

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

PRESENT: SHRI.K.SASIDHARAN NAIR, STATE ELECTION COMMISSIONER

Saturday, the 30th day of August 2014

O.P.No.89/2013

Petitioner : Muhammed Shafi.K,
S/o Muhammed, Kuriyathil House,
Meenaduthur, Thanalur,
Malappuram District,
PIN- 676 406.

(By Advs.M.Hashim Babu & Sajitha. S)

Respondent : Velliyathu Abdul Razakh,
Member, Ward No.17,
Thanalur Grama Panchayat,
Malappuram District,
PIN 676 406.

**(By Advs. Kulathur Jayakumar,
Abdul Shukkur Arakkal & Pratap K.Pushpakaran)**

This petition having come up for hearing on the 5th day of July 2014,
in the presence of Advocates **M.Hashim Babu & Sajitha.S** for the
petitioner and Advocates **Kulathur Jayakumar, Abdul Shukkur Arakkal
& Paratap K Pushpakaran** for the respondent and having stood over for
consideration to this day, the Commission passed the following.

ORDER

Petition filed under Section 35(k) of the Kerala Panchayat Raj Act for declaring that the respondent has ceased to hold office as a member of Thanalur Grama Panhayat.

2. The short facts are as follows:- The petitioner is a voter of ward No.17 in Thanalur Grama Panchayat and the respondent is the elected member from that ward in the election held in 2010. The respondent is a member of the Standing Committee for finance. The respondent has not attended the meetings of the Finance Standing Committee held on 17.02.2011, 26.02.2011, 15.03.2011, 31.03.2011, 23.04.2011, 28.04.2011 and 27.05.2011 which were held with due notice to him. Since the respondent had failed to attend three consecutive meetings of the Finance Standing Committee held within a period of three months with effect from 17.02.2011 and as those meetings were convened with due notice to the respondent, he has become disqualified under Section 35(k) of the Kerala Panchayat Raj Act and hence this petition to declare that he has ceased to hold office as a member of Thanalur Grama Panchayat.

3. The respondent filed objection contenting in brief, as follows:- The petition is not maintainable either in law or on facts. It is true that the respondent is an elected member of Thanalur Grama Panchayat and he is

also a member of the Finance Standing Committee. The cause of action if any had arisen on 17.02.2011 and as this petition is filed only on 08.10.2013, it is hopelessly barred by limitation. The allegation in the petition that the respondent has incurred disqualification under Section 35(k) of the Kerala Panchayat Raj Act is totally false. In terms of the statutory provisions, where a person ceases to be a member under clause (k) of Section 35 of the Act, the Secretary of the Panchayat has to intimate the fact in writing to such person and report the same at the next meeting of the Panchayat and if such person applies for restoration before the Panchayat on or before the date of its next meeting or within 15 days of receipt by him of such intimation, the Panchayat may at the meeting next after the receipt of such application, restore him to his office as a member. In the case on hand no such intimation as required by law was given by the Secretary to the respondent. The respondent is continuously attending all the meetings for the last one year without any interruption. The allegation that the respondent has not attended the meetings is totally false. The petitioner has no locus-standi to file this petition. The Secretary of the Panchayat is the competent person to take action and he has never intimated to this respondent or mentioned in any meeting of the Panchayat with regard to the failure of this respondent as provided by Section 37(2) of the Kerala Panchayat Raj Act. The respondent

has attended all the meetings of the Panchayat and the Standing Committee for Finance for which due notice has been received. In case the respondent was unable to attend the meeting for any reason that was duly intimated to the Panchayat and there was no willful latches on the part of this respondent in this regard. The petition has been filed on account of political vengeance and it is an abuse of the process of this Commission. Since the respondent had participated in all the meetings of the Panchayat in which due notice has been served the petition is untenable. More over the Secretary who is the competent person has never initiated any action as provided by Section 37(2) of the Kerala Panchayat Raj Act and so the petition deserves only dismissal.

4. The evidence consists of the oral deposition of PW1 and Exts.P1 to P3. No evidence is adduced on the side of the respondent.

5. Both sides were heard

6. The following points arise for consideration;

- (i) Whether the petition is barred by limitation?
- (ii) Whether the petition is not maintainable?
- (iii) Whether the petitioner is competent to file the petition under Section 35(k) of the Kerala Panchayat Raj Act against the respondent?
- (iv) Whether the respondent has failed to attend three consecutive meetings of the Standing Committee for finance for which due notice was given as alleged?

- (v) Whether the respondent has ceased to hold office as a member of Thanalur Grama Panchayat as provided by clause (k) of Section 35 of the Kerala Panchayat Raj Act?
- (vi) Reliefs and costs?

7. ISSUE No.(i): This petition is filed under Section 35(k) read with Section 36(1) of Kerala Panchayat Raj Act, for short the 'Act'. According to the petitioner the respondent who is a member of the Finance Standing Committee has failed to attend seven consecutive meetings held from 17.02.2011 to 27.05.2011 and thereby he has incurred disqualification to continue as a member of Thanalur Grama Panchayat as provided by Section 35(k) of the Act. The respondent would contend that as the cause of action if any arose on 17.02.2011 and the petition is filed only on 08.10.2013, the petition is hopelessly time barred and it is liable to be dismissed. Section 35(k) of the Act states that a member shall cease to hold office as such if he absents himself without permission of the Panchayat concerned from its meeting or the meeting of the Standing Committee for a period of three consecutive months. As per Section 36(1) of the Act, whenever a question arises as to whether a member has become disqualified under any of the provisions of Section 35 except clause (n) thereof after having been elected as a member, any member of the Panchayat concerned or any other person entitled to vote at the election in which the member was elected, can file a

petition before the State Election Commission, for decision. As per Section 36(3) of the Act, a petition referred to in sub section (1) of Section 36 shall be disposed of in accordance with the procedure applicable under the Code of Civil Procedure when filing a suit. No period of limitation for filing a petition under Section 36(1) of the Act is provided under this Act. The only pre-requisite for entertaining such a petition is that the petition can be filed whenever a question arises as to whether a member has become disqualified under the provisions of Section 35 by any member or a voter of the constituency from which the concerned member was elected. Of course such a petition can be filed only in respect of the cause of action which arose after the said member was elected and not for a cause of action which arose before his election. It is also clear from the provisions of this Act that the disqualification incurred by such member is only for the remaining period of his tenure as a member and not thereafter. The opening words of Section 35 that “the member shall cease to hold office as such” if any of the provision contained in clauses (a) to (r) is attracted would mean that the disqualification is only for functioning as a member during his remaining term. Since no limitation period is prescribed for filing a petition under Section 36 of the Act, the only possible conclusion that a petition can be filed during the tenure as a member provided a question arises as to whether

he has become disqualified under Section 35 of the Act. There cannot be any doubt that the Limitation Act is not applicable to a petition under Section 36(1) of the Act and if the legislature had intended to prescribe a period for filing a petition under Section 36(1), it would have been provided in the Panchayat Raj Act itself. Simply because the cause of action arose in 2011 and the petition has been filed only in 2013, it cannot be held that it is barred by limitation. The delay in filing the petition also cannot be considered as fatal in the absence of any provision which makes the same unentertainable. Therefore I find that the petition is not barred by limitation. The point is answered accordingly.

8. **POINT Nos.(ii) & (iii)**: The respondent would contend that the petition is not maintainable. As already point out whenever a question arises as to whether a member has become disqualified under Section 35, any member of the Panchayat concerned or any other person entitled to vote at the election in which the member was elected can file a petition. The petition has been filed by a voter of ward No.17 of Thanalur Grama Panchayat of which the respondent is the member. The petitioner is included under serial No.125 of the voters list of this ward as seen from Ext.P1 and the said entry is marked as Ext.P1(a). The above fact is not challenged by the respondent. Therefore I find that the petitioner who was

entitled to vote at the election in which the respondent contested is competent to file the petition.

9. The respondent has taken another contention that in terms of the statutory provision which states that when a person ceases to be a 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 and in such a case such person can apply for restoration to the Panchayat on or before the date of next meeting as provided by Section 37 of the Act and so without resorting to the above procedure, a petition under Section 36 is not tenable. It is also contended that since such a specific provision is incorporated under Section 37(2) of the Act in relation to Section 35(k) of the Act, a petition under Section 36(1) of the Act is not maintainable. The learned counsel for the respondent would rely on the decision in **Rajan Kannath V.P.R.Pradeep Kumar (2010(3) KLT 457)** to canvass for the position that in the absence of a proceedings under Section 93(2) of the Kerala Municipality Act which is in pari materia with Section 37(2) of the Kerala Panchayat Raj Act, by the Secretary either suo moto or on a request by anybody requiring cessation of membership, no member will cease to hold office by virtue of the operation of Section 91(k) of the Kerala Panchayat Raj Act, which of course is similar

to Section 35(k) of the Act. In the above decision the challenge was against the belated intimation given by the Secretary as provided by Section 93(2) of the Kerala Panchayat Raj Act and while considering this provision, the Hon'ble High Court held that there cannot be cessation of membership in the absence of proceedings under Section 93(2) by the Secretary. The above decision has no application to the facts of this case.

10. On a harmonious construction of Sections 35(k), 36(1) and Section 37(2) of the Act, it is clearly found that whenever a question arises as to whether a member has become disqualified under Section 35(k) of the Act, either any member of the Panchayat or a voter of the constituency from which the concerned member was elected can file a petition before this Commission for decision and so under this provision even a member who has been served with an intimation under Section 37(2) of the Act also can file a petition and he need not try his luck by applying for restoration under sub-section (2) of Section 37 of Act. So in the case of an alleged disqualification under Section 35(k) of the Act, any member or voter can file a petition under Section 36(1) for declaring that the concerned member has ceased to hold office and if an intimation has been given under Section 37(2) of the Act, the concerned member also can file a petition under Section 36(1) of the Act. Section 37 is a special provision whereby the Secretary of

the Panchayat has to intimate the fact in writing to the member if he ceased to hold office under Section 35(k) of the Act and in such a context that member has two options i.e., he can admit the cessation and apply for restoration as provided by Section 37(2) or file a petition under Section 36(1) challenging such intimation. However if no intimation has been served as provided by Section 37(2) of the Act, any other member or a voter of the constituency from which the concerned has been elected can file a petition under section 36(1) of the Kerala Panchayat Raj Act. The Secretary can also make a reference even without resorting to Section 37(2) of the Act for the purpose of disqualifying a member who has ceased to hold office as provided by the proviso to Section 36(1) of the Act. Section 36(1) of the Act is a general provision and Section 37 is a special provision and both these provisions would operate under different situations. In V.Anil Kumar V. Kerala State Election Commission (2007 (2) KHC 273) it has been held at Paras 7 and 8 as follows,-

“7. We are of the view, whenever a question arises as to whether a member has become disqualified under Section 35(k) that member can invoke Section 36(1) of the Act and seek a decision from the Election Commission. So also, such a person can invoke Section

37(1) for restoration of his membership by preferring an application under sub-section (2) of Section 37 before the Panchayat but a voter cannot invoke Section 36(1), if that elected member has already entailed disqualification and that order of disqualification has become final. An elected member can always invoke sub-section (1) of Section 36 even if the Panchayat Committee has rejected his application under sub-section (1) of Section 37 for restoration of his membership.

8. *We however, find it difficult to approve the reasoning in Rajan's case (supra) which says that remedies available under Sections 36 and 37(2) are inconsistent remedies. In our view those provisions operate on different situations. Section 36(1) calls upon the Election Commission to decide as to whether a member has entailed disqualification. Section 37(2) gives an opportunity for a disqualified member for restoration of his membership. On facts this case stands on a different footing, hence reference to a*

Larger Bench does not arise. In the instant case, petition was moved under Section 36(1) of the Act not by the person who entailed disqualification but by a voter. So far as a voter is concerned, in our view, once the member has already become disqualified and that order has become final, no question arises as to whether the elected member has become disqualified or not so as to enable a voter to invoke sub-section (1) of Section 36 of the Kerala Panchayat Raj Act.”

11. In the above decision it has been held that a member of the Panchayat can invoke Section 36(1) of the Act whenever a question arises as to whether he has become disqualified under Section 35(k) if he has been served with an intimation under Section 37(2) of the Act and such a member can also apply for restoration without resorting to Section 36(1) on getting such intimation and it has been further held that the said member even after the dismissal of his application for restoration can file a petition under Section 36(1) and in such a context a voter cannot move the Commission for decision. At the same time it has been clarified that a voter can file a petition under Section 36(1) of the Act when a question arises as to whether a member has ceased to hold office as provided by Section 35(k) of the Act.

In Giji Mathew V. Kerala State Election Commission(2006 (3) KLT 141) also this position has been clarified. In **Gopi V. Maneed Grama Panchayat (2002(2)KLT 753)** it has been held at **Para 4** as follows,-

“4. Under Section 36 of the Kerala Panchayat Raj Act, 1994, whenever a question arises as to whether a member has become disqualified under Section 30 or under Section 35 (except under Section 35(n), it is open to any member of the Panchayat concerned or any person entitled to vote at the election in which the member was elected to file a petition for a decision by the Commission. It has now been held by a Bench decision of this Court in Rajan V. Kerala State Election Commission, 1999(3) KLT 601 that an aggrieved member also is entitled to approach the Commission. After the amendment by Act 13/1999 with effect from 24.03.1999 the Secretary of the Grama Panchayat or any officer authorized by the Government are also entitled to refer such a question to the Commission. It is significant to note that as far as aggrieved member/members of the Panchayat/voters are

concerned, they have to file a petition before the State Election Commission as and when the question arises; whereas in the case of the Secretary of the Grama Panchayat or the officer authorized by the Government they are entitled to refer a question for decision by the Commission.”

This position is further clarified at **Para 6** of the above decision as follows,-

“6. But a question may arise as to the disqualification of a member even before the Secretary of the Panchayat gives an intimation to the member or reports the matter to the Panchayat. It is significant to note that the expression ‘question’ has been understood as ‘dispute’ by the Division Bench in Rajan’s case (supra). Even otherwise the Legislature uses the expression under Section 36 “whenever a question arises.” The question is said to arise when the membership becomes questionable. The membership becomes questionable not only at the instance of the member concerned but at the instance of (1) any other member, or (2) any voter, or (3) the Secretary, or (4) the Officer specifically authorized by the Government.

Those persons are entitled to approach the Election Commission under Section 36, even before the Secretary of the Grama Panchayat intimates the fact to the member concerned. It is also to be noted that Section 36 operates in a wide range of situations under Section 30 and Section 35 whereas Section 37(2) deals only with Section 35(k) situation. As to whether it is a fact that a person has ceased to be a member can itself be a matter of reference as far as the Secretary or the authorized officer is concerned. The affected as well as aggrieved members and voters are concerned they are entitled to file petition before the Election Commission for a decision as to the acquisition of disqualification.”

12. On a careful reading of Section 36(1) of the Act itself there cannot be any doubt that a voter of the constituency from which the concerned member was elected, and on whom no intimation has been given by the Secretary under Section 37(2) of the Act, is competent to file a petition for declaration that such member has ceased to hold office when a question so arises. So in the light of the settled position of law, I hold that the petition filed by a voter of the constituency from which the respondent

has been elected is fully competent to file a petition under Section 36(1) of the Act. In the light of the allegation that the respondent has ceased to hold office for his failure to attend three consecutive meetings of the Standing Committee for Finance of which he is a member this petition is found to be maintainable. The points are answered accordingly.

13. **POINT Nos.(iv) to (vi)**: The definite case of the petitioner is that the respondent who is a member of Finance Standing Committee has failed to attend the meetings held on 17.02.2011, 26.02.2011, 15.03.2011, 31.03.2011, 23.04.2011, 28.04.2011 and 27.05.2011 for which due notices have been served to him. The contention of the respondent is that he had attended the meetings for which due notices were served and there was no failure to attend the meetings of the Standing Committee for Finance as provided by Section 35(k) of the Act. In this context Section 35(k) becomes relevant and it 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.”*

14. So for attracting this provision certain conditions are to be satisfied. Firstly the member should absent himself from the meeting of the Panchayat 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 that he attended. Secondly due notices of those meetings should have been served to him and such meetings were not held on requisition of members. There should have been three meetings within the period of the above three months. It is also important to point out that if within the said period of three months only less than three meetings of the Panchayat or of the Standing Committee as a case may be have been held, the member should have failed to attend the meetings of the subsequent three consecutive months to attract disqualification. The period of three consecutive months to be reckoned from the last date that the member has attended is to be calculated not on the basis of calendar months but on the basis of the month starting from the date of the meeting from which he failed to attend. This position has been clarified in Krishna Kumar C. V. Kerala State Election Commission (2010 (3) KLT 315). At Paras 11 and 12 of the above decision it has been held as follows,-

“11.It is clear from the principles laid down in the above decisions that the word “month” has to be reckoned, and the period has to be computed in the light of the language employed in the provision itself. When a particular date which is not the first of the month has to be reckoned, the first month will have to be computed by reckoning the said factor. When the period has to be counted from a date which is not the first day of the month, the method of computation as described in Halsbury’s Laws of England has to be adopted which is the safest method. This is clear from the decisions in Daryoth Singh’s case, Bibi Salma Khatoon’s case and Surabhi’s case. In all these three cases the word “month” is qualified by the words “from the date” etc. Therefore, when the word “month” is followed by such an expression indicating the date from which it has to be computed, the principles stated in the above three decisions will squarely apply and the period will expire upon the day in the succeeding month corresponding to the

date upon which the period starts. Evidently, in Surabhi;s case (supra), this Court considered an identical situation like one herein, wherein under the Land Acquisition Act, viz. Section 28A(1), the application had to be made within “ three months from the date of award of the Court.” Therefore, the calendar month has to be reckoned from the date of the award. The Apex Court in Bibi Salma Khatoon,s case (supra), also has considered a similar issue. Therefore, the said dictum alone will apply to the facts of this case. The decision of this Court in Radhakrishnan’s case,” was one considering a case where the wording of Section 33(1) of the Kerala Co-operative Societies Act, 1969 was not the like one in Section 35(k) of the Panchayat Raj Act. Therefore, it is in that context this Court said that when ‘month’ followed by the words, “consecutively six months” has to be reckoned based on British calendar, till the end of the six months period.

12. Herein, going by the facts of the case, the last meeting which the petitioner had attended, was on 16.10.2008. The notice Ext.P1 was issued on 24.01.2009. Therefore reckoned from the date 16.10.2008, on which he last attended the meeting and even excluding one day, the period of three months will expire before 24.01.2009, the date of Ext.P1 notice. It is not as if the Secretary should have waited till the end of January, ie., 31.01.2009. Therefore, the contention raised by the petitioner that the notice itself is without jurisdiction, cannot be accepted.”

15. In the case on hand even according to the petitioner the failure to attend was in the meeting held on 17.02.2011, 26.02.2011, 15.03.2011, 31.03.2011, 23.04.2011, 28.04.2011 and 27.05.2011. On taking 17.02.2011 as the first date of meeting in which the respondent absented there should have been one meeting in the month of March and another in the month of April by counting from 17.02.2011 which means that the third meeting should have been held on or before 17.04.2011. But no meeting was held in April before 17.04.2011. Since it is specifically stated in Section 35(k) that

if within the said period of three consecutive months, only less than three meetings of the Panchayat or the Standing Committee as case may have been held, a fresh period would start from the date of the next meeting, the subsequent date to be reckoned can only be from 23.04.2011 and there should have been three consecutive meetings from that date in which he had absented. But even according to the petitioner the respondent did not absent for three consecutive meetings counted either from 23.04.2011 or 28.04.2011. So even going by the allegations in the petition it cannot be found that the requirements under Section 35(k) of the Act have been satisfied for incurring disqualification to the respondent. Therefore the petition cannot be legally sustain.

16. The respondent also would contend that there was no due notice to him for attending the meetings of the Standing Committee. Exts.P2 series are the copies of the notices said to have been served to the members of the Standing Committee. Ext.P2(a) is the notice for the meeting held on 17.02.2011. The date mentioned on the top of notice is 09.02.2011. The respondent is found to have affixed his signature. No date is mentioned by him while accepting the notice. Ext.P2(b) is the copy of the notice dated 22.02.2011 for the meeting held on 26.02.2011. Only one meeting for

February can be counted and so this notice becomes irrelevant. The notice for the next consecutive month is dated 10.03.2012 for the meeting held on 15.03.2011. Here also even though the respondent has signed against his name, the date of receipt of the notice has not been mentioned. The next meeting held on 31.03.2011 being not for the next consecutive month, it cannot be counted Ext.P2(e) is the notice dated 18.04.2011 for the meeting held on 23.04.2011. Of course the respondent is found to have received this notice on the very same date. The next meeting held on 28.04.2011 not being for the next consecutive month, it cannot be counted and Ext.P2(g) is the notice for the meeting held on 27.05.2011. The respondent has not been served with the notice for this meeting and some other person is seen to have been given the notice on his behalf. This cannot be treated as due notice as provided by law. If it was served to an adult member in his house it should have been clearly mentioned. So there is force in the contention of the respondent that due notice was not served in respect of the said meetings for the simple reason that there is no acceptable evidence to prove that three clear days notices were served. It is not the date of despatch of the notice but it is the receipt of the notice which is to be taken into account for considering clear days. So on this score also, the petition has to fail. The points are answered accordingly.

From the discussion held above, I find that the petition is only to be dismissed.

In the result, the petition is dismissed.

In the circumstances both parties shall bear their respective costs.

Pronounced before the Commission on this the 30th day of August 2014

Sd/-
K.SASIDHARAN NAIR,
STATE ELECTION COMMISSIONER

APPENDIX

Witness examined on the side of the petitioner

PW1 : Muhammed Shafi.K

Document produced on the side of the petitioner

P1 : Voters list of ward No.17 of Thanalur Grama Panchayat

P2 : Copy of the meeting Notice Book of Finance Standing Committee, Thanalur Grama Panchayat

P2(a) : Copy of the Notice of the meeting dated 09.02.2011 of Finance Standing Committee, Thanalur Grama Panchayat

P2(b) : Copy of the Notice of the meeting dated 22.02.2011 of Finance Standing Committee, Thanalur Grama Panchayat

- P2(c) : Copy of the Notice of the meeting dated 10.03.2011 of Finance Standing Committee, Thanalur Grama Panchayat
- P2(d) : Copy of the Notice of the meeting dated 27.03.2011 of Finance Standing Committee, Thanalur Grama Panchayat
- P2(e) : Copy of the Notice of the meeting dated 18.04.2011 of Finance Standing Committee, Thanalur Grama Panchayat
- P2(f) : Copy of the Notice of the meeting dated 23.04.2011 of Finance Standing Committee, Thanalur Grama Panchayat
- P2(g) : Copy of the Notice of the meeting dated 23.05.2011 of Finance Standing Committee, Thanalur Grama Panchayat
- P3 : Copy of the attendance register of Finance Standing Committee, Thanalur Grama Panchayat

Sd/-

**K.SASIDHARAN NAIR,
STATE ELECTION COMMISSIONER.**

//True Copy//