also and thus all of them had won in that election. This would further prove that he became disloyal to his party and UDF which set up him as a candidate and joined with the candidates set up by CPI (M) under LDF coalition.

13. The definite case of the petitioner is that the respondent had voluntarily given up his membership from the party in which he belongs and also that he had voted against the direction given by the petitioner while casting his votes in the election to the Welfare Standing Committee and thus committed defection. I have already found that Ext.R1 is a fabricated record and that it was created with an intention to justify his action of casting his votes in favour of CPI(M) members in the election to the Welfare and Health Standing Committee members. It is also found that the petitioner who was the whip of

KC(M) had directed, as seen from Ext.P6(a), to vote in favour of the UDF candidates in the election to all the Standing Committee members. The fact that he had disobeyed the direction and voted against the candidates setup by the UDF in the election to the Welfare Standing Committee and also Health Standing Committee is born out by Ext.X5 and other evidence. As per Section 3 of the Act, if a member of a local authority belonging to any political party voluntarily gives up his membership of such political party, he is liable to be disqualified for being a member of that local authority. It is settled in law that disqualification for voluntarily giving up membership of one's party is attracted when such member votes against his own party members. In the decision in Shajahan v. Chathannoor Grama Panchayat and others, (2000 KHC 283), it has been held by the Division Bench of the Honourable High Court that by voting against the political party to which the member belonged, he had voluntarily given up his membership of that party and was therefore liable to disqualification. In the case on hand, it is found that the respondent was set up as a candidate of the Welfare Standing Committee by KC (M) and UDF and he did not vote in his favour or in favour of the UDF candidates and he voted in favour of the CPI(M) candidates. This was a ploy designed by the respondent in collusion with the rival political Front

with the ulterior motive of achieving the success of the members set up by the LDF along with himself to the Welfare Standing Committee. He won because the UDF members voted in his favour. On account of this ploy, the said members set up by LDF and also the respondent had won in the election to the Welfare Standing Committee. It is further seen that all the members of the Standing Committee along with himself are still continuing. The conduct of the respondent in having defied the direction issued by the whip of his party and by voting in favour of the LDF members in the said election would amount to defection by voluntarily giving up his membership under the Act.”

16. The main contention urged by the petitioner is that he is entitled to exercise conscience vote as there was no valid whip. Paragraph 9 of **Varghese's** case (supra) is relevant which is extracted hereunder:

“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 development 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 Section 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 Section 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."

17. In fact, that was a case in which the Division Bench was concerned with the discipline of the democratically elected representatives of the people and under what circumstances they become disloyal to a party. It is held that if a member or a group of 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. It is further found that the moment one becomes disloyal by his conduct to the political party, the inevitable inference is that he has voluntarily given up his membership.

18. It is not in dispute and as rightly found by the Commission, the petitioner has participated in the election process as a candidate of KC(M), which is forming part of the

coalition UDF. Their contest in the election was against LDF candidates. The general elections were held and the results were announced on 27/10/2010. The petitioner, in a sworn declaration, submitted that he is the official candidate of KC(M). The election to the post of Chairperson and Vice-Chairman was held on 08/11/2010. The election to the members of various Standing Committees were held on 18/11/2010. According to the petitioner, he had exercised his conscience vote. He relied upon Ext.R1, a whip allegedly issued by the second respondent. The Commission, on an evaluation of the evidence, rejected the contention of the petitioner that the second respondent had issued two whips, one to vote in favour of UDF candidates to the election of Standing committee on Finance, Development and Public works and another whip to cast conscience vote to Welfare and Health Standing Committees. It is stated that no other KC(M) members voted in favour of CPI(M) nominees. The Commission also found that from Ext.X5 minutes of the election held to various Standing Committees, other than the writ petitioner, all other UDF members supported the UDF candidates and on account of the vote casted by the petitioner in favour of Smt.Kunjumol Sabu, she was elected by a margin of one vote. Further, petitioner voted in

favour of CPI(M) candidates by giving preferential votes one, two and three respectively and all of them were elected as members of the Welfare Standing Committee. The Commission found that Ext.P6(a), which contains the signature of the petitioner, is a genuine document, whereas Ext.R1 was not so.

19. Therefore, when the contention regarding exercise of conscience vote is not acceptable, then the question is whether it was open for the petitioner to vote for an LDF candidate when he had won as a member of KC(M) which forms part of UDF. This situation is to be analysed as if there was no specific instruction from the UDF or KC(M). It is apparent that the petitioner himself was a candidate for the Welfare Standing Committee. Other members who were in the panel were Indian National Congress (for short 'INC') candidates. Even if it could be argued that, by voting against other UDF candidates other than KC(M) he had not abandoned his membership from the political party, it is in evidence that he himself, being a candidate fielded by KC(M), he did not vote for him. He voted in favour of LDF, thereby giving an advantage to an opposite faction, and he won in the election along with LDF candidates. This aspect itself might be enough to come to a conclusion that he did not show loyalty to the wishes of

his own political party, whereas he had supported the opposite faction who won with the one vote available from him. When his vote was crucial for tilting the majority in an election, acting against the interest of all other KC(M) members and other members of the coalition clearly amounts to disloyalty to the political party, and thereby voluntarily giving up membership from a political party. If it was a conscience vote to be exercised by the petitioner, the said suggestion should have come from the political party as held in **Varghese** (supra), otherwise the exercise of option to vote in favour of LDF candidates is nothing but shifting of loyalty. Under such circumstances I am of the view that the order of the Commission does not call for interference.

The writ petition is hence dismissed.

(A.M.SHAFIQUE, JUDGE)

jsr

WPC 21390 of 2011

