**BEFORE THE KERALA STATE ELECTION COMMISSION,**
**THIRUVANANTHAPURAM**

**PRESENT: SHRI. A SHAJAHAN,**
**STATE ELECTION COMMISSIONER**

**Tuesday, the 2nd day of July, 2024**

**O.P. No. 35 OF 2021**

**Petitioner** : Milsy Shaji
W/o. Shaji,
Aadukuzhiyil House,
Paingottoor P.O., Kadavoor Village,
Kulappuram Kara, Kothamangalam.

(Member, Ward No.13
Paingottoor Grama Panchayat)

**(By Adv. A.Santhosh Kumar)**

**Respondent** : Nizar Muhammed,
S/o Muhammed,
Veliyathkudiyil Veedu,
Paingottoor.P.O, Kadavoor Village,
Kulappuram Kara, Kothamangalam
(Member, Ward No.10,
Paingottoor Grama Panchayat)

**(By Adv. Praveen C.P)**

## ORDER

This is a petition filed under section 3 and section 4 (1) of the Kerala Local Authorities (Prohibition of Defection) Act, 1999 for declaring that the respondent has committed defection and hence became disqualified to continue as a member of Paingottoor Grama Panchayat and also for declaring him as disqualified to contest as candidate in any election of local authority for a period of six years.

2. The averments in the petition are in short, as follows:

The Petitioner and respondent are elected members of Paingottoor Grama Panchayat in the general election held to the Local Self Government Institution, during December 2020. The Petitioner contested and was elected as the official candidate of Indian National Congress, in official symbol "Hand". The Respondent contested as an independent candidate supported by UDF. After the election, both the petitioner and the respondent had given sworn declaration before the Secretary, Paingottoor Grama Panchayat, showing their association with political party as INC. On the basis of the same, the Secretary of Paingottoor Grama Panchayat prepared the register showing the political affiliation of the elected members and wherein it is stated that the Respondent is an independent candidate supported by INC and UDF. There are 13 ward members in Paingottoor Grama Panchayat. Out of which UDF got 6 seats viz. 5 members belong Indian National Congress (INC) and 1 independent member supported by INC. The LDF coalition has 6 members, viz. 3 members belongs to CPI(M), 2 members belong to Janathipathya Kerala Congress and 1 belongs to Kerala Congress (M). One independent member not belonging to any political party or coalition was also elected.

3. Thereafter the respondent was elected as the Vice President of the Panchayat as the candidate of INC and UDF. However, subsequently respondent was resigned from the post of Vice President without any prior intimation to the INC or UDF as part of conspiracy with the LDF members. Within days after the resignation of respondent, the LDF faction moved no-confidence motion against the Panchayat President Smt. Cissy Jaison , who was elected to the post with the support by INC and UDF. The District Committee President of the INC issued whip to the respondent directing him to abstain from the meeting of no confidence motion. However contrary to the direction respondent attended the meeting held on 15.09.2021 and voted in favour of the no confidence motion, which led to filing OP No. 27/2021 before the Commission by the petitioner.

4. After the removal of President through the no confidence motion held on 15.09.2021 the election for the new President was scheduled on 20.10.2021. The petitioner herein was fielded by INC/UDF to contest election to the post of President. INC through the Ernakulam District Committee President of INC issued written direction by way of whip dated 11.10.2021 to all elected members of the INC, including the respondent. It was specifically directed in the whip to vote in favour of the petitioner for the post of President. Whip was tendered directly to the respondent but he was not amenable to receive the same. Therefore the whip was sent by registered post with acknowledgement due. But again respondent refused to accept the same and it was returned to the sender with the postal endorsement "unclaimed".

5. In the election held on 20.10.2021, the respondent in blatant violation of the whip voted in favour of the candidate fielded by the rival LDF coalition and thereby the official candidate of INC/UDF was defeated. Respondent was fully aware of the whip issued by INC to him but he intentionally defied the

whip and thereby his political party lost governance of the Paingottoor Grama Panchayat. From the above facts it is clear that respondent has withdrawn from INC and UDF, also defied the valid direction given by his party and thus the respondent has voluntarily abandoned his membership from the INC/UDF, which fielded him as a candidate in the general election. Respondent has committed defection and thereby liable to be disqualified under Kerala Local Authorities (Prohibition of Defection) Act, 1999.

6. The contentions raised by the Respondent in his objection are in short as follows:

The Original Petition is not maintainable either in law or on facts. In the general election to the Local Self Government Institutions held during December, 2020, respondent contested the said election from Ward No.10 as directed by Muslim League. The respondent has acted only in accordance with the directions issued by the authorized persons of Muslim League. UDF was constrained to elect respondent as the Vice President as they could not rule the Panchayat by its own without the support of independent members. The period of Smt.Cissy Jaison as the President of the Panchayat was absolutely a period of maladministration, mismanagement, corruption, mis-utilization of funds etc. As the atrocities became intolerable, this respondent was constrained to resign from the post of Vice President of the Panchayat by giving prior intimation to all the authorities concerned. Respondent was never given any written direction by way of whip dated 11.10.2021 as alleged. The Ernakulam District Committee President of INC was not competent to issue any such direction to the respondent. The petitioner has no case that she has communicated the copy of the whip to the secretary of the Paingottoor Grama Panchayat as provided under Rule 4 (2) of Kerala Local Authorities (Disqualification of Defected members) Rules. The respondent has not

violated or disobeyed any direction or whip and he was not aware of the alleged intention of the political party INC. Respondent has not committed any defection and hence is not liable to be disqualified under the Kerala Local Authorities (Prohibition of Defection) Act, 1999.

7. The evidence consists of the oral depositions of PW1 to PW3, RW1 and RW2 and the Exhibits A1 to A5, B1 and X1 and X2.

8. Both the sides were heard.

9. The following points arise for consideration

(i) Whether the respondent contested the election as an independent candidate supported by INC as alleged?

(ii) Whether the whips issued by the INC is binding on the respondent as alleged?

(iii) Whether copy of the whip was served to the Secretary of the panchayat as provided under rule 4 (2)?

(iv)Whether the respondent has committed defection as provided under section 3 of the Kerala Local Authorities (Prohibition of Defection) Act, 1999 as alleged?

(v) Whether the petitioner is entitled to the declaration as prayed for ?

10. Points (i) to (v):-There is no serious dispute with regard to the *locus standi* of the petitioner to file the petition or jurisdiction of the Commission to entertain the petition. As regards of the merit of the matter, Ext. A1 is the nomination paper submitted by the respondent which would show that respondent is an independent candidate supported by UDF. Ext.X1 is the declaration filed by the respondent immediately after the election under rule 3 (2) of Kerala Local Authorities (Disqualification of Defected members) Rules, which would show that respondent is a member of UDF coalition. Ext.X2 is the register maintained in the panchayat under rule 3 (1) of Kerala Local Authorities

(Disqualification of Defected members) Rules, to record the party affiliation of elected members of the panchayat. Ext.X2 would go to show that respondent is an independent member supported by INC in UDF coalition. The said authentic documents indicates that no other constituent of UDF, other INC has representation in the Paingottoor Grama Panchayat. During the cross examination of respondent as RW1, he admitted the veracity of entries in Ext.A1 nomination paper, Ext. X1' declaration and Ext.A2 Party Affiliation Register.

11. PW3, the District Committee President of INC, who issued whip to the respondent was examined from the side of petitioner. He categorically deposed before the Commission that respondent was a candidate supported by INC in the general election and he had issued whip to the elected members of INC, including the respondent prior to the president election held on 20.10.2021. Respondent was directed in the whip to cast vote in favour of Smt Milsy Shaji, who was fielded by the INC/UDF for the post of President. The whips were served to the respondent through Mandalam President of the INC. The whip to the respondent was served by registered post by Mandalam President of the INC. But it was not served through affixture. The copy of the whip was served to the secretary of the panchayat through e-mail.

12. The evidence adduced by PW3-District Committee President of the INC, who issued whip to the respondent would show that the respondent was an independent candidate supported by INC. There is no cross examination on the above evidence. Admittedly INC or UDF has not fielded any other candidate to the constituency, where the respondent was contested election as a candidate. It appears from nomination, declaration, statutory register, etc., the respondent was truly recorded as an independent candidate supported by the INC in the UDF coalition.

13. Ext. A3 is the whip issued to the respondent. It is pertinent to note that in Ext.A3 copy of whip was not marked to the secretary of the panchayat. Petitioner has also produced the returned postal cover containing the whip, which was marked as Ext. A4. It appears from the Ext.A4 that the whip was returned to sender with the endorsement "unclaimed" by the postal authorities.

14. The Explanation to Section 3 (3) of the Kerala Local Authorities (Prohibition of Defection) Act, 1999 created a deeming provision that 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 or given support as a candidate for the election.

Explanation to Section 3(3) reads as follows;-

"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 or given support as a candidate for the election."

15. In the judgment in *Sujith Sreerangam v. Sunil Sradheyam* [2023 (3) KHC 482], the Hon'ble High Court has relied on the statutory fiction created by the Explanation to Section 3 that even if a member though has no formal membership in a political party, he can still be treated as a member of the party in order to apply Section 3(a) of the Defection Act, 1999. Explanation 3 is equally applicable to section 3 (b) also.

16. Even though respondent has a contention that he was fielded as a candidate by IUML, the respondent has failed to prove the same. Respondent has not produced the direction allegedly issued by IUML directing him to vote in favour of President candidate sponsored by LDF. Respondent has produced

the agreement dated 23.10.2020 allegedly executed between the respondent and one Mohammed Veliyathukudi, who is allegedly the President of IUML Paingottoor panchayat committee, which is marked as Ext.B1. In view of the authentic documents such as Ext.A1,X1 and A2, Ext B1 is not sufficient to prove the existence of such a direction by IUML. There is clear provisions in para 8 of the Local Authorities Election Symbols (Reservation and Allotment) Order, 2017 for setting up of a candidate by political party. It further provides the office bearers of political party authorized to allot the symbol to the candidate of political. There is also clear provisions for issuing whip to members of the political party in rule 4 of Kerala Local Authorities (Disqualification of Defected members) Rules. B1 agreement is against the specific provisions of law and has no legal sanctity. The respondent has no case that the person signed the agreement allegedly for IUML is having authority to issue whip to the respondent by virtue of the agreement.

17. Respondent has a case that District President of INC has no manner of right or authority to issue whip to the respondent. In *Sindhu Anilkumar V State Election Commission* (judgment dated 22.02.2024 in WA No.1474/2023) the High Court examined the position and held that ;-

"As per explanation to section 2(ii) of the Act, a member who stood as a candidate in an election with the support of any one of the political parties shall be deemed to be a member included in that political party. The position further clarified by Explanation to section 3 of the Act. The above deeming provision creates a fiction by which an independent candidate, who had contested the election with the support of a political party, is to be considered as a member of that political party even without the member joining the political party."

18. But in view Explanation to Section 3 (3) the case of the respondent is unsustainable and District President of DCC has the necessary authority to issue whip to the respondent. It further appears that the whip was served to the respondent through registered post. But it was returned to the sender with the postal endorsement "unclaimed" on his refusal to accept the whip.

19. It is pertinent to note that in the petition there is no pleading that copy of the whip was served to the panchayat secretary in compliance of rule 4 (2). However while examining the petitioner as PW1, she deposed that whip was served to the panchayat through e-mail. But during the cross examination she deposed that she is not having any personal knowledge about it. While examining PW3, District Committee President of the INC stated that whip was sent to the secretary through e mail. However , the secretary of the panchayat who was examined as PW2 categorically denied service copy of the whip. The respondent has a case that copy of the whip was not served to the secretary of the panchayat. There is no evidence of any nature to indicate that the whip was served on the secretary of panchayat.

20. In the decision in *George Elamplakkadu @ Vakkachan Powathil v. A.V. Mathew @ Samkutty Vettupalam and* Others [2020 (5) KHC 297] this Court had held that the service of a copy of the direction in writing (whip) to the Secretary of the local authority concerned is the only method by which a member of that local authority belonging to any other political party will come to know about the whip. It was further observed that the service of the whip to the Secretary is mandatory, and non-compliance with the said provision is fatal. The said decision was followed in *Moly George v. Benny Thomas and Another* [AIR 2021 Ker. 1] as well as in *Sulfath Noufal Khan v. Kerala State Election Commission* [2021 (1) KLT 75].

21. In the petition petitioner has a define case of voluntarily giving up of membership by the respondent. District Committee President of INC issued Ext A3 whip to the respondent intimating the stand of INC in the election held on 20.10.2021. It was specifically directed in the whip to cast vote in favour of Smt. Milsy Shaji, petitioner herein for the post of President. Authorized person of the political party tried to serve the whip to the respondent through registered post. But the whip was returned with the endorsement " unclaimed". In the President election held on 20.01.2021, the respondent in violation of whip voted in favour of the candidate fielded by rival coalition LDF. Thus the official candidate of INC/UDF defeated with the support of respondent and LDF.

22. Further, while examining petitioner as PW1, she deposed that

"20.10.2021-ൽ എതിർകക്ഷി പാർട്ടിയുടെ തീരുമാനത്തിന് എതിരായി എതിർ പാർട്ടിയിലെ അംഗങ്ങളുമായി ഗൂഡാലോചന നടത്തി എതിർകക്ഷി പ്രവർത്തിച്ചതിനാൽ മുന്നണിക്ക് പൈങ്ങോട്ടൂർ ഗ്രാമ പഞ്ചായത്ത് ഭരണം നഷ്ടപ്പെടുകയും ചെയ്തിട്ടുള്ളതാണ്. എതിർകക്ഷിയ്ക്ക പാർട്ടിയുടെയും മുന്നണിയുടെയും തീരുമാനവും നിർദേശവും വ്യക്തമായി അറിയാമായിരുന്നിട്ടും നിർദ്ദേശം ലംഘിച്ചു കൊണ്ട് പ്രവർത്തിച്ചത് വഴി പാർട്ടി നിർദേശത്തെ പരാജയപ്പെടുത്തുകയും അതുവഴി യു.ഡി.എഫ് പരാജയപ്പെടുകയും ചെയ്തു."

There is no cross examination on the above evidence.

23. Petitioner has produced the copy of the Minutes of the meeting of President election held on 20.10.2021, which is marked as Ext.A5 and voted in favour of Smt. Seema Sibi, candidate fielded by LDF and she was elected as President of the Paingottoor Grama Panchayat on the strength of vote cast by the respondent. There is sufficient evidence to indicate that respondent has voted in favour of the candidate fielded by LDF contrary to the directions issued by the political party INC, it was by colluding or conniving with the members

of opposite party LDF and thereby UDF lost governance of Paingottor Grama Panchayat.

24. It is further gathered from Ext.A5 minutes that in the Vice President election held on 27.09.2021, LDF members voted in favour of the respondent and he got elected as Vice President of Paingottoor Grama Panchayat. As a *quid pro quo* respondent voted in favour of LDF candidate in the election held on 20.10.2021. Even if there is a failure to prove a valid whip, still the petitioner has proved that the respondent by his conduct voluntarily given up his membership of the party under whose banner he was elected.

25. Judgment in *Eruthavoor Chandran and another v. Kerala State Election Commission* [2018 (5) KHC 964] Hon'ble High Court held that where a member of a political party is aware of the decision taken by the political party but failed to act in accordance with the political directive, it would amount to voluntarily abandoning the membership. The 1st respondent has voluntarily given up his membership by supporting a rival party candidate and by winning the post of Vice President with the help of the rival party.

26. Another judgment in *Biju R.S. and others v. Kerala State Election Commission and others* [2009 (2) KHC 839] Hon'ble High Court held that disqualification for voluntarily giving up the membership of one's party is not dependent on violation of whip, urged the counsel for the petitioner.

27. Hon'ble High Court in *Mohandas K P V State Election Commission* ( 2009 (4) KHC 935) ( decision prior to 17.01.2012 ) held that " Therefore, the principles laid down by this Court in the different precedents referred to above on the concept of appreciation of evidence regarding the question whether a member of a local authority belonging to a political party has voluntarily given up his membership of such political party, apply with same vigour to

cases where the allegations of defection is made against an independent, who has allegedly withdrawn from a coalition to which he belonged by virtue of section 2 (ii) of the Kerala Local Authorities (Prohibition of Defection) Act, 1999 and Explanation thereto.

28. There is evidence on the record that respondent is aware of the decision taken by UDF coalition, but failed to act in accordance with political directive and acted hand in glove with LDF members to defeat the candidate fielded by the INC/UDF by voting in favour of the candidate fielded by LDF . It is nothing short of disloyalty under section 3 (1) of the Kerala Local Authorities (Prohibition of Defection) Act, 1999.

In the result the OP is allowed and the respondent is declared as disqualified for being a member of Paingottoor Grama Panchayat as provided under Section 3 (1) of the Kerala Local Authorities (Prohibition of Defection) Act, 1999. The respondent is further declared as disqualified from contesting as a candidate in an election to any local authorities for a period of 6 years from this date, as provided under section 4 (3) of the Act.

Pronounced before the Commission on the 2nd day of July, 2024.

**Sd/-**
**A. SHAJAHAN**
**STATE ELECTION COMMISSIONER**

# APPENDIX

**Witness examined on the side of the Petitioner**

PW1 : Smt. Milsy Shaji

PW2 : Sri. M.V. Ajaya Kumar

PW3 : Sri. Muhammed Shiyas

**Witness examined on the side of the Respondent**

RW1 : Sri.Nizar Muhammed

RW2 : Sri.Ajims P.M.

**Documents produced on the side of the Petitioner**

A1 : Copy of the nomination paper submitted by Sri.Nizar Muhammed

A2 : Copy of the relevant page of the register showing the party affiliation of elected members of Paingottoor Grama Panchayat

A3 : Copy of the whip dated 11.10.2021 issued to Sri.Nizar Muhammed by Muhammed Shiyas, DCC President, Ernakulam

A4 : Returned Postal article addressed to Sri. Nizar Muhammed

A5 : Copy of the minutes of the meeting held on 20.10.2021 in connection with the election of President, Paingottoor Grama Panchayat

**Documents produced on the side of the Respondent**

B1 : Copy of the agreement between Janab.P.M. Koyakkutty and Nizar Muhammed dated 23.10.2020

**Documents produced by Witnesses**

X1 : Copy of the declaration in form No.2 submitted by Sri. Nice Eldo dated 21.12.2020

X1(a) : Copy of the declaration in form No.2 submitted by Sri. Sunny dated 21.12.2020

X1(b) : Copy of the declaration in form No.2 submitted by Sri. Sabu Mathai dated 21.12.2020

X1(c) : Copy of the declaration in form No.2 submitted by Smt. Saramma Paulose dated 21.12.2020

X1(d) : Copy of the declaration in form No.2 submitted by Sri. Reji Santi dated 21.12.2020

X1(e) : Copy of the declaration in form No.2 submitted by Sri.Santhosh George dated 21.12.2020

X1(f) : Copy of the declaration in form No.2 submitted by Sri.Jiji Shibu (Shiju) dated 21.12.2020

X1(g) : Copy of the declaration in form No.2 submitted by Smt. Subimol Shine

X1(h) : Copy of the declaration in form No.2 submitted by Smt. Seema Siby dated 21.12.2020

X1(i) : Copy of the declaration in form No.2 submitted by Sri.Nizar Muhammed dated 21.12.2020

X1(j) : Copy of the declaration in form No.2 submitted by Smt.Sissy Jaison dated 21.12.2020

X1(k) : Copy of the declaration in form No.2 submitted by Sri.Hareesh Rajappan dated 21.12.2020

X1(l) : Copy of the declaration in form No.2 submitted by Sri.Milsy Shaji dated 21.12.2020

X2 : Copy of the Register showing the party affiliation of the elected members of the Paingottoor Grama Panchayat

**Sd/-**
**A. SHAJAHAN**
**STATE ELECTION COMMISSIONER**

**// True Copy //**

PRAKASH B.S
PEN No : 101452
SECRETARY
State Election Commission
Kerala, Thiruvananthapuram