

(2006) 06 KL CK 0069**High Court Of Kerala****Case No:** Writ Petition (C) No. 13294 of 2006

Giji Mathew

APPELLANT

Vs

The Kerala State Election
Commission and Others

RESPONDENT

Date of Decision: June 16, 2006**Acts Referred:**

- Kerala Panchayat Raj Act, 1994 - Section 162(1)(a), 30, 35, 35(k), 35(k)

Citation: (2006) 3 ILR (Ker) 318 : (2006) 2 KLJ 534 : (2006) 3 KLT 141**Hon'ble Judges:** Thottathil B. Radhakrishnan, J**Bench:** Single Bench**Advocate:** Ashok M. Cherian, for the Appellant; T.R. Ramachandran Nair and Murali Purushothaman (SC), for the Respondent**Final Decision:** Dismissed**Judgement**

Thottathil B. Radhakrishnan, J.

The petitioner is the President of a Village Panchayath. The second respondent was elected as a member of the said Panchayat from ward No. 5. She was subsequently elected as a member of the Standing Committee for Finance constituted u/s 162(1)(a) of the Kerala Panchayat Raj Act, 1994, hereinafter referred to as the "Act". On an allegation that she has incurred the disqualification u/s 35(k) of the Act on account of her alleged absence in three consecutive meetings of the Standing Committee for Finance, the Secretary of the Village Panchayat issued a communication to the second respondent u/s 37(2) of the Act regarding the cessation of membership attributed to her and reported the matter to the Panchayat Committee in its next meeting.

2. The second respondent, faced with the aforesaid situation, filed O.P. No. 4/2006 before the State Election Commission u/s 36(1) for a decision as to whether she is disqualified.

3. In purported exercise of authority u/s 36(2) of the Act, the State Election Commission passed Ext. P3, impugned interim order, allowing the second respondent to continue in office with all rights and privileges as member, including voting right, till disposal of the main matter. The said impugned Ext. P3 order was issued after hearing the Secretary of the Village Panchayat.

4. This writ petition is filed challenging the aforesaid Ext. P3 order contending that the impugned order results in restoration of membership of the Village Panchayat to the second respondent, whose membership has ceased to exist by the operation of Section 35(k) read with Section 37(2) of the Act. It is contended that the State Election Commission, while exercising power u/s 37(2), can only decide as to whether a member may continue in office or not till a decision is taken on the petition filed seeking decision as to disqualification and that the State Election Commission has no power to pass an order to put back a person, who, by the happening of the event provided for by Section 35(k) followed by intimation given by the Secretary in terms of Section 37(2) of the Act, has ceased to hold office.

5. The second respondent has filed a counter affidavit. A statement has also been placed on record by the first respondent, State Election Commission.

6. Arguments heard.

7. Section 36 of the Act, as it stood, prior to its amendment by Act 13 of 1999 reads as follows:

36. Determination of subsequent disqualification of a member

(1) Whenever a question arises as to whether a member has become disqualified under S.30 or S.35 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, may file a petition before the State Election Commission, for decision.

(2) The State Election Commission, after making such enquiry as it considers necessary, shall decide the petition referred to in sub-s.(1) whether or not such members has become disqualified and the decision shall be final; so however that pending such decision, the member shall be entitled to act as if he were not disqualified.

(3) Every petition referred to in sub-s(1) shall be disposed of in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (Central Act 5 of 1908) when trying a suit.

(emphasis supplied)

8. By the amendments brought by Act 13 of 1999, among other things, the State Election Commission was conferred with the power to pass interim orders as to whether a member may continue in office or not till a decision is taken on the

petition or the matter involved in the reference. The amended Section 36(2) would read as follows:

The State Election Commission, after making such enquiry as it considers necessary, shall decide the petition referred to in sub-s.(1) whether or not such members has become disqualified and the decision shall be final, so however that the State Election Commission may pass an interim order as to whether a member may continue in office or not till a decision is taken on the petition or the matter involved in the reference.

(emphasis supplied)

9. As noticed by this Court in [Gopi Vs. Maneed Grama Panchayat](#), while prior to the amendment of 1999, the position was that a person, in whose case a question has arisen before the State Election Commission, was entitled to continue as member during the pendency of the proceedings before the Commission, after the said amendment with effect from 24/3/1999, such person is entitled to continue only subject to the interim orders of the State Election Commission.

10. In view of the sweep of Section 36, it has to be noticed that even a person, who is alleged to have incurred a disqualification is also entitled to move the State Election Commission u/s 36 of the Act for a decision as to whether he has become disqualified. He has no other way for redressal of any situation, as in this case. This position is well supported by the decision in Gopi's case, referred to above, as also principles emanating out of the Bench decision of this Court in [M.P. Rajan Vs. Kerala State Election Commission, Thiruvananthapuram and Others](#), wherein their Lordships were called upon to decide, among other questions, as to whether the proceedings initiated by a member for restoration of membership u/s 37(2) would be a bar for proceedings u/s 36. Though the said judgment is delivered by holding that invocation of remedy u/s 37(2) for restoration of membership would be inconsistent with a right to move for decision for disqualification u/s 36 of the Act, it is further held that on the facts of that case, since the application u/s 36 before the State Election Commission was not made by the member, who is alleged to have incurred the disqualification, such proceedings would not be hit by the principles of estoppel by election. In deciding so, the Division Bench has, in my considered view, proceeded on the basis that a member who is alleged to have incurred disqualification has, in him, the right to move the State Election Commission u/s 36 of Act.

11. In [Trivandrum District Co-Operative Bank Ltd. Vs. Government of Kerala and Others](#), the Division Bench of this court held that where statute confers any jurisdiction on any authority, such authority has got all the power of doing such acts, which are essential and necessary for its proper execution and so much so, the necessary power inheres in the authority to pass ancillary and interlocutory orders, including orders granting stay, even in cases where there is no express provision,

conferring power to issue an interlocutory order.

12. In so far as sub-section 2 of Section 36 of the Act is concerned, after the amendment of 1999, the State Election Commission is empowered to pass an interlocutory order as to whether a member may continue in office or not. This is a decision to be taken to godown the member until a decision is taken on the petition or the matter involved in the reference made to it u/s 36(1) of the Act. Hence, it is essentially an interlocutory order, that is contemplated under the second limb of sub-section 2 of Section 36. Now, the State Election Commission, by virtue of its powers u/s 36(1), has, necessarily, the authority to hold, if found so ultimately, that a member had not incurred any disqualification. This means, even assuming that a member was treated by the Panchayat as disqualified, the final decision of the Election Commission will result in declaring the status of the said member on his/her alleged disqualification. A reading of Section 36(1) of the Act would show that the power to determine the alleged disqualification of the member includes the power to decide as to whether such a member has incurred the disqualification u/s 35(k). This means that even as regards a member who has been given an intimation u/s 37(2) of the Act, the cessation of the membership provided by the operation of Section 37(2) is made amenable to interfere with by a decision of the State Election Commission, if proceedings are initiated in terms of Section 36(1) in relation to any such alleged disqualification. In that premise, there is no room to read the words in the second limb of sub-section 2 of Section 36 in a restricted sense, so as to exclude the State Election Commission of the power to pass an interlocutory order ordering that a member, who has applied for a decision as to an alleged disqualification referable to Section 35(k), shall continue to hold office, notwithstanding the service of an intimation by the Secretary u/s 37(2) and a report in that regard to the Panchayat. The statutory provisions in sub-section 1 and 2 of Section 36 are made for the purpose of enabling the adjudication of a question as to disqualification and the wordings in the second limb of Section 36(2) do not exclude or rule out the power in the State Election Commission to direct that a member alleged to have incurred a disqualification in terms of Section 35 (k) shall not continue in office. If it were the intention of the Legislature to make such a classification between the different groups of persons, who may incur liability under the different provisions in Section 35, the same would have been expressed unequivocally, in the statute. In the absence of any such statutory exclusion, I am not inclined to read the second limb of Section 36(2) of the Act in a restricted sense, as urged on behalf of the petitioner.

13. There is also yet another angle in which the matter can be considered, which according to me, will lead to the same conclusion, as arrived at above. Before the amendment of 1999, the second limb of sub-section 2 of Section 36 provided that during the pendency of proceedings before the State Election Commissioner for a decision on the question of disqualification, the member shall be entitled to act, as if he were not disqualified. The Legislature, at that point of time, has to be attributed

with the knowledge of the fact that Section 37(2) read with Section 35(k) provides for cessation of office of a member in terms thereof. Therefore, even before the amendment; of 1999, what was provided for with the Legislature is that even in a case, arising out of Section 35(k) read with Section 37(2), the member, who is alleged to have incurred the disqualification, will be entitled to continue, as if he were not disqualified, during the pendency of proceedings before the State Election Commission. A question of disqualification can be put in issue by a member, who is allegedly disqualified, only after he faces the situation, following action u/s 37(2). Therefore, even if he were to be treated as one, who has incurred cessation of office, owing to the conjoined effect of Section 35(k) read with Section 37(2), he will survive the said cessation during the currency of proceedings before the State Election Commission. All that has been done by the 1999 amendment is that the statutory entitlement of the member to act, as if he were not disqualified, has been converted into a right to continue in office on the basis of the decision of the State Election Commission. Therefore, the entitlement would be the same as before the amendment, provided the State Election Commission passed an interim order that the member shall continue to hold office till a final decision is taken in the matter. Any other way of looking at it, will be to read into the statute, a classification between the different types of disqualifications, all of which would otherwise be treated as a bunch of situations amenable for consideration by the State Election Commission u/s 36, for which classification, there is neither any provision nor any warrant. This view, on the effect, nature and scope of the amendment of 1999, in my view, works against the petitioner's contentions. Coming to the merits of Ext. P3, on facts, it has to be noticed, at the outset, that not much was urged touching the findings of facts. The State Election Commission has perused the papers filed, has adverted to the relevant facts and details, has appreciated the content and scope of the statutory provisions and has come to a *prima facie* conclusion that it is doubtful whether due notice, relating to the Finance Committee meeting held on 17-01-2006, was given to the second respondent herein before issuing intimation u/s 37(1). That is only a *prima facie* finding. The State Election Commission has held that the benefit in that regard has to go in favour of the petitioner at the interlocutory stage. It has been further held that the second respondent has to convene the Grama Sabha of the ward represented by her and that the electors of the said ward have to project their grievances through her and that if she is not allowed to function as a member, even the public residing in ward No. 5 will be put to loss. Stating so, the State Election Commission has concluded that the balance of convenience is also in favour of the second respondent. Considering on the basis of the yardstick applicable to judicial review of interlocutory orders, Ext. P3 stands. It has been issued on a fair application of mind on the relevant facts and factors, stating reasons and also considering the balance of convenience in the matter of the interlocutory status to be secured, in the interest of the Panchayat and the member. Under such circumstances, I do not find any ground to interfere with the findings in Ext. P3.

In the result, this writ petition fails. The same is accordingly dismissed. No costs.