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Jancy Chandy Vs. Jose Puthenkala

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Court : Kerala

Decided On : Aug-17-2006

Reported in : 2006(4)KLT116

Judge : V.K. Bali, C.J. and; Kurian Joseph, J.

Acts : Kerala Local Authorities (Prohibition of Defection) Act, 1999 - Sections 3, 4(2), 4(3) and 7; Constitution of India - Articles 226 and 243F; Kerala Panchayat Raj Act, 1994; Kerala Municipality Act, 1994; Kerala Local Authorities (Disqualification of Defected Members) Rules, 2000 - Rule 4 and 4(2)

Appeal No. : W.A. No. 1855 of 2005

Appellant : Jancy Chandy

Respondent : Jose Puthenkala

Advocate for Def. : Bechu Kurian Thomas,; Murali Purushothaman,; Paul Jacob

Advocate for Pet/Ap. : K. Ramkumar, Adv.

Disposition : Appeal dismissed

Judgement :

Kurian Joseph, J.

1. Politics without principle is one of the seven capital sins to be deprecated, according to the Father of our Nation, Mahatma Gandhi. Political defection is one of the grave vices in that group. In the statement of objects and reasons for the Fifty-second Amendment to the Constitution introducing Tenth Schedule in order to prevent frequent political defects, it is stated as follows:

The evil of political defections has been a matter of national concern. If it is not combated, it is likely to undermine the very foundations of our democracy and the principles which sustain it.

While upholding the constitutional validity of the Tenth Schedule, the Supreme Court in Kihoto Hollohan v. Zachillhu (1992) Supp. 2 SCC 651 observed as follows:

A political party goes before the electorate with a particular programme and it sets up candidates at the election on the basis of such programme. A person who gets elected as a candidate set up by a political party is so elected on the basis of the programme of that political party....If a member while remaining a member of the political party which had set him up as a candidate at the election votes or abstains from voting contrary to any 'direction' issued by the political party to which he belongs or by any person or authority authorised by it in this behalf, he incurs the disqualification.... A political party functions on the strength of shared beliefs. Its own political stability and social utility depends as such shared beliefs and concerted action of its members in furtherance of those commonly held principles. Any freedom of its members to vote as they please independently of the political party's declared politics will not only embarrass its public image and popularity but also undermine public confidence in it which, in the ultimate analysis, is its source of sustenance-nay indeed its survival.... To vote against the party is disloyalty. To join with others in abstention or voting with other side smacks of conspiracy.

Under the mandate of Article 243-F of the Constitution of India, the Kerala Local Authorities (Prohibition of Defection) Act 1999 was enacted. To quote from the statement of objects:

An Act to prohibit defection among members of local authorities in the State of Kerala and to provide for disqualification of the defecting members for being members of the local authorities.

Section 3 provides for disqualification on the ground of defection 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 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 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 a voting on a no-confidence motion against any one of them except a member of a Standing Committee;

(b) if an independent member belong 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 its 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 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 an 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 this section an elected member of a local authority shall be deemed to be a member belonging to the political party, if there is any such party, by which he was set up as a candidate for the election.

Thus a member belonging to any political party can be disqualified if he (1) voluntarily gives up his membership, or (2) votes or abstains from voting contrary to any direction in writing issued either by the political party to which he belongs or by the person authorised by it in a meeting convened for election of Chair Person, Deputy Chair Person or a member of the Standing Committee or the Chairman of the Standing Committee of a Municipality, President, Vice President, a member of the Standing Committee or the Chairman of the Standing Committee of a Panchayat as the case may be, or in a voting on a no-confidence motion against any one of them except a member of a Standing Committee. An independent member belonging to a coalition, if withdraws from the coalition or joins any other political party or other coalition or acts in violation of the authorised direction also invites disqualification. If an independent member not belonging to any coalition joins any political party or coalition, he is disqualified to be a member of that local authority. Any question arising on the disqualification on the ground of defection is to be decided by the State Election Commission under Section 4 of the Act. If the Commission holds that a member is disqualified on the ground of defection, he shall cease to be a member from the date of such decision and shall be disqualified for contesting as a candidate in an election to any local authority for six years from that date under Section 4(3) which reads as follows:

4(3). Where the State Election Commission decides that a member has become subject to disqualification under Sub-section (2), he shall cease to be a member from the date of such decision and shall be disqualified for contesting as a candidate in an election to any local authority for 6 years from that date.

2. The Kerala Local Authorities (Disqualification of Defected Members) Rules 2000 have been promulgated under Section 7 of the Act. Rule 4 provides for the procedure in the matter of giving direction by authorised person to the members concerned. The Rule reads as follows:

4. The manner in which a Political party or Coalition may give direction to its members: - (1) If a political party or its coalition gives any direction in respect of the casting vote in an election or in a voting as has been mentioned in Clause (a) or Clause (b) of Section 3. it shall be in writing and such a direction shall be given, -

i) in case of a member who belonging to a political party or is considered to be included in it; by the member whom the member of the political party or the members of such political party and the members considered of such political party and the members considered to be included in it in the local authority concerned elect for the purpose, on majority basis from among themselves; and

ii) in the case of a member who belongs to a coalition or considered to be included in it; by the member whom the member of the said coalition or the members of such coalition and the members considered to be included in it in the local authority concerned elect for the purpose, on majority basis from among themselves.

2) The political party and the coalition having representation in the local authority shall, immediately when the member who shall issue direction under sub -rule (1) is elected, inform the fact to the Secretary.

3) While issuing a direction under Sub-rule (1) 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 affixing it shall be done in

the presence of at least two witnesses.

The member thus elected for the purpose of issuing the direction in terms of Rule 4 read with Section 3 is known as whip in the common parlance. The word is also synonymously used for the direction issued by him. The whip, no doubt, is against the very basic principles of democracy. But in view of the unhealthy trends of politics without principle noticed in the past more than four decades, the anti-defection law was enacted introducing for the first time the concept of whip.

3. Now the short facts. The appellants are the respondents in the respective Writ Petitions. In the year 2000, the appellants along with the party respondents were elected from different wards of Kadutaruthy Grama Panchayat. There was a coalition of various political parties formed as United Democratic Front (UDF) and the Kerala Congress (M) was one of the political parties in the coalition. The appellants and the party respondent contested the election as members of the Kerala Congress (M). On 9-9-2003, it is alleged that meetings were held to elect the whip, both of the members belonging to the UDF coalition as well as of the Kerala Congress (M) and one Sri. E.M. Chacko was elected as whip. The matter was communicated to the Secretary of the Grama Panchayat on 12-9-2003. A no-confidence motion was moved by the opposition against the Vice President of the Panchayat. The same was scheduled for voting on 5-12-2003. Sri.E.M.Chacko on 26-11-2003, issued a direction to the appellants to vote against the motion. Discarding the direction the appellants voted in favour of the motion and the motion was carried. The first respondent filed three petitions before the Kerala State Election Commission seeking disqualification of the appellants. By common order dated 7-3-2005 the Commission dismissed all the petitions on the ground that the election of whip on 9-9-2003 was not fully established since the same had not been intimated immediately as stipulated under Rule 4(2). However, the Commission found that Sri. Chacko had issued a direction dated 26-11-2003 to the appellants, the same had been duly served on them and that the appellants had acted contrary to the direction. It was also found that the appellants had not voluntarily given up their membership in the political party. The order of the Election Commission was challenged in the Writ Petitions. By common judgment dated 30-8-2005, the learned single Judge set aside the order and declared that

the appellants had incurred disqualification in terms of Section 3 of the Act and hence the appeals.

4. Sri. Ramkumar, learned Counsel appearing for the appellants contends that the Writ Petition is not maintainable. Judicial review, particularly on re-appreciation of the facts, is not called for, since the decision of the fact finding authority namely the State Election Commission is final in view of the mandate under Section 4(2) of the Act, it is submitted. Still further it is contended that, in any case, the learned single Judge should not have declared that the appellants were disqualified; that function being that of the Commission. Sri. Bechu Kurian Thomas, on the other hand, contends that it is not a case of re-appreciation of the evidence; the attempt is only to see whether the findings entered by the Commission are perverse in the sense that such findings whether are possible on the materials available on record. The declaration is only the consequential and inevitable course. In view of the serious dispute on the facts noted by the Commission, the learned single Judge called for the records. On scrutiny of the records, the learned single Judge noted that the findings with regard to the minutes of the meeting of the members of the coalition and also the members of the Kerala Congress (M) on 9-9-2003 were not proper and correct. Tampering of the records could not have been ruled out, observed the learned single Judge. The learned single Judge also noted that the Secretary of the Grama Panchayat at the relevant time had no case of non-receipt of intimation regarding the election of the whip on 9-9-2003 and the minutes thereof. In fact the Secretary deposed before the Commission that the receipt of the communication regarding election of whip had been duly entered in the distribution register. Then the remaining question was only regarding the dispute as to whether the election of the whip had been immediately communicated to the Secretary of the Grama Panchayat. The Election Commission it appears has strained too much in referring to the dictionary meaning of the word 'immediately' and came to the conclusion that the alleged election on 9-9-2003 had been communicated only on 12-9-2003 and thus there was no proper compliance of Rule 4(2) of the Rules. The expression 'immediately' and for that matter any expression has to gather its meaning from the context where it appears. The true meaning of the expression and the intention of the legislative in using the expression can be gathered only on analysing the factual background of the

events. It has to be examined in relation to the conduct of the parties and the evaluation of the events at the relevant time. At the outset it has to be noted that the election of the whip was on 9-9-2003. It is not in dispute that intimation was given on 12-9-2003. The no-confidence motion was slated to be held only on 5-12-2003 and the whip was issued on 27-11-2003, evidently after two months of the disputed election of the whip. Neither the then Secretary of the Grama Panchayat who received the intimation on 12-9-2003 or for that matter any member in the Panchayat including the appellants, did have any grievance on the election of the whip at the relevant time. There is no evidence either regarding any other whip being issued or served on them. Therefore it cannot even be assumed for a moment that the election of the whip was stage-managed on 9-9-2003 so as to thwart the no-confidence motion which was moved only on 5-12-2003. It will also be profitable to refer to one decision of the Supreme Court with regard to the interpretation of the word 'immediately,' in this context. In Tulsiram v. State of Madhya Pradesh : 1984 CriLJ1731 it has been held as follows:

It is not to be understood to mean the very next instant; the very next hour, that very day or the very next day. It must be construed in its setting. It is no use turning to dictionaries. Dictionaries give variegated meanings to words. What meaning is to be adopted depends on the context.

Thus in the context of events as noted above and in the background of the conduct of the parties noted above, it cannot be said that there was no due intimation of the election of the whip on 9-9-2003. The Election Commission could not have reasonably come to a finding regarding the election of whip on 9-9-2003, and the alleged delayed intimation thereof on 12-9-2003 as grounds for not disqualifying the appellants, particularly since there is no case for the petitioners that they had not duly received the communication dated 27-11-2003 from Sri. Chacko regarding the course to be adopted in the meeting for considering the no-confidence motion against the Vice Chairman to be held on 5-12-2003. It is the spirit of law that ought to be followed and not the letter of law while interpreting laws involving moral principles. Under the anti-defection law what is not morally right cannot be legally just. The conduct of the political leaders should not only be legally correct but morally right also.

5. The finding regarding disqualification on the ground of giving up the membership in the political party voluntarily is also not correct. The Tribunal has noted that the appellants failed to attend one parliamentary party meeting. However, that is justified stating that the superior committee of the political party had called a meeting of the parliamentary party and the appellants had attended the said meeting. The parliamentary party meeting of the members is to be convened by the Convenor of the Parliamentary party and not by any other committee or person. Therefore, the defence that the appellants had attended the meeting convened by the 'superior committee' of the party is not tenable.

6. The remaining question to be considered in this case is whether the learned single Judge should have remitted the matter to the Commission for the declaration regarding disqualification. The writ court having perused the records available on the file of the Election Commission found that the Commission could not have reasonably come to a conclusion as in the impugned order. On perusing the records the learned single Judge also held that the appellants were disqualified since they had violated the whip issued to them. In view of such a factual finding what remained was only the declaration. For such a normal and formal order it is not necessary for the writ court to remit the matter to the Commission. It will be too technical an argument that this Court under Article 226 does not have the jurisdiction while exercising the power of judicial review to pass an order which the Commission ought to have passed in the facts and circumstances of the case. This is all the more so since any delay in the matter of declaration would be to the detriment of democracy. Since the appellants have betrayed the confidence of the voters they should not be allowed to cling on to their office. It has also to be noted that a disqualified member under law, is disabled from contesting as a candidate in an election to any local authority for six years from the date of declaration of disqualification by the Election Commission. The Election Commission passed the impugned order on 7th March 2005. We have already found that on the materials available on record, the Election Commission could not have but disqualified the appellants. Therefore, it is made clear that the appellants shall be deemed to be disqualified for the purpose of Section 4(3) of the Act from the date of the order passed by the Election Commission, namely 7th March, 2005.

7. The jurisdiction under Article 226 of the Constitution of India cannot be cribbed and cabined by technical pleas. It is meant to reach wherever injustice is found. In order to prevent injustice, the writ court should in appropriate cases pass orders or give directions which the concerned statutory authorities could have and should have passed. That position is settled by a decision of the Supreme Court in Controller and Auditor General of India v. K.S. Jagannathan. To quote:

Article 226 is designedly couched in a wide language in order not to confine the power conferred by it on the High Courts only to the power to issue prerogative writs as understood in England. The High Courts exercising jurisdiction under Article 226 can issue 'directions, orders or writs' so as to enable the High Courts to reach injustice wherever it is found and to mould the reliefs to meet the peculiar and complicated requirements of this country. The High Courts have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can compel the performance in a proper and lawful manner of the discretion conferred upon the government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the court may itself pass an order or give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion.

Thus we do not find any merit in these Writ Appeals. They are accordingly dismissed subject to the clarification regarding the date of commencement of disqualification as clarified by us above.

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