

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

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

**Tuesday, the 1<sup>st</sup> day of October, 2024**

**O.P. Nos. 04 of 2023 & 05 of 2023**

**O.P. No.04 of 2023**

**Petitioner**

**: Lijesh K.  
S/o. Janardhanan K.,  
Sree Sankaralayam,  
Kommavayal, Temple Gate P.O.,  
Thalassery, Kannur - 670 102**

**(Councilor, Ward No.17  
Thalassery Municipality)**

**(By Adv. J.R. Padma Kumar &  
Adv. Mili Chandra))**

**Respondent**

**: Secretary,  
Thalassery Municipality**

**(By Adv. I.V. Pramod)**





**O.P. No.05 of 2023**

**Petitioner** : Ajesh K.  
S/o. Balakrishnan,  
Kunnumpurathu House,  
Temple Gate P.O., Kannur - 670 102

(Councilor, Ward No.37,  
Thalassery Municipality)

(By Adv. M. Nizarudheen &  
Adv. Harikrishnan P.B)

**Respondent** : Secretary,  
Thalassery Municipality

(By Adv. Bimal V.S.)

**COMMON ORDER**

The O.P. No.04/2023 is filed under section 92(1) of the Kerala Municipality Act by a Councilor of Ward No.17 of the Thalassery Municipality challenging Exhibit A9 notice issued to him by the respondent -Secretary, Thalassery Municipality intimating him that he ceased to be a Councilor of Thalassery Municipality under section 91 (1) (k) of the Kerala Municipality Act. OP No. 05/2023 is filed under section 92 (1) of the Kerala Municipality Act by a Councilor of Ward No.37 of the Thalassery Municipality assailing Exhibit A9 notice issued to the petitioner in O P No.04/2023. Respondent filed separate objections in both cases. Both petitioners being Councilors of Thalassery Municipality,



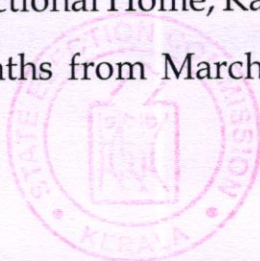


are having *locus standi* under section 92 of the Kerala Municipality Act to file the petition before the State Election Commission for determination of disqualification. Since common questions of law and facts arises in both cases they are tried together, as OP No. 04/2023 as leading case.

2. The petitioner's case in brief is as follows:

The petitioner is an elected Councilor of Ward No. 17 of the Thalassery Municipality belongs to Bharatiya Janata Party. He is an active member of Bharatiya Janata Party. On account of the political rivalry with ruling CPI (M), petitioner was implicated in a murder case of CPI (M) worker, which occurred during the late hours of 21.02.2022. Petitioner was never in the scene of occurrence and has no connection with the said murder. On the very next day of the incident the petitioner was summoned to the Mahe Police Station. The petitioner without any protest appeared before the Police Station as the police informed that there is threat to his life, later after two days of the incident the arrest of the petitioner was recorded in connection with the Crime No. 183/2022 registered under the provisions of section 302 and 120B of the Indian Penal Code. True copy of FIR dated 21.02.2022 in Crime No. 183/2022 of New Mahe Police Station is Exhibit A1. Petitioner was in judicial custody since then. While in judicial custody petitioner was not able to attend the meetings of the Council.

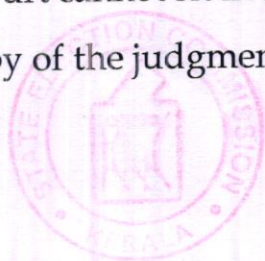
3. During the judicial custody, petitioner submitted an application for leave before the Thalassery Municipal Council, through Superintendent of Central Prison and Correctional Home, Kannur. The petitioner requested to grant leave for 3 months from March, 2022 on account of being in





judicial custody. The Municipal Council in its meeting held on 28.04.2022 took a majority decision rejecting his application for leave as per decision No. G2.9313/22 dated 30.04.2022. (ExhibitA4).

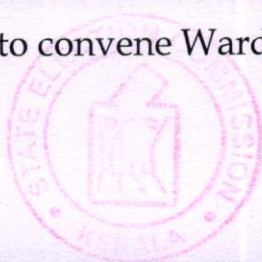
4. Petitioner is entitled to be exempted from attending the meeting of the Municipal Council. When the petitioner is in judicial custody, he would not be able to attend the council meetings. His absence can never be reckoned as deliberate or voluntary. Section 91 (1) (k) of the Kerala Municipality Act states about "absence without permission of the Municipality". Herein the term permission denotes that when a Councilor has approached for being exempted from attending the meeting, it has to be subjectively considered by Council as to whether the absence is temporary and unavoidable.
5. It is only due to the political rivalry that the petitioner's request for leave was rejected. The implication of petitioner in Crime No. 183/2022 and consequent rejection of application for exemption are only with political motives. It is impossible for the petitioner to be present in the Council meetings when in judicial custody. The petitioner clearly apprehends that on account of his involuntary absence from the meeting, it will certainly result in invoking the provisions of section 91 (1) (k) of the Kerala Municipality Act and it will result in his disqualification.
6. The petitioner moved the Hon'ble High Court of Kerala in WP(C) No. 18895/2022 against the rejection of his application for leave by the Council. However, the Hon'ble High Court did not interfere in the matter by observing that Court cannot sit in appeal over the decision of Council rejecting leave. Copy of the judgment dated is Exhibit A6.





7. Due to the petitioner's involuntary absence, the respondent sent a letter to the State Election Commission, seeking clarification on the further proceedings regarding the question of disqualification. In response to it State Election Commission in its administrative side offered remarks on how to proceed further in the matter. Copy of the communication dated 21.12.2022 is marked as ExhibitA8. Thereafter respondent-Secretary takes a stand that the petitioner is already disqualified. The impugned notice in this regard dated 05.01.2023 issued to the petitioner is marked as ExhibitA9.
8. Assuming that section 91 of the Kerala Municipality Act applies, which is not admitted, the proviso to section 91 (1) (k) of the Act states that the meeting in which he was absent will not counted against him if due notice of the meeting was not given to him. Likewise, the word used is in section 91 (1) (k) of the Act "absents himself", which means he voluntarily should be an absentee. Here the petitioner was in jail on account of the pretrial detention. In which case section 91 (1) (k) of the Act does not apply. It is also specifically stated in the Act that "proper notice" should be given to the Councilor before every council and standing committee meetings. But in this matter no notice was served to the petitioner in any manner, except the last communication from the Secretary (ExhibitA10). Therefore, the ExhibitA9 notice is unsustainable.
9. The respondent filed objection contending as follows:

Petitioner was disqualified from the membership of the Municipal Council for the reason that he was continuously absent from the Council meetings and failed to convene Ward Sabha for more than the time limit

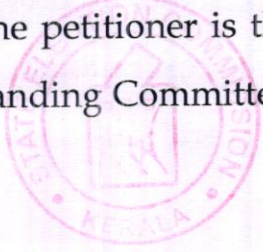




prescribed under section 91 (1) (k) and section 91(1) (o) of the Kerala Municipality Act, as the case may be. Admittedly the petitioner was not in a position to attend the Council meetings because of his alleged involvement in a murder case and consequent judicial custody since 22.02.2022. Petitioner was granted bail after being disqualified under section 91(1) (k). Petitioner incurred disqualification both under section 91 (1) (k) and section 91 (1) (o) of the Act.

10. Petitioner attended the Council meeting held on 24.01.2022 and thereafter abstained from attending the meeting. Notice and agenda of council meeting was sent to his residence through messenger, but could not be served because of his absence. The messenger affixed the said notice in the notice board and completed service of notice. It is not the case of the petitioner that he informed the Municipality that where he was housed by the Jail authorities. In the absence of such a contention, there is no meaning in saying that he did not receive notice. Even if he was served with a notice, he was not in a position to attend any of the meetings.

11. Petitioner preferred several bail applications before the Sessions Court, Thalassery and Hon'ble High Court of Kerala. In all these cases he put forward a plea that he is a member of Thalassery Municipal Council and wants to attend the meetings of the Council etc. But these bail applications were dismissed. That means the plea of attending the meetings representing the people etc. are rejected by respective Courts. Admitted case of the petitioner is that he could not attend 20 Council meetings and 13 Standing Committee meetings for more than one year.





Petitioner is not entitled to any reliefs and petition is liable to be dismissed.

12. The evidence in this case consists of oral testimonies of PW1, RW1 and Exts.A1 to A13.

13. Both sides were heard.

14. The following points arise for consideration:

(1) Whether the petition is maintainable?

(2) Whether the petitioner failed to attend the meeting of the Municipality for a period of three consecutive months?

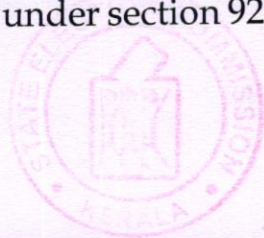
(3) Whether proper notice was served to the petitioner?

(4) Whether the period during which petitioner was under detention can be treated as "absenting himself from the meeting" as provided under section 91(1) (k) of the Kerala Municipality Act?

(5) Whether the petitioner incurred disqualification as provided under section 91(1) (k) of the Act as alleged?

(6) Whether the petitioner incurred disqualification as provided under section 91(1) (o) of the Act for his alleged failure in convening ward Sabha?

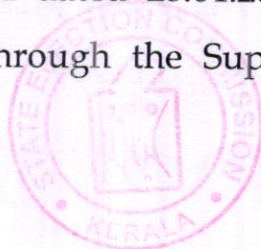
15. Point No. (1) to (6): As common questions of law and facts arise for consideration in these points, they are considered together for convenience and to avoid repetition. The petitioner is an elected councilor from ward No.17 of Thalassery Municipality. The petitioner filed this petition under section 92 (1) of the Kerala Municipality Act *inter*





*alia* challenging ExhibitA9 notice dated 05.01.2023 issued by respondent-Secretary intimating him that he ceased to be a Councilor of Thalassery Municipality under section 91 (1) (k) of the Kerala Municipality Act as he failed to attend the meetings of the Council for more than 6 months.

16. Admittedly the last meeting petitioner attended was on 24.01.2022. Thereafter petitioner was involved in Crime No. 183/2022 of New Mahe Police Station and was arrested on 22.02.2022. FIR is marked as ExhibitA1. Petitioner is the 1st accused in the said Crime No.183/2022 of New Mahe Police Station registered under the provisions of sections 302 and 120B of the Indian Penal Code. Petitioner was in judicial custody since 22.02.2022 and not able to attend the Council meetings. Admittedly, petitioner submitted application for leave before the Municipal council on 30.03.2022, through superintendent of Central Prison and Correctional Home, Kannur. The Municipal Council in its meeting held on 28.04.2022 considered the said leave application and rejected the application on the ground of his involvement in murder case and also the fact that the murder was condemned by the Municipal Council and that petitioner is still in judicial custody. The Resolution dated 28.04.2022 of the Municipal Council is marked as Exhibit A4.
17. Aggrieved by the ExhibitA4 Resolution of the Municipal Council, petitioner preferred WP(C) No. 18895/2022 before the Hon'ble High Court. The Hon'ble High Court did not interfere in the matter stating that Court cannot sit in appeal over such a decision taken by the Municipality. Moreover, ExhibitA4 dated 28.04.2022 took cognizance of the leave application given through the Superintendent of Central Prison of





Correctional Home, Kannur. Thereafter also three months elapsed. The copy of the judgment dated 17.08.2024 is marked as ExhibitA6.

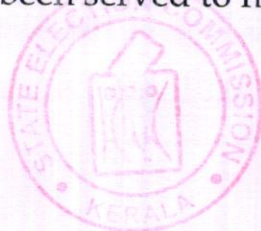
18. Thereafter the respondent in his capacity as Municipal Secretary issued ExhibitA9 notice to the petitioner under section 93(2) of the Kerala Municipality Act, wherein it is mentioned that since the petitioner had not attended the meetings of the Municipal Council for more than 6 months, he has ceased to be a Councilor of Thalassery Municipality under section 91 (1) (k) of the Kerala Municipality Act.
19. Having aggrieved by ExhibitA9 notice, petitioner approached the Hon'ble High Court in WP(C) No. 2981/2023. In the said WP(C) the petitioner has taken a contention that the provisions of section 91 (1) (k) of the Kerala Municipality Act, 1994, which provide for a disqualification on voluntary act of the Councilor absenting himself without permission from meeting of the Council are not applicable to the instant case and that Exhibit A9 notice issued by the Secretary under section 93(2) and further steps under ExhibitA10 are therefore completely unjustified.
20. However, the Hon'ble High Court as per judgment dated 30.01.2023 dismissed the WP(C) No. 2981/2023 by observing that since admittedly the petitioner is under the judicial custody from February, 2022 and since this Court in Exhibit A6 judgment did not interfere with the decision of the Municipal Council not to grant any leave or exemption as requested by the petitioner, it is for the petitioner to either approach the Commission under section 92 or to invoke the power of the Council under section 93 (2) for restoration of his membership in the Council. Copy of the judgment dated 30.01.2023 is marked as Exhibit A12. As





directed in Exhibit A12 judgment, petitioner approached State Election Commission by filing this OP on 09.02.2023 by invoking the provisions of section 92(1) of the Kerala Municipality Act.

21. It has come in evidence that petitioner had filed several bail applications before the Sessions Court, Thalassery and Hon'ble High Court of Kerala and in all these cases, he had put forward a plea that he is a member of Thalassery Municipal Council, he wants to attend meetings of the Council. But those bail applications were dismissed.
22. The last meeting petitioner attended was on 24.01.2022. Thereafter petitioner was arrested and placed under judicial custody since 22.02.2022. Petitioner was granted bail and released from the custody on 01.03.2023. The release order dated 01.03.2023 is marked as Exhibit A2. Admittedly petitioner was absent in the meeting of the Council for a period from 22.02.2022 to 01.03.2023 that led to his disqualification. While he was in judicial custody, he could not attend the meeting as it was beyond his control. The leave application submitted by him under section 91 (1) (k) of the Act was rejected by Municipal Council.
23. As per the provisions to attract the provisions of section 91 (1) (k) of the Act, certain conditions are to be satisfied. Firstly, the Councilor should absent himself from the meeting of the Council or of the Standing Committee of which he is a member for a period of three consecutive months reckoned from the date on which his term of office starts or of the last meeting which he attended. Secondly, due notices of those meeting should have been served to him.





24. The clear case of the petitioner is that no notice of Council meetings was served to him. The petitioner remained completely unaware of the Council meetings. According to the respondent, notice and agenda of Council meetings was sent to the residence of petitioner through messenger, but could not be served due to his absence. The messenger affixed the notice in the notice board of the Municipality and completed service of notice.

25. At this juncture it is worthy to examine whether affixture of notice at the notice board of the Municipality is considered as a due or proper service of notice for the purpose of section 91 (1) (k) of the Act. The first proviso to section 91 (1) (k) of the Act provides that

"Provided that no meeting from which a Councilor absented himself shall be counted against him under this clause if-

(i) due notice of that meeting was not given to him; or

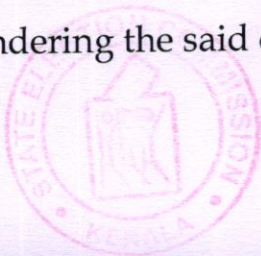
(ii) the meeting was held after giving shorter notice than that prescribed for an ordinary meeting; or

....."

26. Section 525 (1) of the Act provides for method of serving notices etc., as follows

" 525. Method of serving documents: (1) Where any notice or other documents is required by this Act, or any rule, bye-law, regulation or order made thereunder to be served on or sent to any person, the service or sending thereof may be effected-

(a) by giving or tendering the said document to such person; or

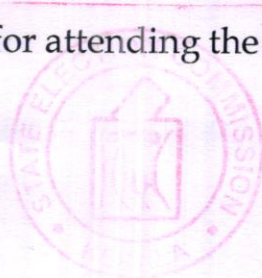




- (b) If such person is not found, by leaving such document at his last known place of abode or business or by giving or tendering the same to some adult member or servants of his family; or
- (c) if such person's address elsewhere is known to the Secretary, by sending the same to him by registered post; or
- (d) if none of the means aforesaid be available by affixing the same in some conspicuous part of such last known place of abode or business."

27. Petitioner through the leave application submitted to the Municipality on 30.03.2022 informed the Secretary that he is currently undergoing judicial custody at Central Prison and Correctional Home, Kannur. The respondent was well aware of the place where petitioner is kept as undertrial prisoner and procedure for serving notices to a prison inmate. As per the above provisions the method under clause (c) of section 525 (1) could be invoked if the person has got an address elsewhere. But respondent failed to serve notice to the petitioner as provided under law. It is also evident from Exhibit A13 reply issued under Right to Information Act that service of notice as contemplated under section 525 of the Act has not exhausted in the present case. Therefore, there is no due notice to the petitioner and contentions of the respondent in this regard is untenable.

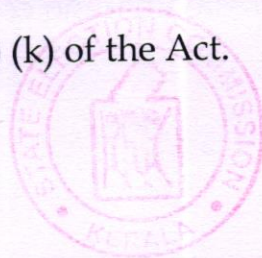
28. Further, as per rule 4 (1) of the Kerala Municipality (Procedure for meeting of Council) Rules, 1995 there should be three clear days' notice to the councilors for attending the meeting. As per the provisions of said





rule the date of receipt of notice and date of meeting shall not be included in the said clear days.

29. It is the consistent case of the petitioner that there was no sufficient notice of meetings to him as contemplated under law and agenda of meetings were not given to him. But it is pertinent to note that respondent has not controverted these allegations nor adduced any evidence to rebut the case of the petitioner. As per section 106 of the Indian Evidence Act, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The respondent being the custodian of notice of meeting book, despatch register etc. was in a position to rebut the case of petitioner. But respondent has not cared to aduce any evidence to establish the issuance and service of due notice to the petitioner, which are fatal to the case of respondent. Therefore, adverse inference can be drawn against the respondent.
30. Further, it is clear case of the petitioner that during the period when he was under detention in Central Prison, it cannot be treated as "absenting himself" for the purpose of section 91 (1) (k) of the Act and said period should be excluded. It is the case of the petitioner that he was arrested on 22.02.2022 and could not attend the meeting held thereafter as it was beyond his control. It has come in evidence that petitioner submitted leave application before the Municipal Council for exempting him from attending the council meeting citing his judicial custody and moved bail applications before the Courts in an attempt to attend the meeting. Therefore it cannot be treated as willfully "absenting himself" for the purpose of section 91 (1) (k) of the Act.





31. In this connection, the Hon'ble High Court in the judgment dated 03.07.2024 in WP(C) No. 18248/2024 (*Sulfikar V Kerala State Election Commission and Others*) examined a similar matter and observed as follows;-

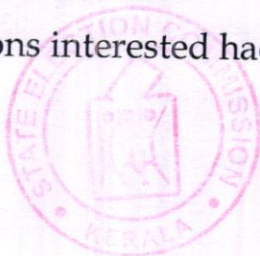
" 13. This Court, in the decision *Rajan v Thomas* reported in 1964 KHC 257 construing a provision under section 63(1) of the Kerala Municipality Act, 1960, which also contained a provision "absenting himself without the permission of the Council" held that, during the time the respondent therein was under detention in the Central Jail, he cannot be said to have absented himself from the meeting of the Council as the expression "absents himself " has to be construed as voluntarily or deliberately absented himself without leave for the period mentioned.

.....

14. Even otherwise, on the doctrine of impossibility, which is based on the doctrine "*lex non cogit and impossibilia*" ( the law does not compel a man to do what he cannot possibly perform). "*impossibilium nulla obligatio est*" (the law does not expect a party to do the impossible) and "*impotentia excusat legem*" in the qualified sense that there is a necessary or invincible disability to perform the mandatory part of the law or to forbear the prohibitory.

.....

Therefore, when it appears that the performance of the formalities prescribed by the statute has been rendered impossible by circumstances over which the persons interested had no control, like an act of God, the





circumstances will be taken as a valid excuse. The above maxims are founded upon justice and good sense and serve as a safe and certain guide for the administration of law.

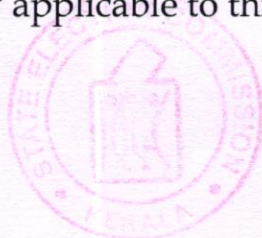
.....

In the instant case, the petitioner did make an unsuccessful attempt even when he was in judicial custody to attend the meeting.

15. Accordingly, the period between 02.03.2022 (when the petitioner was arrested) and 10.06.2022 (when the petitioner was released on bail) cannot be treated as a voluntary act and since his absence was involuntary, it should be held that the said period has to be excluded from computing the number of meetings he absented."

32. In the light of the dictum laid down in above judgment, in the instant case, the period of absence between 22.02.2022 (when the petitioner was arrested) and 01.03.2023 (when the petitioner was released on bail) is excluded from the computing the number of meetings he absented. Therefore, Exhibit A9 notice dated 05.01.2023 and further proceedings thereto are unsustainable. I found so.

33. As discussed above, this OP is filed by the petitioner *inter alia* for declaring Exhibit A9 notice dated 05.01.2023 as illegal. However, in the objection filed, respondent has taken a plea that petitioner has also failed to convene ward sabha for more than the time limit prescribed under section 91 (1) (o) and petitioner has incurred disqualification on that ground also. The dictum laid down in the above judgment "*lex non cogit and impossibila*" (the law does not compel a man to do what he cannot possibly perform) is equally applicable to this plea also.





34. Further, the Hon'ble High Court in *Mohammed Haneefa V Saudath Asharaf & Others* (2013 (3) KHC 104 (DB) held that disqualification does not automatically take effect when there is failure to convene Grama Sabha. There has to be an adjudicatory process to decide on disqualification. Hence, disqualification can come into effect only on an order passed the State Election Commission under section 36 of the Kerala panchayat Raj Act (corresponding to section 92 of the Kerala Municipality Act). It is pertinent to note that respondent has not initiated any adjudicatory process under section 92 of the Act to determine the alleged disqualification of the petitioner under section 91 (1) (o). Therefore, the alleged disqualification of the petitioner under section 91 (1) (o) of the Act is untenable.
35. From the available evidence and in the light of the dictum laid down by the Hon'ble High Court, it is not possible to say that the petitioner has incurred the disqualification put forward against him. The respondent failed to make out a case under section 91 (1) (k) or section 91 (1) (o) of the Kerala Municipality Act. Therefore, I hold that the petitioner in OP 04/2023 has not ceased to be a Councilor of Thalassery Municipality as alleged. The Exhibit A9 notice issued by the respondent is not proper and legal. Points answered accordingly.

In the result, the petition is allowed and Exhibit A9 notice is declared as illegal. The petitioner is allowed to continue as a Councilor of Thalassery Municipality.

Pronounced before the Commission on this 1<sup>st</sup> day of October, 2024.

Sd/-

**A. SHAJAHAN**

**STATE ELECTION COMMISSIONER**



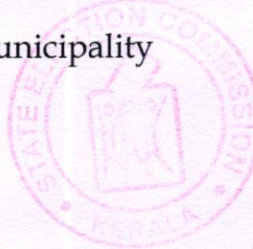


**APPENDIX****Witness examined on the side of the Petitioner**

PW1 - Shri. Lijesh K.

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

- A1 - FIR dated 21.02.2022
- A2 - Release Order in SC.653/2022 by Additional Sessions Judge-II, Thalassery, dated 01.03.2023
- A3 - Copy of the notice dated 22.04.2022 of the Chairperson, Thalassery Municipality
- A4 - Copy of the Council Decision No.17, dated 28.04.2022, Thalassery Municipality
- A5 - Copy of the minutes of the Council meeting held on 28.04.2022, Thalassery Municipality
- A6 - Copy of Judgement of Hon'ble High Court dated 17.08.2022 in WP(C) No.18895 of 2022
- A7 - Copy of the letter No.G2:9313/22 dated 24.09.2022 of Secretary, Thalassery Municipality issued to Secretary, State Election Commission.
- A8 - Copy of the letter from Secretary, State Election Commission dated 21.12.2022 to Secretary, Thalassery Municipality
- A9 - Copy of the Information regarding disqualification of Sri. Lijesh K., given by Thalassery Municipality, dated 05.01.2023
- A10 - Copy of the Council decision No.36 of the Council meeting dated 31.01.2023, Thalassery Municipality





- A11 - Notice regarding the Council meeting, Thalassery Municipality
- A12 - Copy of the Judgement in WP(C) No.2981 of 2023
- A13 - Copy of the letter under RTI issued by Public Information Officer, Thalassery Municipality dated,21.02.2023

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

RW1 - Shri. Suresh Kumar N.

Sd/-

**A. SHAJAHAN**

**STATE ELECTION COMMISSIONER**

**//True Copy//**

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

