

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

**PRESENT: SHRI.V.BHASKARAN, STATE ELECTION COMMISSIONER**

**Tuesday, the 5<sup>th</sup> day of February 2019**

**O.P.No.98/2018**

Petitioner : ArunV.Mohan,  
S/o P.K.Mohanan,  
Vechukettical, Kizhacombu P.O.,  
Koothattukulam,  
Ernakulam – 686 662.

**(By Adv.RamprasadUnni.T)**

Respondent : Seena Johnson,  
Aranjaniputhenpura House,  
Kizhacombu P.O.  
Ernakulam District PIN: 686 662.

Councillor, Division No.2,  
Koothattukulam Municipality.

**(By Adv.Sabu John)**

This petition having come up for hearing on the 16<sup>th</sup> day of **January 2019**, in the presence of Advocate **RamprasadUnni.T** for the petitioner and Advocate **Sabu John** for the respondent and having stood over for consideration to this day, the Commission passed the following.

## **ORDER**

This is a petition filed under Section 92 r/w 86 of the Kerala Municipality Act for a declaration that the respondent has become disqualified to continue as a Councillor of Koothattukulam Municipality.

2. The petitioner's case in brief is as below:- The petitioner is a resident and voter of ward No.2 of Koothattukulam Municipality and the respondent is the elected Councillor of that ward. The respondent is not properly discharging her responsibility as a Councillor and there were complaints regarding that. The people of the locality have been finding it difficult to meet Councillor for alleviation of their grievances. The respondent was nowhere available in the ward of in Koothattukulam Municipality when the recent natural calamity occurred due to heavy rain in last July. On enquiry the petitioner came to know that the respondent is functioning as a member of Child Welfare Committee constituted under the Juvenile Justice (Care and Protection of Children) Act. Because of the duties attached to the functioning of the Child Welfare Committee the respondent is unable to perform her functions as a Councillor of Koothattukulam Municipality. The respondent is getting honorarium and Travelling Allowance and Sitting fee as a member of Child Welfare Committee. She was appointed as Child Welfare Committee member by the State Government and financial benefits are given to her out of the

funds provided by the state. The respondent is holding an office of profit while functioning as a Councillor of the Municipality. The functioning of the respondent in dual capacity of Councillor as well as the member of Child Welfare Committee is in violation of Sections 86 and 90 of the Kerala Municipality Act.

3. As per Section 86 of the Kerala Municipality Act, no officer or employee in the service of a State shall be qualified for holding the office of the Councillor of a Municipality. No Councillor of a Municipality can at the same time being an officer or employee in the services of the State Government or Central Government or a local authority or a Corporation owned or controlled by a State. The intention of the statute is very clear that it is not intended for a Councillor of a Municipality from performing any other duty or taking up any other employment which would grant the person any pecuniary or financial gain. Obtaining honorarium or allowance from any other bodies functioning under the State Government or the Central Government or such other authorities would automatically entail disqualification of the Councillor as such. The respondent is obtaining payments from Child Welfare Committee and also from Koothattukulam Municipality which is clearly illegal. The statutory bar in functioning in two costs is clearly intended to see that the peoples representative does not get distracted from his functioning as a representative of the people to alleviate the grievances of the people of the

Municipality. As the respondent is appointed as a member of Child Welfare Committee she is disqualified under Section 86 of the Kerala Municipality Act to continue as a Councillor of Koothattukulam Municipality. The petitioner hence seeks a declaration to that effect.

4. The respondent filed counter statement contending as follows:-

The petition is not maintainable. It is true that the respondent is a member of Child Welfare Committee of Ernakulam District and she is receiving sitting fee for that from the Child Welfare Committee. The averments that the respondent is not properly discharging her duties as a Councillor and she is not available in the ward or Municipality, are all false. False allegations are put forward against the respondent out of political enmity. The respondent is actively working in the ward as a Councillor and discharging her duties. Child Welfare Committee is a Committee constituted under the Central Act and the service of a member appointed under the Act is a Part time service. The respondent is receiving sitting fee and she is not receiving any honorarium. There is no disqualification for the respondent to act as a member of Child Welfare Committee and to receive sitting fee from Child Welfare Committee. There is no violation of Section 86 of the Kerala Municipality Act. There is no bar for a Councillor to become a member of Child Welfare Committee. There is no merit in the petition. The petitioner is not entitled to get any relief in the petition and hence it is only to be dismissed.

5. The evidence in this case consists of the oral testimonies of PW1 and RW1 and Exts.A1 to A6 and B1 to B7.

6. Both sides were heard.

7. The following points arise for consideration;

- (1) Whether the petition is maintainable?
- (2) Whether the respondent has incurred disqualification as provided under Section 86 of the Kerala Municipality Act as alleged?
- (3) Whether the petitioner is entitled to the declaration prayed for?
- (4) Reliefs and costs?

8. **POINT No.(1)**: This is a petition filed under Section 92 r/w 86 of Kerala Municipality Act. Respondent is the elected Councillor of Koothattukulam Municipality in the election held in November 2015 and she represents ward No.2. According to the petitioner he is a voter of ward No.2 of Koothattukulam Municipality. While acting as a Councillor of Koothattukulam Municipality, the respondent was later appointed as a member of Child Welfare Committee Ernakulam District, by the State Government. To the petitioner the respondent became disqualified to continue as a Councillor of Koothattukulam Municipality when she was appointed and became the member of Child Welfare Committee, in view of Section 86 of Kerala Municipality Act. As per Section 86 of the Kerala Municipality Act, an officer or employee in the service of a State in the

Central Government or a local authority or a Corporation is disqualified from contesting the election or for holding the office of Councillor of a Municipality. As per explanation 2, to the Section the part time employees and persons receiving honorarium except the Anganwadi, Balawadi employees and Asha workers shall be deemed to be employees.

9. The respondent in his counter statement, among other things, raised a contention that the petition is not maintainable. But except making a vague statement in the counter statement there is nothing from her side to show that the petition is not maintainable. It is the case of PW1 that he is a voter of ward No.2 of Koothattukulam Municipality and the said claim of the petitioner is not denied by RW1, the respondent. Further Exts.A4 and A5 would show that the petitioner is a voter of ward No.2. Ext.A4 is the elector photo identity card issued to the petitioner by the Electoral Registration Officer under the Election Commission of India. Ext.A5 is the residence certificate issued by the Secretary, Koothattukulam Municipality to the petitioner. When Exts.A4 and A5 are considered together it can be seen that the petitioner is a voter of ward No.2 of Koothattukulam Municipality. Anyway a detailed discussion is not required on that aspect as the respondent has no case that the petitioner is not a voter of ward No.2.

10. As stated above this is a petition filed under Section 92 of the Kerala Municipality Act. As per Section 92 of the Act, whenever a

question arises as to whether a Councillor has become disqualified under Section 86 or Section 91, except clause (II) after having been elected as such Councillor, any Councillor of a Municipality concerned or any other person entitled to vote at the election in which the Councillor was elected, can file a petition before the State Election Commission, for decision.

11. According to the petitioner the respondent when appointed as the member of Child Welfare Committee, incurred disqualification under Section 86 of the Kerala Municipality Act. To the respondent there is no disqualification for her to act as a Municipal Councillor and also as a member of Child Welfare Committee. Her appointment as a member of Child Welfare Committee will not come under Section 86 of the Kerala Municipality Act, the respondent contends. So a question then arises as to whether the respondent has become disqualified under Section 86 of the Kerala Municipality Act. A voter of the constituency from which the respondent was elected is competent to file a petition in the matter under Section 92 of the Kerala Municipality Act for a decision. The petitioner being a voter of ward No.2 from where the respondent was elected as a Councillor of Koothattukulam Municipality is certainly entitled to file this petition as per law.

12. It is also a contention of the respondent that the petition is bad for non-joinder of necessary parties. According to him Koothattukulam Municipality, Union of India and Social Justice Department of Government

of Kerala are necessary parties in the original petition. How they are necessary parties in this original petition is not known. The dispute in this case is whether the respondent incurred disqualification under Section 86 of the Kerala Municipality Act consequent to her appointment as a member of Child Welfare Committee. To decide the said issue the presence of Koothattukulam Municipality, Union of India and Social Justice Department of Government of Kerala are not at all necessary in the party array. Admittedly the respondent was appointed as a member of Child Welfare Committee Ernakulam District by the State Government while she was functioning as a Councillor of Koothattukulam Municipality. Whether her appointment will come within the ambit of Section 86 is the matter to be decided in this case and it is to be decided on the basis of the provisions of law and the evidence adduced by the petitioner and respondent. The presence of the Koothattukulam Municipality, Union of India and Social Justice Department of Government of Kerala is not required to decide the said matter.

13. There is nothing from the side of the respondent to hold that the above original petition is not maintainable. As this petition is filed by a competent person and a question arises as to whether the respondent has become disqualified as provided under Section 86 of the Kerala Municipality Act this petition is held maintainable. Point is answered accordingly.



14. **POINT Nos. (2) to (4):** Case of the petitioner is that the respondent became disqualified to continue as a Councillor of Koothattukulam Municipality as she was appointed as a member of Child Welfare Committee Ernakulam District, during her tenure as a Councillor. Submission of the learned counsel for the petitioner is that the respondent is disqualified to hold the office of a councillor as per Section 86 of the Kerala Municipality Act when she is appointed as a member of Child Welfare Committee Ernakulam District by the State Government. She is now an officer in the service of the Government coming within the ambit of Section 86 and she is getting monetary benefits from the Government. It is a full time job as the Child Welfare Committee should work at least six hours per day and shall function for a minimum of 20 days in a month. The respondent will not be able to function effectively as a Councillor of Koothattukulam Municipality under the above circumstances and in fact she is not discharging the functions of a Councillor, the counsel further submits. As against that the submission of the learned counsel for the respondent is that Section 86 of the Kerala Municipality Act is not applicable in this case. Appointment of the respondent as a member of Child Welfare Committee while continuing as a Councillor will not attract Section 86 of the Act. There is no bar for the respondent as a Councillor to become a member of Child Welfare Committee. According to the learned counsel work of a member of Child Welfare Committee is part time service

and Section 86 bars only full time service. It is also the submission of the learned counsel that the respondent is not getting honorarium from Child Welfare Committee and she is getting only the sitting fee. The respondent is not an employee or officer of the state and hence the appointment of the respondent as a Child Welfare Committee member will not come within the purview of Section 86 and the petitioner filed this case against the respondent out of political enmity.

15. The short question to be considered in this case is whether the appointment of the respondent as a member of Child Welfare Committee, Ernakulam District would disqualify her to hold the office of the Councillor in view of Section 86 of the Kerala Municipality Act.

Section 86 of the Act reads as below:-

**86. Disqualification of officers and employees of Government, local authorities etc,-** (1) No officer or employee in the service of a State or Central Government or a local authority or a Corporation owned or controlled by a State or the Central Government or of a company in which a State or Central Government or local authority has not less than fifty one per cent share or of Boards or any University established under a State enactment shall be qualified for election as, or for holding the office of Councillor of a Municipality.

Explanation-1,- For the purpose of this section, company means a Government Company as defined in section 617 of the Companies Act,

1956 (Central Act 1 of 1956) and includes a Co-operative Society registered or deemed to have been registered under the Kerala Co-operative Societies Act, 1969 (21 of 1969).

Explanation-2,- For the purpose of this section, the part time employees and persons receiving honorarium except the anganwadi employees, Balawadi employees and Asha workers shall be deemed to be employees.

16. The respondent is an elected Councillor of Koothattukulam Municipality and admittedly she is appointed as a member of Child Welfare Committee Ernakulam District while is continuing as a Councillor of Koothattukulam Municipality. Section 27 of the Juvenile Justice (Care and Protection of Children) Act deals with constitution of Child Welfare Committee and appointment of Chairman and members of Child Welfare Committee. The selection of the members of Child Welfare Committee was after conducting interview by a selection committee constituted for that purpose. It was after undergoing the above selection process the respondent was appointed as a member of Child Welfare Committee and there is no dispute over that. Ext.B5 is the copy of the Government notification regarding the appointment of the respondent as a member of Child Welfare Committee.

17. Section 27 of the Juvenile Justice (Care and Protection of Children) Act provides induction training also and it is mandatory. The

committee shall have the authority to dispose of cases for the care and protection, treatment, development and rehabilitation of children in need of care and protection as well as to provide for their basic needs and protection as per Section 29 of the Act. Section 30 of the Act deals with the functions and responsibilities of the Child Welfare Committee and they shall include taking cognizance and receiving the children produced before it, conducting inquiry on all issues relating to and affecting the safety and well being of the children under the Act. A Child Welfare Committee has several responsibilities to be discharged under the Act including judicial functions. Sub section (9) of Section 27 gives judicial powers to the committee while dealing certain matters under the Act and the Child Welfare Committee shall function as a Bench. Such is the important position and function of the Child Welfare Committee.

18. Contention of RW1 in her chief examination is that the work of the Child Welfare Committee is a part time service and Section 86 bars only full time service. It is to be stated that Section 86 of the Kerala Municipality Act does not make any difference between part time and full time service. Further, the evidence available in this case would show that the work of Child Welfare Committee is a full time service. In fact it is a 24 hours job. A child in need of care and protection can be produced before a member of Child Welfare Committee even during night for necessary orders and appropriate directions. It is an evidence that the

government has issued a circular in 2017 to the effect that the Child Welfare Committee should work at least six hours per day. RW1 admitted the said fact in her cross-examination. It is stated by her that as a member of Child Welfare Committee she is bound to work at least six hours per day as per the circular. RW1 has a case that they are now conducting sittings only on Mondays and Fridays. On what basis they have reduced the working time is not known. There is no Government order or circular to that effect. Anyway whether the Child Welfare Committee conducts sittings properly and discharging their duties as per law is a matter to be considered by the authorities under the Juvenile Justice (Care and Protection of Children) Act and that is not a matter to be decided in this case.

19. Citing Ext.B6 notification issued by the Gujarat Government it is submitted by the learned counsel for the respondent that a job of Child Welfare Committee member is not a Government job. Ext.B6 is said to be a copy of the notification issued by the Government of Gujarat inviting application for appointment of Chairperson and members of Child Welfare Committee. In the footnote of the notification it is noted that the notification is not for Government job. The said note in Ext.B6 will not in any way help the respondent and that note alone is not the deciding factor while considering the question of office of profit. The authority and the manner of appointment, termination, remuneration to be paid to them are

all matters to be considered. Further, it is not the notification issued by the Government of Kerala who appointed the respondent. So Ext.B6 has nothing to do with this case.

20. Another argument of the learned counsel for the respondent is that the respondent is not getting any salary or honorarium from the Child Welfare Committee and she is getting only sitting fee for the sittings conducted and it is not an office of profit. As she is not getting any salary or honorarium as a member of Child Welfare Committee Explanation -2, to Section 86 is not attracted in this case, the counsel further submits. It is a matter of admission that the respondent is getting sitting fee from the Child Welfare Committee. Ext.A1 document also would show the said fact. It is a reply given by the Chairperson of Child Welfare Committee Ernakulam District to the petitioner's application under the RTI Act. It is stated therein that a Child Welfare Committee member gets ₹1,000/- as sitting fee per day and an amount of ₹71,000/- was paid to the respondent as sitting fee from September 2017 to March 2018. For deciding the question as to whether one is holding an office of profit or not, what is relevant is whether the office is capable of yielding a profit or pecuniary gain and not whether the person actually obtained a monetary gain as held in the decisions reported in 2001(7)SCC 425 (Shibu Soren V. Dayanand Sahay and Others) and 2006 (5) SCC 266 (Jaya Bachan V. Union of Indian and Others). Same view is taken by the Hon'ble High Court in the decision

reported in 2015(2) KHC 786 (AsharafKokknur V. K.V.Abdulkhader and Others). Holding an office under the Central or State Government to which some pay, salary, emolument, remuneration or non-compensatory allowance is attached, is holding an office of profit. The question whether a person holds an office of profit is required to be interpreted in a realistic manner. Nature of the payment must be considered as a matter of substance rather than of form. Nomenclature is not important.

21. Admittedly the respondent receives sitting fee from Child Welfare Committee by way of remuneration for the sittings conducted, from the funds provided by government to Child Welfare Committee. If a person holds an office profit under the State Government such a person is disqualified for being chosen as, and for being a Councillor as per Section 86 of the Kerala Municipality Act. Office of profit is an office which is capable of yielding a profit or pecuniary gain. The profit always being treated equivalent for a substitute for the term of pecuniary gain other than mere compensatory allowances to defray his/her out of pocket expenses. The sitting fee paid in this case is not a compensatory allowance.

22. As per Article 243 V of the Constitution of India a person shall be disqualified for being chosen as and for being a member of a Municipality-

(a) if he is so disqualified by or under any law for the time being in force for the purposes of elections to the legislature of the state concerned.

(b) if he is so disqualified by or under any law made by the legislature of the state.

23. The second limb of Article 243V of the constitution is relevant in this case. The law made by the legislature of the state applicable in this case is the Kerala Municipality Act. In addition to the disqualification provided under the Constitution and the Representation of People Act 1951 a person shall be disqualified for being chosen as a member or for holding the office of Councillor of a Municipality if he is disqualified under the provisions of the Kerala Municipality Act. In this case the law concerned is the law made by the legislature of the state. The law made by the state legislature is Kerala Municipality Act and the relevant provision applicable to this case is Section 86 of the Kerala Municipality Act. As per Section 86 of the Act an officer or an employee of the State Government is disqualified for holding the office of Councillor of the Municipality. Thus from the above evidence and circumstances and the relevant provisions of the Juvenile Justice (Care and Protection of Children) Act and Kerala Municipality Act it can be seen that the respondent as a member of Child Welfare Committee member is holding an office of profit and that she is an officer of the State Government coming under the purview of Section 86(1)



of the Kerala Municipality Act. It may be noted here that the object of Section 86(1) of the Kerala Municipality Act is to ensure that a person elected as a Councillor of a Municipality is utilizing his/her time can for the purpose of serving his ward and partake in the meetings of the Municipality without being disturbed in any other manner as observed by the Hon'ble High Court in the judgment in W.P.(c) No.21926/2018 dated 16.11.2018.

24. Further argument put forward by the learned counsel for the respondent is that the respondent was appointed as a member of Child Welfare Committee after the intervention of the Hon'ble High Court when there was delay in appointing the respondent. It is true that the respondent approached the Hon'ble High Court by filing WP(c) No.37778/2016 for a direction to the Government to appoint her as a member of Child Welfare Committee Ernakulam District when there was delay in making the appointment after the select committee selected her. The Hon'ble High Court disposed of the said case directing the State Government to consider the minutes of the select committee and to issue necessary orders. Ext.B3 is the copy of the judgment in WP(c) No.37778/2016. The State challenged Ext.B3 judgment in Writ Appeal No.416/2017 and it was dismissed Ext.B4 is the copy of the judgment in the Writ Appeal. But Exts.B3 and B4 judgments will not in any way help the respondent in this case. Section 86 of the Kerala Municipality Act was not at all a matter in issue in that case and the respondent's election as a Councillor was also not

mentioned in that case. Whether the respondent is qualified to be appointed as a member of Child Welfare Committee is not a matter in this case and the petitioner has no case that the respondent is not qualified to be appointed as a member of Child Welfare Committee. Whether her appointment will invite the mischief under Section 86 of the Kerala Municipality Act and will disqualify her from continuing as a Councillor of Koothattukulam Municipality is the matter in issue in this case. So the above contention of the learned counsel with regard to the litigation mentioned above is only to be ignored.

25. As submitted by the learned counsel for the petitioner this case is to be decided on the basis of Section 86 of the Kerala Municipality Act. As per Section 86 of the Act an officer or an employee in the service of a State or Central Government or local authority or corporation is disqualified from contesting the election and holding the office of a Councillor in a Municipality. As stated above the respondent was appointed as a member of Child Welfare Committee by the State Government during her tenure of Councillorship and the authority to terminate her service in the Child Welfare Committee is also the State Government. The payment of sitting fee is from the Government revenue and she is receiving the sitting fee as remuneration. The Child Welfare Committee is discharging important governmental functions receiving

pecuniary gain from the Government and therefore the respondent is an officer of the Government. She is holding an office of profit.

26. Under the above facts and circumstances I will have to necessarily hold and I hold that the respondent has incurred disqualification as provided under Section 86 of the Kerala Municipality Act and hence she became disqualified to continue as a Councillor of Koothattukulam Municipality. The points are answered accordingly.

In the result, the petition is allowed and the respondent is declared as disqualified to continue as a Councillor of Koothattukulam Municipality as provided under Section 86 of the Kerala Municipality.

Considering the circumstances of the case the parties are directed to bear their respective costs.

Pronounced before the Commission on this the 5<sup>th</sup> day of February 2019

Sd/-

**V.BHASKARAN,  
STATE ELECTION COMMISSIONER.**

**APPENDIX**

**Witnesses examined on the side of the petitioner**

PW1 : Shri.ArunV.Mohan

**Witnesses examined on the side of the Respondent**

RW1 : Smt.Seena Johnson

**Documents produced on the side of the petitioner**

- A1 : Reply received from the Chairperson of Child Welfare Committee Ernakulam District by the petitioner ArunV.Mohan dated 06.08.2018 under the RTI Act
- A2 : Letter No.G1-848 dated 10.08.2018 of Koothattukulam Municipality Ernakulam District.
- A3 : Copy of the Online news item published in the Hindu daily
- A4 : Elector photo Identity card
- A5 : Residential Certificate No.R1/9443/18 dated 11.12.2018 issued by the Secretary of Koothattukulam Municipality to the petitioner
- A6 : Certified copy of the list of Councillors of Koothattukulam Municipality

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

- B1 : Copy of the Kerala Gazette Notification G.O(P) No.17/2015/SJD dated 20.03.2015
- B2 : Copy of the Kerala Gazette Notification ICPS 3/31205/14CD dated 04.06.2015
- B3 : Copy of the Judgment in WP(c) No.37778/16 of the Hon'ble High Court dated 21.12.2016
- B4 : Copy of the Judgment in WA No.416/2017 in WP(c) No.37778/16 dated 14.03.2017
- B5 : Copy of the Kerala Gazette Notification G.O(P) No.16/2017/SJD dated 29.08.2017

- B6 : Copy of the print of the notification for the post of Chairperson and Members in Child Welfare Committee issued by the SJD Gujarat dated 03.12.2018
- B7 : Photograph

Sd/-  
**V.BHASKARAN,**  
**STATE ELECTION COMMISSIONER**

//True Copy//