

BEFORE THE KERALA STATE ELECTION COMMISSION,
THIRUVANANTHAPURAM

PRESENT: SHRI. A. SHAJAHAN,
STATE ELECTION COMMISSIONER

Thursday, the 23rd day of May, 2024

O.P. No. 18 of 2022

Petitioner

: Shibi Boban,
W/o. Boban Jacob,
Kallungal Veedu,
Adivad, Pallarimangalam P.O.,
Ernakulam - 686 671

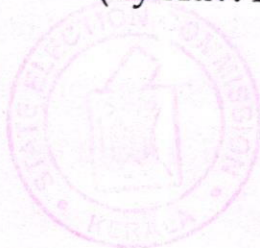
(Member, Ward No.10,
Pallarimangalam Grama Panchayat)

(By Adv. A. Santhosh Kumar &
Adv. K. Vinod)

Respondent

: The Secretary,
Pallarimangalam Grama Panchayat

(By Adv. R. Vasudevan Nair)



ORDER

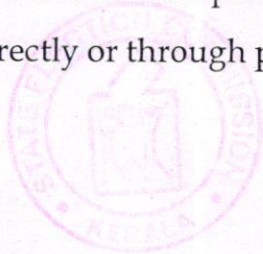
This is a petition filed under Section 36 (1) of the Kerala Panchayat Raj Act, 1994 to set aside the notice No. A1-3134/2021 dated 07.07.2022 issued by the Respondent, Secretary, Pallarimangalam Grama Panchayat.

2. Petitioner's case in brief is as below:- The petitioner is the elected member representing Ward No.10 (Mavudi) of the Pallarimangalam Grama Panchayat. She was elected as a candidate of Indian National Congress in the general election to the Local Self Government Institutions held in December, 2020. After the election the petitioner was elected as the member of Finance Standing Committee of the said Panchayat. There are altogether 13 elected members in the Pallarimangalam Grama Panchayat. CPI (M), which is one of the constituents of LDF, is ruling the Panchayat with a majority of 8 elected members and UDF having 5 elected members. The respondent is a puppet in the hands of the President, Vice President and other LDF members in the Grama Panchayat. In the Grama Panchayat, there was no proper issuance of the notices regarding the meetings of Standing Committees as well as the General Committees. Usually the respondent informed about the meetings through e-mail. The petitioner was granted leave from attending the panchayat meetings upto 31.01.2022. The grant of leave upto 31.01.2022 was informed to the petitioner only on 05.03.2022 vide e-mail and she was further directed in the e-mail to attend the meeting on or before 30.04.2022. In reply petitioner has informed that she could not personally appear for the meetings of panchayat as she was in abroad for meeting the urgent and immediate needs of her daughter, who was staying there and requested for exemption from physically attending meeting upto 28.07.2022. Petitioner has also sought permission for attending the intervening meetings through online mode, which is prevalent in the



Panchayat at that time. But the said request was declined by the respondent. There is no absence by the petitioner in the meetings of panchayat for a consecutive period of 3 months so as to incur disqualification under section 35 (k). No proper notices were issued for the meeting subsequent to 31.01.2022 by the respondent which amounts to infraction of the procedure laid down in R.3(1)(d) of the Kerala Panchayat Raj (Manner of Service of Notices) Rules, 1996.

3. The respondent filed objection contending as follows:- The petitioner failed to attend the meetings of Panchayat Committee held after 01.11 .2021. Similarly, petitioner has also failed to attend the meetings of the Finance Standing Committee held after 08.09.2021. However, Panchayat committee as per Ext A3 resolution restored her membership up to 31.01.2022 in the Panchayat committee. In the Ext. A3 resolution it was further directed the petitioner to attend any of the meetings of the committees before 30.04.2022 to avoid cessation of membership under section 35 (K). Petitioner who was in abroad at that time expressed her inability to attend the physical meeting of the panchayat committees and sought permission to attend the meeting through online. The request dated 12.04.2022 of the petitioner is marked as Ext. A4. However petitioner's request for permission to attend the meeting through online was declined by the panchayat as per letter dated 26.04.2022. The letter dated 26.04.2022 is marked as Ext A6. Petitioner has not attended the consecutive meetings of panchayat for a period of more than 3 months even after restoration of her membership in the committee as per Ext. A3. Petitioner expressed her inability to attend physical meetings of panchayat committee for a period upto 28.07.2022 as she was in abroad. Since petitioner was in abroad, respondent was not in a position to issue the meeting notices to the petitioner either directly or through post. Since petitioner was absent

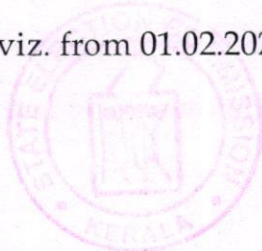


in the consecutive meetings of panchayat for a period of more than 3 months from 31.01.2022 viz. from the date of restoration of office as member, respondent issued Ext A7 notice dated 21.06.2022 to the respondent under the provisions of section 37 (2) of the Kerala Panchayat Raj Act. Petitioner filed Ext. A8 objection to the Ext A7 notice. In Ext A8 objection she *interalia* stated that there is no proper meetings after 31.01.2022, there is delay in issuing 37(2) notice to her, there is also failure in reporting the matter of cessation of membership of petitioner to the next meeting of the panchayat, there is no proper issuance of meeting notices to the petitioner and also no proper service of notice to the petitioner. The respondent contended that petition is not maintainable.

4. Both sides were heard
5. The following points arise for consideration
 - (i) Whether the petitioner failed to attend three consecutive meetings of the panchayat Committee held after 31.01.2022 as alleged in Ext. A7 notice
 - (ii) Whether there is proper issuance of meeting notices to the petitioner
 - (iii) Whether there is proper service of meeting notices to the petitioner
 - (iv) Whether respondent has complied of the provisions of section 37 (2) of the Act of the Kerala Panchayat Raj Act
 - (v) Whether petitioner has incurred disqualification as provided under section 35 (k) of the Kerala Panchayat Raj Act as alleged
6. Point No. (i) to (v): As regards of Ext.A7 notice issued to the petitioner under section 37 (2) informing cessation of her membership in the panchayat, it does not contain the details of three consecutive meetings held during the period from 31.01.2022 to 30.04.2022 which is counted against the petitioner by the respondent. The Ext. A7 also lacks material particulars such as

frequency of meeting viz. whether due once in a month meetings were held during the said period and whether it is ordinary meetings or urgent meetings etc. Further, the relevant materials such as issuance of 3 clear days notice to the petitioner and the mode of service of notice to the petitioner were also not stated in the Ext A7 notice. The petitioner who allegedly incurs disqualification on account of section 37 (2) notice is having every right to know such details to agitate the matter before the Commission by filing a petition under section 36 (1). Withholding of such relevant information from the petitioner is definitely not the intention of section 37 (2) of the Act and it caused serious prejudice to the petitioner in challenging the action of respondent. Hence Ext A7 notice appears to be defective.

7. As per section 35 (1) (k) of the Kerala Panchayat Raj Act the period of three consecutive months for which a member is absent is to be reckoned from the last meeting that he attended or of the restoration of office as member under sub-section (2) of section 37 as the case may be. In the present case admittedly permission was granted by the panchayat to the petitioner to be absent from the meeting of the panchayat upto a period of 31.01.2022 as per Ext.A3. Since there was no notice under section 37 (2) by the Secretary before issuing Ext. A3, no question of any restoration of membership of the petitioner with effect from 31.01.2022 arose in this case. In light of Ext. A3 petitioner is liable to attend the meetings of the panchayat held on or after 01.02.2022. However, admittedly the said Ext. A3 resolution was communicated to the petitioner belatedly after 05.03.2022, which makes it impossible for petitioner to attend meeting of the panchayat from 01.02.2022 onwards as required in Ext.A3. The absence of the petitioner from meetings during the said period viz. from 01.02.2022 to 30.04.2022 is the cause for the



respondent to issue Ext. A7 notice to the petitioner. Therefore Ext. A7 notice is unreasonable.

8. In the OP petitioner has alleged non-compliance of the provisions of section 35(k) of the Kerala panchayat Raj Act, while issuing the impugned Ext.A7 notice.

Section 35 (k) reads as follows

35. Disqualifications of members. – (1) Subject to the provisions of Section 36 or Section 102, a member shall cease to hold office as such, if he.

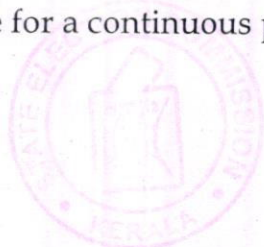
.....

 (k) absents himself without the permission of the Panchayat concerned from its meeting or the meeting of the Standing Committee thereof for a period of three consecutive months reckoned from the date of commencement of his term of office or of the last meeting that he attended, or of the restoration to office as member under sub-section (1) of Section 37, as the case may be, or if within the said period, only in less than three meetings of the Panchayat or of the Standing Committee as the case may be, have been held, absents himself from three consecutive meetings held after the said date:

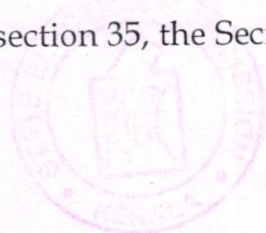
Provided that no meeting from which a member absented himself shall be counted against him under this clause if, – . .

- (i) due notice of that meeting was not given to him; or
- (ii) the meeting was held after giving shorter notice than that prescribed for an ordinary meeting; or
- (iii) the meeting was held on a requisition of members; or:

Provided further that no permission shall be granted by the Panchayat to a member for absenting himself from meetings of the Panchayat or of the Standing Committee for a continuous period of more than six months.



9. In the light of the above provision, the absence should be for the meetings of the panchayat for a period of three consecutive months reckoned from, among others, the date of restoration of member viz. from 31.01.2022. But in the objection filed by the respondent does not contain the details of three consecutive meetings held during the period from 31.01.2022 to 30.04.2022, which is counted against the petitioner, the frequency of meeting viz. whether once in a month meetings were held during the said period and whether it is ordinary meetings or urgent meetings etc. Further, the other relevant facts such as issuance of 3 clear days notice to the petitioner and the mode of service of notice to the petitioner were also not pleaded in the objection. There is severe dearth of materials to rebut the case of the petitioner.
10. Further, section 37 (2) contains the procedure to be adopted by the Secretary of the panchayat where a person ceases to be a member under section 35 (k), which reads as follows;-
37. Restoration of membership.—
- (2) Where a person ceases to be member under clause (k) of Section 35 the Secretary of the Panchayat concerned shall at once intimate the fact in writing to such person and report the same at the next meeting of the Panchayat. If such person applies for restoration to the Panchayat on or before the date of its next meeting or within fifteen days of the receipt by him of such intimation, the Panchayat may at the meeting next after the receipt of such application restore him to his office of member:
- Provided that a member shall not be restored more than twice during his term of office.
11. Sub-section (2) of section 37 says that where a person ceases to be a member under clause (k) of section 35, the Secretary of the panchayat shall at once



intimate the fact in writing to such person and report the same to the committee at the next meeting of the panchayat. At this juncture it is only appropriate to examine whether these statutory requirements were complied with by the respondent in the present case. It is specifically stated in the Ext.A7 notice that petitioner had become disqualified with effect from 30.04.2022. But Ext. A7 notice was served to the petitioner belatedly after 21.06.2022, viz. more than one and half months after her deemed disqualification. Ext. A9 is the notice dated 07.07.2022 issued by the respondent. Therefore the respondent failed to intimate the fact of cessation of her membership immediately as mandated in section 37(2) . Further, it is consistent case of the petitioner that respondent has also failed to report the fact of cessation of membership of the petitioner to the panchayat. The said allegation was not denied by the respondent. It is pertinent to note that Report by secretary under section 37 (2) is the only method by which panchayat committee is aware that a member of panchayat had incurred disqualification under section 35 (k). The very same panchayat committee is having powers to restore the membership if the member applies for the restoration within 15 days. Therefore mandatory requirements under section 37 (2) have not been complied in the present case. The non compliance of the requirements by the respondent are fatal and it causes prejudice to the petitioner.

12. Further, as per rule 4 (1) of the Kerala Panchayat Raj (Procedure for panchayat committee meetings) Rules, 1995 the notice regarding the place, date and time of the meeting and subject to be discussed in the meeting shall be given to the members at least three clear days prior to the date fixed for beginning of the meeting.



Provided that, in the above said clear days, declared holidays shall be included but the date of receipt of notice and date of meeting shall not be included.

13. In view of rule 4(1) notice of meeting should be served at least three clear days prior to the date fixed for the meeting. Admittedly respondent has not issued meeting notices to the petitioner ever since petitioner reported the fact that she is staying in abroad viz. after 12.04.2022. Moreover, respondent has neither pleaded nor proved the service of notice to the respondent in terms of rule 4 (1). Therefore there was no sufficient notice to the petitioner prior to the meetings as contemplated under rule 4(1) to attend the meeting.

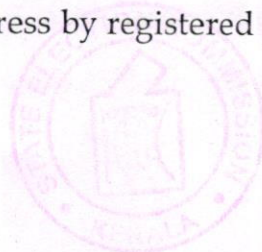
14. Further, Rules 3 of the Kerala Panchayat Raj (Manner of service of notices) Rules, 1996 provides that

"3. Serving of notice.-- (1) in case the Act or rules or bye-laws made thereunder requires the Panchayat to serve any notice or document to a person, such service or sending shall, unless otherwise provided in the Act or rules or bye-laws made thereunder, be done.--

(a) by service or sending of notice or document to such person; or

(b) If such person cannot found out, by leaving such notice or document at his last known place of abode or business or by entrusting the same to some adult member or servant of his family and in the case of employees working in firms, factories, plants and workshops where admission to notice server is prohibited or where service of notice cannot be possible in the ordinary course, by entrusting the same to the head of the institution or to any authorised person, or

(c) if such person's address elsewhere is known to the Secretary, by sending the same to that address by registered post; or



(d) if none of the aforesaid means are available, by affixing the notice in some conspicuous part of his abode or work place."

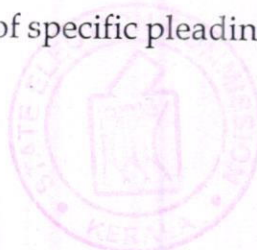
However the method of service of meeting notices to the petitioner has neither pleaded in the objection. Respondent has also failed to adduce evidence to controvert the case of the petitioner.

15. At this juncture it is pertinent to examine the provisions of Indian Evidence Act as to whom burden of proof lies.

Section 101 of the Indian Evidence Act provides that whoever desires the Court to give any judgment regarding any right or liability that is "*dependent on the existence of facts which he asserts, must prove that those facts exist.*" Law casts a primary burden upon the petitioner to prove her case. However, Section 106 of the Indian Evidence Act - burden of proving fact especially within knowledge - provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Section 106 of the Indian Evidence Act is an exception to the general rule under section 101 of the evidence Act, which places the burden of proof on the petitioner. Therefore when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

16. Therefore matters such the number of meetings held during the period from 31.01.2022 to 30.04.2022, frequency of meetings, issuance of meeting notice to the petitioner, service of three clear days notice, absence of the petitioner in the meeting etc. come with the special knowledge of the respondent being the secretary of the panchayat. But the respondent has neither pleaded nor proved the same.

17. However, the respondent has made available the file concerned having nearly one thousand pages to Commission without providing the copies to the petitioner. In the absence of specific pleadings to establish the case of the



respondent that petitioner has incurred disqualification, it is not possible to conduct a *suo moto* enquiry as to whether petitioner has incurred any disqualification.

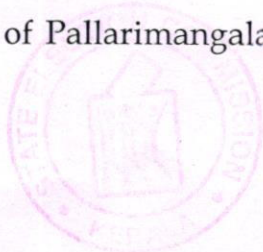
18. In this connection, in *Madhu V State Election Commission* (judgment dated 11.12.2003 in O P No. 35632/2003 Hon'ble High Court has observed as follows

“ Further, the Election Commission is functioning as a statutory tribunal, while deciding on the question of disqualification of a Councilor. So, it should follow the adversary procedure and not the inquisitorial procedure. The learned Authors HWR Wade and CF Forsyth in their Administrative Law 8th edition have described ‘adversary procedure’ as follows:-

“It is fundamental that the procedure before a tribunal, like that in a court of law, should be adversary and not inquisitorial. The tribunal should have both sides of the case presented to it and should judge between them, without itself having to conduct an inquiry of its own motion, enter into the controversy and call evidence for or against either party. It if allows itself to become involved in the investigation and argument, parties will quickly lose confidence in its impartiality, however fair-minded it may be. This principle is observed through out the tribunal system.....

The above statement of law apply to the 1st respondent (Commission) also while it is deciding a petition regarding disqualification under section 92 of the Act”.

19. From the pleadings and evidence on record it is not possible to say that the petitioner has incurred any disqualification under section 35 (1) (k) of the Kerala Panchayat Raj Act. Therefore I hold that the petitioner has not ceased to be a member of Pallarimangalam Grama Panchayat as alleged. Ext.A7



and Ext. A9 notices issued by the respondent are not proper and legal. Points are answered accordingly.

In the result, the petition is allowed and Ext.A7 and Ext A9 are declared as illegal. Petitioner is allowed to continue as member of Pallarimangalam Grama Panchayat.

Pronounced before the Commission on the 23rd day of May, 2024.

Sd/-

A. SHAJAHAN

STATE ELECTION COMMISSIONER



APPENDIX

Witness examined on the side of the Petitioner

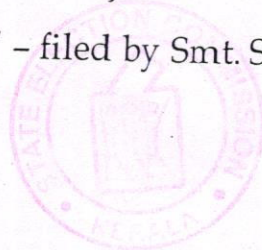
- 1) PW1 : Smt. Shibi Boban

Witness examined on the side of the Respondent

- 1) RW1 : Sri. M.M. Shamsudheen

Documents produced on the side of the Petitioner

- 1) A1 : Copy of the meeting notice book of Pallarimangalam Grama Panchayat, dated 25.01.2022
- 2) A2 : Copy of the letter submitted by Smt. Shibi Boban under RTI Act on 07.11.2022 and its reply under RTI Act by the State Public Information Officer, Pallarimangalam Grama Panchayat.
- 3) A3 : Proceedings No.A1/3134/2021 dated 05.03.2022 of Secretary, Pallarimangalam Grama Panchayat
- 4) A4 : Letter dated 12.04.2022, submitted to Secretary, Pallarimangalam Grama Panchayat by Smt. Shibi Boban, Member
- 5) A5 : Copy of the acknowledgement receipt dated 13.04.2022.
- 6) A6 : Copy of the letter No.400643/GAERO2/GPO/2022/76 dated 26.04.2022 of Secretary, Pallarimangalam Grama Panchayat
- 7) A7 : Copy of the letter No.A1-3134/21 dated 21.06.2022 issued by Secretary, Pallarimangalam Grama Panchayat
- 8) A8 : Copy of the "Objection to the Notice No.A1-3134/21 dated 21.06.2022" - filed by Smt. Shibi Boban



B. SURENDRAN PILLAI
Pen No : 101864
SECRETARY
State Election Commission
Kerala, Thiruvananthapuram

- 9) A9 : Copy of the letter No.A1-3134/2021 dated 07.07.2022 issued by Secretary, Pallarimangalam Grama Panchayat

Documents produced on the saide of the Respondent

- 1) B1 : File No.A3-3134/21, Pallarimangalam Grama Panchayat
- 2) B2 : Attested copy of the approved minutes for the period from 01.11.2021 to 25.10.2022, of Pallarimangalam Grama Panchayat
- 3) B3 : Attested copy of the minutes of the Financial Standing Committee, Pallarimangalam Grama Panchayat for the period from 11.11.2021 to 08.07.2022
- 4) B4 : Attested copy of the notice book for financial standing committee meetings from 06.11.2021 to 12.09.2022
- 5) B5 : Attested copy of the notice book of Panchayat Committee meetings of Pallarimangalam Grama Panchayat from 01.11.2021 to 20.10.2022.
- 6) B6 : Copy of the Attendance Register for Panchayat Committee meetings of Pallarimangalam Grama Panchayat from 01.11.2021 to 25.10.2022
- 7) B7 : Copy of the Attendance Register for financial standing committee meetings from 11.11.2021 to 10.06.2022.

Sd/-

A. SHAJAHAN

STATE ELECTION COMMISSIONER

//True Copy//


B. SURENDRAN PILLAI
 Pen No : 101664
 SECRETARY
 State Election Commission
 Kerala, Thiruvananthapuram

