

**(2011) 11 KAR CK 0332**

**In the Karnataka High Court**

**Case No :** Writ Appeal No's. 4539-4541 of 2011 and 16487-488 of 2011

B.C. Parthasarathy, Dr. Gnanaprakash B.K. and Sri. Mahadeva  
Swamy

**APPELLANT**

**Vs**

Dy. Commissioner Mysore District Mysore and Others

**RESPONDENT**

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**Date of Decision :** 04-11-2011

**Acts Referred:**

Constitution of India, 1950 — Article 226

Karnataka Local Authorities (Prohibition of Defection) Act, 1987 — Section 3 (1) (a), 3 (1) (b), 4 (1)

**Citation :** (2011) 11 KAR CK 0332

**Hon'ble Judges :** Vikramajit Sen, Acting C.J.;A.S. Bopanna, J

**Bench :** Division Bench

**Advocate :** M.B. Nargund, Smt. Sona Vakkund and Sri. Rohith Gowda, in W.A. Nos. 4539-4541/2011 and 16487-488/2011 and Writ Appeal Nos. 4536-4538/2011 LB -RES, for the Appellant; Ravivarma Kumar for C/R-3 to 7 Sri. B. Veerappa, AGA. for R1 and 2 in W.A. Nos. 4539-4541/2011 and 16487-488/2011 and Writ Appeal Nos. 4536-4538/2011 (LB -RES), for the Respondent

**Final Decision :** Dismissed

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**Judgement**

A.S. Bopanna, J.—The respondent Nos. 3 to 5 in W.P. Nos. 10294-10298/2011 (LB-RES) and the respondent Nos. 3 to 5 in W.P. Nos. 10300-10301/2011 (LB RES) have filed these appeals against the common order dated 29.03.2011 passed by the learned Single Judge. By the said order, the learned Single Judge has quashed the orders of the Deputy Commissioner disqualifying the petitioners; in the respective writ petition from holding the post of the Councillors of the respective Municipal Council.

2. The issue in WA Nos. 4539-41/2011 arising from W.P. Nos. 10294-10293/2011 relates to the election for the post of Adhyaksha and. Upadhyaksha to the Town Municipal Council, Bannur, T. Narasipura Taluk. The dispute mainly pertains to the election of Adhyaksha which was scheduled on 21.08.2010. In the Elections held

in the year 2007 to constitute the Municipal Council, the partywise strength to the 23 member body is as follows:

a) JanathaDal-(S)

14

b) Congress

07

c) B.S.P.

01

d) Independent

01

3. In the above background, the first appellant who was elected from Janatha Dal-S ("JD(S)" for short) who had the majority was nominated as a candidate for the post of Adhyaksha. The third appellant who is the President of JD(S), T. Narasipura is stated to have approached the State President of JD(S) Sri H.D. Kumaraswamy who had authorised the third appellant to issue direction and whips to the Councillors. Though nine members of JD(S) had received the whips, the respondent Nos. 3 to 7 herein did not receive the same and as such the same were stated to have been sent by speed post. The said respondent who however participated in the meeting on 21.08.2010 had nominated the third respondent as a candidate for the post of the Adhyaksha and with the help of the Congress Councillors, the third respondent got elected as the Adhyaksha of the Town Municipal Council. In this context, it is contended by the appellants that the respondent Nos. 3 to 7 had voluntarily given up the membership of JD(S) and had also violated the whip and incurred disqualification under Section. 3(1)(a) and (b) of the Karnataka Local authorities (Prohibition of Defection) Act, 1987 ("the Act. 1987" for short). Accordingly, the appellants filed a complaint as contemplated u/s 4(1) of the Act, 1987. The Deputy Commissioner, Mysore District before whom the said complaint was filed has allowed the same by the order dated 22.02.2011 disqualifying the respondent Nos. 3 to 7 herein from the membership of Bannur Municipality. It is against the said order the respondents No. 3 to 7 herein had filed W.P. Nos. 10294-298/2011.

4. In W.A. Nos. 4536 33/2011 arising from W.P. Nos. 10300-10301/2011 (LB RES) the issue relates to the elections to the post of Adhyaksha and Upadhyaksha of Periyapatna Pattana Panchayat. In the said Pattana Panchayat consisting of 15 elected members, the partywise strength is as follows:

a) JD(S)

09

b) Congress

5. The election to the post of Adhyaksha and Upadhyaksha in Periyapatna Pattana Panchayath was scheduled on 17.08.2010. The JD(S) party is stated to have nominated the second and the third appellants herein as the candidates for the post of Adhyaksha and Upadhyaksha respectively. The President of the JD(S) Party, Periyapatna Taluk is stated to have informed the said position to the State President of the JD(S) -Sri H.D. Kumaraswamy and the whip was authorised to be issued by the President. However, on the date of the election, the third respondent herein is stated to have tiled her nomination for the post of Adhyaksha with the help of the members from the Congress. The fourth respondent is stated to have deliberately remained absent from the proceedings. Since according to the appellants the respondent Nos. 3 and 4 herein having defied the whip, incurred disqualification in the manner stated above they filed a complaint before the Deputy Commissioner, Mysore District. The Deputy Commissioner by his order dated 22.02.2011 has allowed the complaint and has declared respondent Nos. 3 and 4 herein as being ineligible to hold the membership of the Periyapatna Pattana Panchayat.

6. Since the issue in both these cases arise in a circumstance where defiance of the whip issued on behalf of the JD(S) political party is alleged and in that context, the disqualification as contemplated u/s 3(1)(a) and (b) of the Act, 1987 is claimed in the complaint filed before the Deputy Commissioner, the defence put forth on behalf of the Councillors concerned was with regard to the very validity of the whip. According to them, the defiance of a valid whip alone would lead to disqualification in that context, the said issue was considered both by the Deputy Commissioner as well as the learned Single Judge to determine the validity of the whip. Though the Deputy Commissioner was of the view that there was defiance of a valid whip, the learned Single Judge has held that the whip issued in the instant case is not a whip issued by the Political Party not was there authorisation in favour of the President to issue such whip. As such the learned Single Judge has set aside the order of the Deputy Commissioner which has resulted in these appeals.

7. Heard Sri M.B. Nargund, learned counsel for the appellants and Sri Ravivarmakumar, learned senior counsel for the contesting respondents and Sri B. Veerappa, learned Additional Government Advocate for the official respondents and perused the appeal papers.

8. The threshold contention urged on behalf of the appellants is that the learned Single Judge has erred in clubbing the three sets of writ petition and passing a common order. It is his contention that, the said procedure adopted by the learned Single Judge has resulted in the erroneous conclusion and miscarriage of justice. Though such contention was put forth, the learned counsel did not

specifically point out the error that has occurred due to the consideration of the petitions together. Further, as rightly contended by the learned senior counsel for the respondents, prejudice caused due to clubbing has also not been pointed out. In addition, the factual matrix noticed by us herein and the nature of the complaint made before the Deputy Commissioner being with regard to the similar violation which was alleged and the consideration of the legal position being the same, it was appropriate that the learned Single Judge considered the petitions together. That apart, not only objections were not raised at that stage, but even at this stage, the learned counsel for the appellants in fact has chosen to address common arguments in respect of these two sets of writ appeals before us. Hence, we see no merit in the said contention.

9. The basis for the complaint before the Deputy Commissioner that the contesting respondents herein have incurred disqualification is that they have defied the whip issued by the State President of the Political Party by setting herself as the candidate as against the official candidate/voting against the official candidate. In this regard, the violation of Section 3(1)(a) and (b) of the Act, 1987 is alleged. The learned counsel for the appellants has relied on the decision in the case of Dr. Mahachandra Prasad Singh Vs. Hon. Chairman, Bihar Legislative Council and Others, to contend, the very fact that the contesting respondent had filed the nomination against the official nominee and had contested the election to the Post of Adhyaksha would have to be inferred as a conduct of giving up the membership and therefore, has incurred disqualification. Having noticed the said decision, we find that in the instant case the situation is not similar. The decision in the case of Kedar Shashikant Deshpande Vs. Bhore Municipal Council and Others etc. etc., relied on by the learned counsel for the appellants is no doubt a case where the Supreme Court while considering a similar provision had upheld the disqualification order. However, it is seen that the said decision was rendered based on the admitted and proved facts in that case. The Validity of the whip was not in dispute and as such the said decision is not of assistance. On the other hand, the very manner of nomination of the official candidate and the whip issued to vote in favour of the particular candidate and the validity of such whip is the question involved herein and in such context, even though violation of Section 3(1)(a) is alleged, the same is in the background of the alleged violation of Section 3(1)(b) of the Act, 1987. In that context, the validity of the whip is to be considered and not the conduct divorced from that aspect.

10. In that regard, learned counsel for the appellants has relied on the judgments in the case of H.S. Devaraj and others Vs. State Election Commissioner, Karnataka State, Bangalore and others, ; Ramachandra and Others Vs. The State Election Commission and Others, ; Smt. Ananda Lakshmi and Another Vs. Deputy Commissioner, Mysore District and Others, . The said decisions have been relied on to contend that this Court while considering the disqualification incurred u/s 3(1)(b) of the Act, 1987 has held that when the Election Tribunal (the Deputy Commissioner in the instant case) has arrived at a

finding of fact that the voting was in defiance of the whip, this Court cannot on reappraisal of the evidence interfere or substitute the finding of the Tribunal by its own finding. It is contended that in the said cases also the whip issued by the President of the Political Party was held to be valid and the defiance of the same would lead to disqualification. In fact we find that the said decisions had been cited before the learned Single Judge and the learned Single Judge has analysed the same and having taken note of the said decisions has arrived at the conclusion that in the instant facts, the very validity of the whip is to be determined and as such that aspect requires consideration at the outset. The other aspects would arise only if the whip is held to be valid. On noticing the said decisions, we are also of the view that the whip issued therein were held valid in the facts evolving therein and also the materials and evidence that was available on record. Hence, the same has to be considered in the light of the available materials in the instant case.

11. Apart from the appropriate analysis reached by the learned Single Judge on that aspect, it is to be noticed that even before the Deputy Commissioner the question raised for consideration was as to whether the State President of the Party is empowered to issue whips, suggesting candidates on behalf of the parties for the posts of Presidents and Vice Presidents of the Town Panchayats. While answering the first question raised before him, the Deputy Commissioner merely noticing the observations made by this Court in the case of Ramachandra (2002 (6) KLJ 324) has adopted the very same reasons recorded in the said case and has answered the said point in the affirmative despite observing that no document has been produced in the case on hand. Thereafter reliance has been placed by the Deputy Commissioner on the whip merely because the Whip is signed by the State Party President. The Deputy Commissioner has further assumed that the power of issuing a whip rests with the State President.

12. In contradistinction to such finding, the learned Single Judge has arrived at the conclusion that there is no material on record to establish the power of the Party President to issue such whip, nor was any authorisation produced. In this regard, the learned Single Judge has also taken note of a decision of the Division Bench of this Court (which we would refer to hereinafter) and had concluded to set aside the order of the Deputy Commissioner. The reasoning would indicate that the learned Single Judge before interfering with the order of the Deputy Commissioner, on analysis of the materials on record was convinced that the decision of the Deputy Commissioner was contrary to the material on record. In fact the conclusion reached by the Deputy Commissioner was without there being relevant material on record. Hence in such circumstance, the learned Single Judge was justified in reassessing the material on record in the background of the legal position while exercising the power of judicial review under Article 226 of the Constitution of India. No immunity against interference can be claimed in respect of finding which is contrary to the facts and material on record.

13. In the backdrop of the above, the question is whether the learned Single

Judge was justified in the ultimate conclusion reached. No doubt the learned counsel for the appellants as well as the learned Government Advocate for the official respondent sought to contend that the Deputy Commissioner has taken note of the oral evidence and the documentary evidence which was placed before him. Insofar as the factual aspects relating to the manner in which the elections had taken place and the candidature of the persons concerned, the same has been put forth in the statement recorded but the document relied in this regard is the whip that is stated to have been signed by the State President of the JD(S) party. In a circumstance where the validity of the whip is in dispute, unless the same is proved to be valid, the question of defiance of the whip would not arise. In this regard, no document was placed before the Deputy Commissioner or the learned Single Judge to point out that the JD(S) Political Party had authorised the State President to issue the whip and in that context, the State President had issued the whip in question. In the absence of such material on record, the decision rendered by a Division Bench of this Court in the case of Nijnagouda vs. State Election Commissioner and ors (WA No. 910/2008 DD 19.12.2008), cited by the learned senior counsel, which is also relied on by the learned Single Judge becomes relevant. The said decision was rendered after analysing the decision of the Hon''ble Supreme Court in the case of Sadashiv H. Patil Vs. Vithal D. Teke and Others, which is also cited before us.

14. The position as explained by the Hon''ble Supreme Court in Sadashiv H. Patil's case is that the consequences of disqualification has serious repercussions on the functioning of the local body and the rigours of compliance to prove disqualification should be strict. The Hon''ble Supreme Court after noticing a similar provision has held that the power to issue a direction, popularly called a whip, in order to attract penalty of disqualification has to be issued either by the Political Party or by Aghadi or Front to which the Councillor belongs. The Political Party or Aghadi or Front may act collectively or may act through any person or authority. When it acts through any person or authority, such person or authority must be authorised by the Political Party or Aghadi or Front in this behalf i.e., for issuing any direction (whip). In order to ascertain the same, the rules or regulations whether known as Constitution or called by any other name, should be looked into to determine with regard to the authorisation of the person or authority and the factum of such authorisation having been given to the person or authority issuing the direction or whip shall have to be proved to the satisfaction of the Collector dealing with a reference.

15. In the background of the observations made by the Hon''ble Supreme Court, as already noticed by us the Deputy Commissioner in the case on hand does not refer to such power being established with reference to the document though it is contended that the JD(S) party has its own Constitution and Rules. In fact the Division Bench in the case of Nijnagouda (cited supra) with reference to the Constitution of the JD(S) Party has recorded a finding as hereunder:

The constitution and the rules of JD(S) party which was produced before the

Election Commissioner and the writ petition would clearly show that there is no provision in the Constitution and rules of JD(S) party authorising the State President to issue whip. The learned counsel appearing for respondent No. 2 and 3 is also unable to point out any provision on the constitution of rules of JD(S) party that the State President of JD(S) party has been authorised under the Constitution and the rules to issue whip. There is also no authorisation issued to the State President of JD(S) party to issue the whip in the present case as no resolution in that behalf has been produced.

Having recorded such finding, the Division Bench was of the view that the whip was not a valid one and had also referred to the case of Anandalakshmi (cited *supra*) wherein the situation was not similar.

16. The issue considered by the Division Bench in the Nijnagouda's case is similar to the case on hand inasmuch as no such power, authority or authorisation has been pointed out from the Constitution, the Rules or otherwise. In fact, the learned senior counsel for the respondents relied on the Constitution of the JD(S) party to contend that there is no such power or authorisation. Learned counsel for the appellants on the other hand sought to contend that Article 22 of the JD(S) party Constitution has been amended and in that regard, sought to rely on the resolution dated 16.06.2008. Firstly, as rightly contended by the learned senior counsel for the respondent, the said document was not a part of the records, neither is there any authentication nor has it been produced in the manner known to law. Therefore, it would not be possible for us to rely on the same. That apart, though the resolution is claimed to be passed on 16.06.2008, it was not relied on in the case of Nijnagouda despite the same being decided subsequently on 19.12.2008. Even otherwise, it is difficult to understand as to how a properly amended Constitution if available could not be relied on at the appropriate stage when the very issue had arisen for consideration in the year 2010 when it is contended that the amendment was brought about in the year 2008. Further, the so called amended portion of the Constitution, also does not disclose authorisation from the political party to the State President. Therefore, keeping these aspects in view, we have no reason to take a different view from the one which has been taken by the Division Bench in the case of Nijnagowda since the position relating to the validity of the whip in respect of the very same Political Party remains unaltered. Further the facts involved in the instant case is similar to that case. The learned Single Judge was therefore justified in relying on the same.

17. Before parting, it is also necessary to notice one other contention raised by the learned senior counsel appearing on behalf of the contesting respondents. With reference to the Karnataka Municipalities (President and Vice President.) Election Rules, 1965 ("Rules 1965" for short) it is contended that the same does not envisage nomination for the said posts based on political party affiliation. In this regard, reference is made to Rule 4 which provides for any Councillor to be elected as President or Vice-President as per nomination to be made in Form-2.

It is his further contention that the nomination and declaration only provides for the Candidate, Proposer and seconder to be elected Councillors, without reference to the political party from which they are elected, Hence it is contended that Section 3(1)(a) and (b) of the 1987 Act does not apply to the Election of Adhyaksha and Upadhyaksha. We have given our thoughtful consideration to the said contention even though the same was not the basis on which the matter was decided by the learned Single Judge. However, we are unable to accept the contention of the learned senior counsel insofar as the legal proposition advanced. No doubt, the Rules 1965 does not refer to nomination based on party affiliation, but what cannot be lost sight is that the election to the Municipal Council is based on party affiliation or as an Independent. In such situation, the liberty of nominating any Councillor of his/her choice for the post of Adhyaksha or Upadhyaksha would be available only up to a point when there is no valid direction or Instruction from the Political Party concerned to which either the nominee-candidate, Proposer or Secunder belongs. If in a case there is a valid direction/whip and if in such case, Form No. 2 is signed by the Councillor concerned contrary to the direction/whip of the Political party concerned, it would attract Section 3(1)(a) and (b) of the Act 1987 since such conduct is in furtherance to the meeting which is convened for the purpose of electing the Adhyaksha or Upadhyaksha. Similarly, even though the process is for the election of Adhyaksha or Upadhyaksha and the Rules 1965 does not refer to party affiliation, the vote to be cast is in the capacity as a Councillor ejected from a particular Political Party, Hence, the Act 1937 would come into play being the substantive law, while the Rules 1965 relates only to the procedural aspect relating to the election. The disqualification would not be incurred only in a situation when there is no valid direction or whip by the Political Party concerned to which the Councillor belongs or when the Political Party condones such action. In all other cases, the Councillor concerned would incur disqualification as contemplated under Act 1987 even if such violation pertains to the process of election relating to Adhyaksha and Upadhyaksha. In the instant case, since the validity of the direction/whip was not proved as contemplated in law, the contesting respondents have not incurred disqualification and not otherwise.

18. Keeping all the above aspects in view, we are of the considered opinion that in the instant facts of the case, we see no reason to interfere with the order impugned in these appeals.

The appeals are accordingly dismissed. No order as to costs.