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Pallickal Naseer Vs. The State Election Commission

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Court : Kerala

Decided On : Jul-27-2015

Judge : Honourable Smt. Justice P.V.Asha

Appellant : Pallickal Naseer

Respondent : The State Election Commission

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE SMT. JUSTICE P.V.ASHA MONDAY, THE27H DAY OF JULY20155TH SRAVANA, 1937 WP(C).No. 5931 of 2014 (N) ---------- PETITIONER(S): ---------- 1. PALLICKAL NASEER @ S. NASEER, MEMBER, WARD NO. 10 PALLICKAL GRAMA PANCHAYATH THIRUVANANTHAPURAM DISTRICT - 695 604.

2. REMYA V.S MEMBER, WARD NO. 11, PALLICKAL GRAMA PANCHAYATH THIRUVANANTHAPURAM DISTRICT - 695 604.

3. REMANI AMMA S. MEMBER, WARD NO. 01, PALLICKAL GRAMA PANCHAYATH THIRUVANANTHAPURAM DISTRICT - 695 604.

4. MANIKANTAN PALLICKAL, MEMBER, WARD NO. 08, PALLICKAL GRAMA PANCHAYATH THIRUVANANTHAPURAM DISTRICT - 695 604.

5. DEEPTHI V.D, MEMBER, WARD NO. 09, PALLICKAL GRAMA PANCHAYATH THIRUVANANTHAPURAM DISTRICT - 695 604.

6. AMBIKA KUMARI MEMBER, WARD NO. 07, PALLICKAL GRAMA PANCHAYATH THIRUVANANTHAPURAM DISTRICT - 695 604. BY ADVS.SRI.K.RAMAKUMAR (SR.) SRI.S.M.PRASANTH SRI.M.MANOJKUMAR (CHELAKKADAN) SMT.ASHA BABU SMT.AMMU CHARLES RESPONDENT(S): ---------- 1. THE STATE ELECTION COMMISSION THIRUVANANTHAPURAM - 695 001.

2. LISA NIZAM, WARD MEMBER, WARD NO. 5, PALLICKAL GRAMA PANCHAYATH THIRUVANANTHAPURAM -695604.

3. THE PALLICKAL GRAA PANCHAYATH, PALLIKKAL, THIRUVANANTHAPURAM DISTRICT - 695 604 REPRESENTED BY ITS SECRETARY. R2 BY ADV. SRI.S.SREEKUMAR (SR.) R2 BY ADV. SRI.P.MARTIN JOSE R2 BY ADV. SRI.THOMAS P.KURUVILLA R1 BY ADV. SRI.MURALI PURUSHOTHAMAN, SC, K.S.E.COMMISSION R3 BY ADV. SRI.K.SIJU R3 BY ADV. SRI.S.ABHILASH THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON2707-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: WP(C).No. 5931 of 2014 (N) ---------- APPENDIX PETITIONER(S)' EXHIBITS ---------- EXHIBIT-P1-TRUE COPY OF THE PETITION DATED1504/2013 NO.7/2013 FILED BY R2 BEFORE R1. EXHIBIT-P2-TRUE COPY OF THE PETITION DATED1504/2013 NO. 8/2013 FILED BY R2 BEFORE R1. EXHIBIT-P3-TRUE COPY OF THE PETITION DATED1504/2013 NO.9/2013 FILED BY R2 BEFORE R1. EXHIBIT-P4-TRUE COPY OF THE PETITION DATED1504/2013 NO.10/2013 FILED BY R2 BEFORE R1. EXHIBIT-P5-TRUE COPY OF THE PETITION DATED1504/2013 NO.11/2013 FILED BY R2 BEFORE R1. EXHIBIT-P6-TRUE COPY OF THE PETITION DATED1504/2013 NO.12/2013 FILED BY R2 BEFORE R1. EXHIBIT-P7-TRUE COPY OF THE WRITTEN OBJECTION DATED2705/2013 IN O.P72013 BY THE IST PETITIONER.. EXHIBIT-P8-TRUE COPY OF THE WRITTEN OBJECTION DATED2705/2013 IN O.P82013 BY THE2D PETITIONER. EXHIBIT-P9-TRUE COPY OF THE WRITTEN OBJECTION

DATED2705/2013 IN O.P92013 BY THE3D PETITIONER. EXHIBIT-P10-TRUE COPY OF THE WRITTEN OBJECTION DATED2705/2013 IN O.P102013 BY THE4H PETITIONER. EXHIBIT-P11-TRUE COPY OF THE WRITTEN OBJECTION DATED2705/2013 IN O.P112013 BY THE5H PETITIONER. EXHIBIT-P12-TRUE COPY OF THE WRITTEN OBJECTION DATED2705/2013 IN O.P122013 BY THE6H PETITIONER. EXHIBIT-P13-TRUE COPY OF THE

ORDER
DATED2602/2013 IN O.P NOS. 7 TO12OF 2013 ON THE FILE OF THE KERALA STATE ELECTION COMMISSION, THIRUVANANTHAPURAM. RESPONDENT(S)' EXHIBITS ---------- NIL. /TRUE COPY/ P.S TO JUDGE P.V.ASHA, J.

---------- W.P(c) No.5931 of 2014-N ---------- Dated this the 27th day of July, 2015

JUDGMENT
This Writ Petition is filed challenging the common order Ext.P13 of the Kerala State Election Commission (hereinafter referred to as the 'Commission') whereby the petitioners are disqualified from being members of the Pallikkal Grama Panchayat, under Section 3(1)(a) of Kerala Local Authorities (Prohibition and Defection) Act, 1999 (hereinafter referred to as 'the 1999 Act') and for contesting in election in any local authority for a period of 6 years.

2. The 2nd respondent herein-the outseated President of Pallikkal Grama Panchayat, filed 6 Original Petitions (O.P. Nos. 6 to 12 of 2013) before the Commission against each of the petitioners herein seeking orders disqualifying the respondents. The undisputed facts are the following: Petitioners, the 2nd respondent and one Asbar contested and got elected as members of Pallikkal Grama Panchayat in the Panchayat election held in W.P(c) No.5931 of 2014-N2October 2010 as official candidates of Indian national Congress (INC for short) party. There are 13 wards in the Grama Panchayat and hence 13 seats; out of which INC candidates, who are under the UDF faction won 8 seats; CPI(M) won 4 seats and BJP won 1 seat. 2nd respondent herein was elected as President and respondent in O.P.7/2013-Pallikkal Naseer got elected as Vice President. The

petitioners herein mooted a no-confidence motion against the 2nd respondent President, belonging to the very same INC on 26.3.2013. It was tabled for discussion to 10.4.2013. The 2nd respondent did not attend the meeting on 10.4.2013. All the 12 members, except Sri. Asbar of INC, who were present on 10.4.2013, voted in favour of the no-confidence motion, consequent to which it was carried and the President-the 2nd respondent was outseated. Immediately after the no- confidence motion was passed, the respondents were expelled from the Congress party.

3. The outseated President filed O.P. Nos 7, 8, 9, 10, 11 and 12 of 2013, before the Commission under Section 4 of the 1999 Act. Allegations in the petitions Ext P1 to P6 were that the no-confidence motion was mooted in connivance with LDF and BJP and without consulting with and without getting permission W.P(c) No.5931 of 2014-N3from the District leadership, despite specific instructions to the respondents after discussion with them by the District leadership, including President Sri. Mohankumar and Varkala Kahar M.L.A, not to proceed with the motion and to defeat the motion, and in defiance of the direction of the District President Sri. Mohankumar, to vote against the motion and to protect the seat of President, the respondents voted in favour of the motion and got it carried. Her case was that even though the whip issued by the President was served by the Vice President Adv. Sudarsanan Pillai by affixture and whip was read over in the meeting by Sri. Abar, the petitioners herein intentionally defied the same and thus voluntarily given up their membership in INC, committed defection liable for disqualification under the 1999 Act.

4. The petitioners herein filed objections Ext P7 to P12. It was stated that the indifferent attitude of the 2nd respondent created problems in the smooth functioning of the Panchayat and created a rift between her and other members. Everybody wanted a change of President; she was asked several times to resign. The matter was communicated to the the higher leadership of INC(I) and they were thinking of removing her W.P(c) No.5931 of 2014-N4from the Presidentship. They denied the allegation as to collusion in mooting the no confidence motion; they denied the issuance of any whip or intimation or specific direction or decision from Sri. Mohankumar or Varkala Kahar about the stand of the political party as to

the no confidence motion; they denied the allegation as to issuance and service of whip by affixture, reading of whip by Asbar and disputed the authority of Asbar to hand over the direction if any of DCC President to the returning Officer or Secretary, without the knowledge of parliamentary party leader. They also denied the allegation as to voluntarily giving up of membership and defection. As there was no whip issued to any of the members with respect to the strategies to be adopted, all the members expressed their opinion as per their consciousness and voted against her.

5. Evidence before the Commission consisted of oral evidence of PW1 to 3 and documentary evidence by way of Exts P1 to P13 on the side of petitioner; oral evidence of RW1 and 2 and documents R1, R1(a) and R1(b) on the side of respondents and Exts.X1 to X6 documents marked through a witness. After evaluating the materials on record, Commission found that the petioners herein had voluntarily given up their membership from W.P(c) No.5931 of 2014-N5the party entailing disqualification and allowed the petitions disqualifying the petitioners from contesting an election in any local authority for a period of 6 years.

6. Petitioners are challenging this order on various grounds. The contentions raised by the learned Senior Counsel Sri. K. Ramakumar appearing for the petitioners herein are : the allegation in the petitions filed by the 2nd respondent was that the petitioners herein defied the whip. But there was not even an attempt to prove its issuance or its service on the petitioners herein as required under Rule 4(1) and (2) of the Kerala Local Authorities (Disqualification of Defected Members) Rules 2000. The author of the whip-Sri. Mohankumar disowned it. Even the direction in the whip, which was marked as Ext.P8/X1 series was to abstain from the discussion of no-confidence motion. But the case of the 2nd respondent was that the whip was to vote against the no confidence motion. Collusion with BJP or LDF was neither pleaded nor proved. When 6 of the INC members had mooted the motion there was no necessity to procure votes. The findings of the commission are not on the basis of pleadings. There is no pleading as to disloyalty. Further it was argued that the petitioners wanted only a change in leadership that too by W.P(c) No.5931 of 2014-N6another member belonging to the INC itself. The want of confidence was not in their party; but only on the

leadership. That being so there cannot be any defection. Moreover when the Congress party themselves expelled the petitioners from the party on the same day, that would only mean that they had not given up the membership voluntarily as expulsion can be only of a member and not of one who ceased to be a member. They were expelled only because the party understood them as members. The Learned Counsel relied on Joseph K. M Vs Babychan Mulangasseri and Others:

2015. 1) KHC111 wherein Babychan Mulangasseri and Others V Joseph K.M:2013(3) KLT633 rendered in identical circumstances is upheld. It is pointed out that the findings of the Commission are not supported by pleadings as in Joseph's case (supra). The importance of pleadings as held in Chinnamma Varghese V State Election Commission of Kerala:

2009. 4) KHC527and in Joseph's case (supra) are squarely applicable in this case.

7. The contention of Sri. S. Sreekumar, the learned Senior Counsel appearing for the 2nd respondent is that petitioners mooted the no confidence motion without getting permission from the Congress Party, which stood proved. Ext W.P(c) No.5931 of 2014-N7P13 minutes will show that 5 out of the 6 petitioners were present when it was decided in the meeting at the office of DCC that the no confidence motion should be defeated. It was pointed out that the testimony of RW1 would also show that there was no permission; according to him permission was sought , but reply was not received from the leadership on his request. He submits that para 4 ,5, and 8 of Ext P1 petition as well as para 4 and 6 of the objection coupled with the testimony of the witnesses would indicate that the conduct of the petitioners amounted to disloyalty and that they have voluntarily given up the membership from the party. According to him, the issue raised herein as well as the factual circumstances are covered by the judgment in W.A. 1854/2015, wherein the judgment in Joseph's case supra is explained observing that no confidence motion was moved in that case with the permission of the Party whereas there is no such permission is given in this case.

8. In the light of the contentions raised on either side, I will look into the findings arrived at by the Commission in Ext P13 order and whether it is supported by the

pleadings and evidence arising thereon. The Commission considered mainly 2 points. (i) whether petitioners voluntarily gave up their W.P(c) No.5931 of 2014-N8membership from Congress party by voting in favour of the no confidence motion moved against the President disobeying the direction or decision of Congress Party and (ii) whether they have become subject to disqualification from membership. After referring to the object of the 1999 Act as held in Kihoto Hollohann Vs Zachillhu (1992) Supp.2 SCC651 commission referred to the judgments Varghese Vs Kerala State Election Commission 2009(3) KLT1regarding the casting of conscience vote, Shiney Augustine V Kerala State Election Commission:

2009. 4)KHC527 as to giving up membership of the political party by moving of no-confidence motion against the President belonging to their own party; Dharmamani Vs Parassala Block Panchayat 2009(3)KLT29wherein conduct of the members of Congress Party outseating the President of their own party, supporting the no-confidence motion moved by opposition, held to be voluntarily giving up of membership even in the absence of a whip, Mohammed Kunhi Vs K.Abdulla :

2010. 4) KLT736 wherein relevance of the conduct of the members was held to be sufficient implication to prove voluntarily giving up of membership. The Commission in para 23 held as follows: W.P(c) No.5931 of 2014-N9"23. xxxx It is with the support of the LDF and BJP members that the no confidence motion moved by these respondents was carried. In the subsequent election to the post of President, the respondent in O.P.12/2013 became the President with the support of BJP member. It has come out in evidence that the Congress members joining with BJP members or LDF members is against the policy of the party. The respondents in the present case have aligned with members belonging to LDF and BJP in getting the no confidence motion carried. Congress party joining with LDF and BJP are against the policy. On a careful consideration of all these facts and circumstances it is clearly found that the respondents have voluntarily given up their membership from the party. So the respondents are found to have become subject to disqualification for being members of Pallickal Grama Panchayat. The points are answered accordingly." Findings in para 17 of the order are also

relevant which read as follows: "For passing the no-confidence motion the respondents wanted the support of the LDF and BJP members and without their support the motion could not have been carried. As the motion was moved in such political equations, the inevitable inference is that a deal was struck by the respondents with the members of LDF and BJP in the Panchayat to get the motion passed. Accordingly the respondents, by defying the decision and direction of their political party had voted in favour of the no-confidence motion along with the LDF and BJP members and ousted the President belonging to their own party. It is in the above set of facts, the questions involved in these cases are to be examined.

18. According to the petitioner, the respondents by their above conduct have voluntarily given up their membership from the Congress Party and thus became subject to disqualification for being members of Pallickal Grama Panchayat. xxxxx"
9. Before going into the pleadings and evidence it is W.P(c) No.5931 of 2014-N10necessary to have a look at Section 3 of the 1999 Act, which reads as follows: "3. Disqualification on ground of defection.-- (1) Notwithstanding anything contained in the Kerala Panchayat Raj Act, 1994 (13 of 1994), or in the Kerala Municipality Act, 1994 (20 of 1994), or in any other law for the time being in force, subject to the other provisions of this Act,-- (a) if a member of a local authority belonging to any political party voluntarily gives up his membership of such political party, or if such member, contrary to any direction in writing issued by the political party to which he belongs or by a person or authority authorised by it in this behalf in the manner prescribed, votes or abstains from voting,-- (i) in a meeting of a Municipality, in an election of its Chairperson, Deputy Chairperson, a member of a Standing Committee or the Chairman of a Standing Committee; or (ii) in a meeting of a Panchayat, in an election of its President, Vice President, a member of a Standing Committee or the Chairman of the Standing Committee; or in an voting on a no - confidence motion against any one of them expect a member of a Standing Committee; (b) if an independent member belonging to any coalition withdraws from such coalition or joins any political party or any other coalition, or if such a member, contrary to any direction in writing issued by a person or authority authorised by the coalition in this behalf in the manner prescribed, votes or abstains from voting,-- (i) in a meeting of a Municipality, in an election of its President, Vice President, a member of a Standing Committee or the

Chairman of the Standing Committee; or (ii) in a meeting of a Panchayat in an election of its President, Vice - President, a member of a Standing Committee or the Chairman of the Standing Committee; or in a voting on a no - confidence motion against any one of them except a member of a Standing Committee; (c) if an independent member not belonging to any coalition, joins any political party or coalition; he shall be disqualified for being a member of that local authority. Explanation.-- For the purpose of the Section an elected member of a local authority shall be deemed to be a W.P(c) No.5931 of 2014-N11member belonging to the political party if there is any such party, by which he was set up as a candidate for the election. (2) The direction in writing issued for the purpose of clauses (a) and (b) of sub-section (1) shall be given to the members concerned in the manner as may be prescribed and copy of such direction in writing shall be given to the Secretary of the Local Self Government Institution concerned. (3) Where any dispute arises regarding the direction issued under this section between the political party or coalition concerned and the member authorised in this behalf as prescribed under sub-section (2), the direction in writing issued in this regard by the person authorised by the political party from time to time to recommend the symbol of the political party concerned for contesting in election shall be deemed to be valid." The Commission found that the no confidence motion could have been carried only with the support of LDF and BJP for which there was a deal. Further that Ambikakumari got elected as President in the subsequent election with the support of BJP. Congress party joining with the BJP and LDF was contrary to the policy of Congress party. Hence the petitioners have voluntarily given up their membership from the party.

10. In this context it is necessary to examine the pleadings and evidence arising in the case. The only allegation in the petition regarding support from other political parties is in paragraph 5 which reads as follows: "The respondent as a sequel to his plan to outseat the petitioner from the post of President, the respondent W.P(c) No.5931 of 2014-N12and some others of Indian National Congress including the Vice President Mr. Pallikkal Naseer @ S. Naseer in connivance with BJP and LDF mooted no confidence motion against the petitioner." But there was no evidence for the said allegation in the petition. Ext P6 notice marked before the Commission by which no confidence motion was mooted was signed by the 6 petitioners herein

only, all of whom belonged to INC. 2nd respondent did not have a case either in the petition or when she was examined, that the no confidence motion was carried with the support of BJP or LDF and or else it could not have been carried. On going through Exts.P1 to P6 petitions, I do not find any allegation regarding any deal with them as found by the Commission. There is nothing in evidence also to even indicate either that there was a deal with LDF or BJP or that the motion could be carried only with their support. Out of the 13 members, the 2nd respondent did not attend the meeting and Sri. Asbar did not vote. There were 6 members of INC who mooted the motion and voted in favour of the motion, when the number of members voted was only 11. It cannot be correct to hold that their support was necessary for carrying the motion. Therefore I do not find any basis for the aforesaid findings of the Commission. Similarly W.P(c) No.5931 of 2014-N13nothing was stated in the petition regarding the election of Ambikakumari or support if any given by BJP for her in the subsequent election. It is pertinent to note the deposition of petitioner that she voted in favour of CPI(M) candidate in order to defeat Ambikakumari. However the subsequent election was conducted after the expulsion of petitioners herein from the party. Therefore the finding as to voluntarily giving up their membership on that ground also cannot be accepted. In the absence of any materials on record for the finding of the Commission that there was a deal with LDF and BJP to carry the no confidence motion and that that without their support it could not have been carried, the conclusion arrived at by the Commission that petitioners voluntarily given up their membership is nothing but perverse, based on materials other than on record.

11. In paragraph 17, Commission found that the petitioners herein voted in favour of the no confidence motion, defying the decision and direction of the political party, along with BJP and LDF and ousted the President, even without rendering any specific finding as to the service of whip on the petitioners. It found that the petitioners were fully aware of the W.P(c) No.5931 of 2014-N14decision and direction of the DCC President before the motion was taken up for discussion. In this context it is necessary to examine the pleadings and evidence adduced.

12. In para 6 of the petition, the case of the 2nd respondent was the whip of DCC President was served by affixture by the Vice President Adv Sri. Sudarshanan

Pillai and it was read over in the meeting by Mr. Asbar. In the meeting. She deposed that the whip was served by affixture. In the cross examination she stated that the copy of whip addressed to Asbar, another member of the INC in the Panchayat, who though attended the meeting on 10.4.2013, abstained from voting, reached the Panchayat only at 11.45 AM, whereas the discussion on no confidence motion was at 11 AM. Sri. Jayakrishnan, PW2-deposed that the DCC President had entrusted the whip to him to serve on the petitioners and other members of INC in the Panchayat, as he is the President, Navayikulam Block and X1 series of whip were affixed on the residence of the petitioners herein. Sri. Mohankumar who is the President of DCC who was examined as PW3 deposed that he had entrusted RW2 Sudarshanan to serve the whip directing its members to abstain from discussion. Sri. Sudarshanan was W.P(c) No.5931 of 2014-N15examined as RW2 who deposed that the whips were not served and that he did not entrust PW2 Sri. Jayakrishnan or anybody else to serve the whip; photocopy of whip alone was given to Sri. Jayakrishnan on his request and that too on 10.4.2013. Thus the the service of whip on the other members-petitioners herein was not proved. Moreover her allegation in the petitions was that the whip was to vote against the no confidence motion. In Ext.P8 as well as X1 series of whips the direction was to abstain from the discussion. In case the whip was to vote against the no- confidence motion, as alleged in the petition, the 2nd respondent and Asbar who did not participate/vote disobeyed the whip, as contended by the Senior Counsel for the petitioners.

13. One of the allegations in the petition was that the no confidence motion was mooted without permission from the DCC. According to RW1 permission was sought but no decision was communicated. It has come out in evidence that there were demands from petitioners to remove from the Presidentship; there was a meeting on 7.4. 2013 convened by the DCC, in which all the members of INC in the Panchayat attended and petitioners herein had demanded the removal of President. Ext P13 minutes show that the decision taken therein was to defeat W.P(c) No.5931 of 2014-N16the no confidence motion. According to RW1, they were not informed of any decision. According to PW3-the President of DCC, he came to know only later that all the 6 out of the 8 INC members were against the President and that the no confidence motion was mooted by the members

themselves and the direction was issued in such circumstances.

14. Yet another question is whether a member who is already expelled from the party can be proceeded against for voluntarily giving up his membership. Ext P11 series expelling petitioners from the party were issued by Secretary of DCC on the very same day on which the no confidence motion was carried ie on 10.4.2013, for the reason that petitioners voted in favour of the no confidence motion defying the whip. As rightly contended by the learned Senior Counsel, one cannot be expelled from membership once he ceased to be a member. From Ext P11 series of letters of expulsion of petitioners from membership, show that the conduct of the petitioners did not amount to voluntarily giving up of their membership even according to the party leadership.

15. Now it is necessary to examine the judgments relied on by either side. According to learned Senior Counsel Sri. W.P(c) No.5931 of 2014-N17Ramakumar, the issue involved herein is covered by the Division Bench judgment of this Court in Joseph K. M Vs Babychan Mulangasseri and Others:

2015. 1) KHC111 Babychan Mulangasseri and Others V Joseph K. M :

2013. 3) KLT633and Chinnamma Varghese V State Election Commission of Kerala:

2009. 4) KHC527 It was argued that the election commission's findings are not supported by the pleadings. Unless there are specific pleadings putting opposite parties on notice of the specific grounds enabling the parties to answer each and every contention and is sought to be asserted against them and what are the rights or obligations sought to be enforced against them, no evidence can be permitted to be adduced or conclusions arrived at in that regard. The relevant portion in Chinnamma's case is as follows:

"9. Incurring of the disqualification under any one of the above mentioned contingencies depends upon the existence of a definite set of facts, which facts are required to be specifically pleaded before they are sought to be proved to establish the allegation of disqualification under the Act.

20. The law of pleadings has been very definite in this country from at least 1930 onwards. In the judgment reported in Siddik Mohamed Shah v. Mt. Saran, AIR 1930 PC57(1), the Privy Council held that no amount of evidence can be looked into upon a plea which was never put forward. The said principle had been approved by the Supreme Court in Kashi Nath v. Jaganat, 2003 KHC W.P(c) No.5931 of 2014-N181694 :

2003. 8) SCC740at paragraph 17 as follows: 'As noted by the Privy Council in Siddik Mohd. Shah v. Saran, AIR 1930 PC571) and Trojan and Co. v. Rm. N. N. Nagappa Chetiar, AIR 1953 SC235when the evidence is not in line with the pleadings and is at variance with it and as in this case, in virtual self - contradiction, adverse inference has to be drawn and the evidence cannot be looked into or relied upon.' 21. The insistence upon a specific plea has a rationale behind it. It is only the pleading in a legal proceeding that puts the opposite parties on notice of what is sought to be asserted against them and what are the rights or obligations sought to be enforced against them. Therefore, the order of the first respondent, insofar as it chose to permit evidence against the appellant herein to the effect that the appellant withdrew from the coalition of LDF, is without any pleading and therefore, in the light of the principle of law extracted earlier could not have been looked into. To that extent we are of the opinion that the first respondent as well as the learned Judge fell in error in coming to the conclusion that such a course." Commission has disqualified the petitioners on the ground that the petitioners herein voluntarily gave up their membership. Those findings are arrived at in the circumstances mentioned in paragraphs 17, 18 and 23 (supra). The contention of the learned Senior Counsel for the petitioners is that there are no pleadings in the petition supporting those findings. Therefore it is necessary to look into the petition filed before the Commission.

16. The allegation in the petition in para 5 is " xxx the respondent and some others of Indian National Congress including the Vice President Mr. Pallickal Naseer @ S. Naseer in W.P(c) No.5931 of 2014-N19connivance with LDF and BJP mooted no confidence against the petitioner." Further in para 8 it is stated: "The respondent has voluntarily abandoned her membership from Indian National Congress which fielded her as a candidate in the General Election. He has

voluntarily abandoned or given up her membership in Congress and moving with the support of others against the will of the Indian National Congress in the Panchayat causing loss of power in one Panchayat and thereby committed defection and voted against the President supported by Indian National Congress in the Panchayat causing loss of power in one Panchayat to Indian National Congress in the Panchayat." Ext P6 is the notice for moving no confidence motion, given by Ambikakumari on 26.3.2013. Signatories to this notice are the 6 petitioners herein i.e the members of INC alone. There is no evidence to prove the allegation of connivance in mooting the no confidence motion. Further Ext P7 will show that the 12 members were present on 10.4.2013 when the no confidence motion was tabled for discussion. Petitioner did not attend the meeting. Sri. Asbar, of Congress party abstained from voting. All the 11 others out of the 12 voted in favour of no confidence motion. As found earlier in paragraph 10, in order to carry the W.P(c) No.5931 of 2014-N20no confidence motion, the support of LDF or BJP was not necessary. At any rate there is neither any pleading that no confidence motion could be carried only with the support of other political parties nor any attempt to adduce any evidence to that effect. The further findings in para 23 of the order Ext P13 cannot be said to have any basis, as already found. Therefore the findings of the Commission are based on extraneous and irrelevant materials. At any rate there are no pleadings to support the findings of the Commission regarding the joining with BJP or LDF either for carrying the motion or in the subsequent election. It is pertinent to note that nothing was stated in the petition regarding the subsequent election.

17. In Babychan Mulangasseri and Others v. State Election Commission and Others 2013(3) KLT633 The President of the Manimala Grama Panchayat, who was the congress parliamentary party leader and supported by all other members of UDF, was outseated by the members of UDF in a no-confidence motion. The allegation was that the no-confidence motion was moved in defiance of of the whip and the directions of the District Congress Committee not to move the no-confidence motion and to vote against it and therefore their W.P(c) No.5931 of 2014-N21conduct would lead to an inference that they have become disloyal to the Congress party and by their own action they became disqualified in terms of Section 3(1)(a) of the Act. Election Commission allowed the petition declaring the

petitioners as disqualified. They approached this court contending that the no-confidence motion was moved with the consent, knowledge and approval of the Congress Party. Relying on the judgment of the Apex Court in Balachandra L. Jarkiholy and Others v. B. S. Yeddyurappa and Others (2011) 7 SCC1 it was contended that if a member of a political party moves a no confidence motion against the President of the same political party, it does not by itself amount to disqualification. This court in para 24 observed as follows: "This is an instance in which majority of the members of INC as well as the coalition decides to move a no-confidence motion and, they vote in favour of the said motion. Other than the evidence of DCC President and the letters issued by him as Exts. P5, P9 and P20 there is no other material to conclude the decisions of INC. It definitely gives an indication that he had instructed the members not to favour the no-confidence motion. The question is, if the members acts against the written direction of the DCC President, can it be stated that the members are guilty of defection.xxx xxx xxxxx What is the authority of DCC President in the matter and what is the extent of control he has over the members is not evident. Definitely the letters he had issued does not amount to a whip. If the bye-laws of the INC party W.P(c) No.5931 of 2014-N22prescribes that the members are to obey the instructions of the DCC President, the Election Commission would have been justified in coming to such a conclusion. Such materials are not available in the case." In the above circumstances the order passed by the Election Commission was set aside. In the present case also the no confidence motion was moved by the members of the same party. There is no evidence to prove that any written direction was served on the petitioners regarding the strategy to be adopted. The judgment in Babychan Mulangasseri (supra) was affirmed in Writ Appeal by judgment in Joseph K. M Vs Babychan Mulangasseri and Others 2015(2) KHC111 The following observations in para 33 of the judgment of the Division Bench is relevant in this context.

"3. xxxxx. In our view, the finding of the Election Commission that, after the no - confidence motion, 1st respondent contested for the post of President against the official candidate of Congress Party and 2nd and 3rd respondents supported him in that election, which would prove that respondents 1 to 3 have voluntarily given up their membership of the party cannot be sustained in the light of the pleadings in Exts. P3 to P5 Original Petitions. Our view in this regard finds support from the

judgment in Chinnamma Varghese's case (supra) in which a Division Bench of this Court after a survey of the case law on the point and on an analysis of the provisions contained in the Act held that, incurring of the disqualification under any one of the contingencies depends upon the existence of a definite set of facts, which are required to be specifically pleaded before they are sought to be proved to establish the W.P(c) No.5931 of 2014-N23allegation of disqualification under the Act. Further, it is only the pleading in a legal proceeding that puts the opposite parties on notice of what is sought to be asserted against them and what are the rights or obligations sought to be enforced against them." Further in para.35, it was found as follows: "xxxxxxxThere is also no material on record to prove that Congress members are bound, as per the bye laws of that political party, to obey the instructions of DCC President.xxx" In para 38 it is held as follows:

"8. What constitute defection is deserting the political party and not deserting the leader of that political party. An act of a member expressing no - confidence in the leader of the political party would not amount to voluntarily giving up of his membership of that political party. Our view in this regard finds support from paragraphs 118 to 122 of the judgment of the Apex Court in B. S. Yeddyurappa's case (supra) which we have already quoted in paragraph 30 of this judgment. When a member expressed his no - confidence in the leader of the political party such act by itself would not amount to an act of floor crossing or political disloyalty" The case of the petitioners herein also is that they wanted a change in the leadership alone, for which they mooted the no confidence motion and in the absence of any written direction they voted in accordance with their consciousness.

18. The learned Senior Counsel Sri. S. Sreekumar contended that the judgment in Joseph's case (supra) is distinguished and explained in the judgment dated 4.3.2015 in W.P(c) No.5931 of 2014-N24W.A. 1854/2014, seeing that the no confidence motion was not mooted with the prior permission of the political party. It was argued that the case of petitioners herein was identical and since the petitioners conduct proved disloyalty to the INC there was every reason to justify the findings of the Commission.

19. On a perusal of the judgment it is seen that the no confidence motion was signed by 4 members from Congress, 2 from Kerala Congress and LDF members. The Division Bench observed that it was not a case where members of same political party had moved the no confidence motion for removing their elected leader. Therefore it was found that they got the support of other political parties while mooting the no-confidence motion itself. At the same time in Joseph's case the no confidence motion was mooted by members of the same party. In the case pertaining to the W.A.1854/2014, it was found from RW1 had admitted that they had defied the direction of DCC President. It was in those circumstances that the order of the election commission was upheld. Moreover they mooted the no confidence motion along with members of LDF. The findings of this court in para 24 of Babychan Mulangasseri's case and in para 35 of Joseph's case supra as to the binding nature of the W.P(c) No.5931 of 2014-N25instructions of DCC President also will squarely apply in this case also. It will apply to the question regarding prior permission for mooting the non confidence motion also.

20. Apart from the judgment in W.A. 1854/2014, Sri. Sreekumar relied on the following judgments: Shiney Augustine V Kerala State Election Commission:

2009. 4) KHC527 Dharmamani Vs Parassala Block Panchayat:

2009. 3)KLT29 Varghese V Kerala State Election Commission :

2009. 3) KLT1 Mohammed Kunhi Vs K.Abdulla :

2010. 4) KLT736 .

21. The object of the 1999 Act, as found by the Apex Court, 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. Section 3(1)(a) of the 1999 Act provides for 2 conditions under which a member can be disqualified: (i) if he has voluntarily given up the membership of his political party (2) he acts in defiance of a whip/direction issued by the political party. In Dharma Mani's case (supra) this court held that disqualification can be ordered on either of the grounds which are independent of

each other. W.P(c) No.5931 of 2014-N2622. In Dharma Mani v. Parassala Block Panchayat:

2009. (3) KLT29 2009(2) KHC839 petitioners were elected to the Parassala Block Panchayat as official candidates of INC. INC won in 8 out of 13 divisions and LDF won in 5 divisions. The petitioners along with the five members belonging to LDF signed the notice to move no confidence motion against the President and Vice President belonging to their own party, voted and carried the same. This court found that their conduct was sufficient to prove that they voluntarily gave up their membership of their party by voting and carrying the no confidence motion entailing disqualification. It was held that it was not necessary to hold that the member has violated the whip in order to hold that he has voluntarily abandoned the membership of his political party and the grounds for disqualification are distinct and are not interlinked.

23. In Varghese v. Kerala State Election Commission:

2009. 3) KLT1 2009(3) KHC42writ appellants, who were elected to the Municipal Council as official candidates of the Indian National Congress voted in favour of the no confidence motion moved by the rival political parties . It was held that they had incurred the disqualification of voluntarily giving up W.P(c) No.5931 of 2014-N27membership in the political party. 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. It was held that 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.

24. In Shiney Augustine's case (2009 (4) KHC527,it was held that if a member was instrumental in moving, voting and carrying the no confidence motion against another member of the party, though no whip was issued, it can be concluded that the member had voluntarily given up membership of the political party to which she belonged. There the petitioner, along with others, was instrumental in moving, voting and carrying the no confidence motion against A.J.

Jose of LDF. She was considered as the Parliamentary Party Leader and Chief Whip of the Kerala Congress (J) and LDF. It was found that she had voluntarily given up her membership in the political party to which she belonged, namely, Kerala Congress (J). It is pointed out that the judgment therein was reversed in Writ Appeal. W.P(c) No.5931 of 2014-N2825. Muhammedkunhi v. Abdulla 2010 (4) KLT736was a case where the petitioners were elected to the Meenja Grama Panchayat as candidates of Indian Union Muslim League under the UDF. Out of the 14 members of the Panchayat, UDF won 6 seats with 3 Muslim league (i.e petitioners and the 2nd respondent), 2 from INC and 1 from Kerala Congress (M.). 4 each were won by The B.J.P and L.D.F. Petitioners, joined with BJP in moving, voting and carrying no confidence motion against the President who was their own member and the Vice President who was a member of the UDF and thereafter in the subsequent election voted against the candidates of UDF. Election Commission ordered their disqualification on the finding that they had voluntarily given up membership of their political party. This court upheld the same. The learned Single Judge, after considering various judgments on the issue, held that the petitioners who were elected as members of a particular political party and Front by the electorate, are answerable to the electorate and that disloyalty to their party was evident and will attract the vice of disqualification, following the judgment in Varghese' case supra. W.P(c) No.5931 of 2014-N2926. But in in Balachandra L. Jarkiholy and other v. B.S. Yeddyurappa & Ors :(2011) 7 SCC1 (which was followed in Joseph's case supra) the Apex Court upheld the finding of the High Court that an act of no confidence in the leader of the legislative party does not amount to his voluntarily giving up the membership of the political party and thus the act of expressing no confidence in the Government formed by the party, with a particular leader as the Chief Minister, would not also amount to a voluntary act of giving up the membership of the political party. Following the above judgment of the apex court, a learned Single Judge of this court in Babychan Mulangasseri's case, wherein the members of UDF outseated the President they elected from the UDF, held that moving against the leader of their own party will not come within the purview of S. 3 (1)(a), in the absence of pleadings to that effect and strong proof to support such pleadings. The W.A filed against that was dismissed by Joseph's case supra.

27. In this Writ Petition also the petitioners herein wanted only a change in leadership, which they had been demanding before the leadership. Similarly, the findings of the Commission are not supported by the pleadings as held in Chinnamma's case W.P(c) No.5931 of 2014-N30(supra). In the light of the above judgment of the Apex Court and that of the Division Bench of this court in Joseph's case and Chinnamma's case, and in the light of subsequent expulsion of petitioners from the party, petitioners cannot be said to have voluntarily given up their membership from the party and hence there is no reason for disqualifying the petitioners on the ground of defection under Section 3 (1)(a) of the 1999 Act and the order passe by the Commission is liable to be set aside. In the above circumstances Ext.P13 common order passed by the Kerala State Election Commission in O.P. Nos.6 to 12 of 2013 is set aside and the Writ Petition is allowed. Sd/- (P.V.ASHA, JUDGE) rtr/

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