

Office of the Chief Electoral Officer
Union Territories of J&K and Ladakh
Nirvachan Bhawan, Railhead Complex, Jammu
"Greater Participation for a Stronger Democracy"

Subject:- Reference / Case / Petition u/s 34C of the Jammu and Kashmir Municipal Corporation Act 2000 for setting aside election of Non-applicants/respondents 1-7 on the ground of defection.

ORDER No. CEO/ME/2019/ 34
Dated 10 - 01 - 2020

1. Sh. Shafat Gaffar Mir, Councilor Ward Ziyarat 21 (Chief Whip Indian National Congress), Batamaloo, Srinagar (to be referred as applicant/Petitioner) filed Application/reference u/s 18C of J&K Municipal Act 2000 for setting aside election of below mentioned

07 (seven) Councilors:-

- (i) Mst Sobee Jan
- (ii) Mst Sara Bilal
- (iii) Aijaz Rasool Bhat
- (iv) Mst Gulshan Bilal
- (v) Mst Nazai Yousuf
- (vi) Mst Haseena
- (vii) Mst Shaheena

(to be referred as non-applicants/respondents)

2. The Petitioner/applicant has pleaded that the Councilors/ Corporators (Non-applicants /Respondents) were members of political party Indian National Congress and contested the Srinagar Municipal Elections, 2018 on the ticket of Indian National Congress, but on 07-06-2019 a news item was carried by various social media sites that all the above mentioned seven (07) Councilors have joined another political party namely, Peoples

Conference; even a tweet was also made by Mayor of Srinagar Municipal Corporation wherein photographs of some of the above mentioned Councilors (Non-applicants /Respondents) were made public, which is suggestive of the fact that these Councilors have made defection and have joined another political party namely, Peoples Conference, in violation of Defection Laws and also in violation of party whip. It has been also mentioned in the application/reference that on 07-06-2019 a show-cause notice was issued to the Councilors by the applicant in the capacity of Chief Whip of Indian National Congress and these Councilors were asked to submit detailed reply/response by or before 11-06-2019 however, despite receipt of the show cause notice, the Councilors failed to respond/reply the show cause notice. It has been also pleaded that these Councilors have indulged in the activities which are pre-judicial to the interests of Indian National Congress and have also acted against the party whip. It was on 25-05-2019 that a notice/whip was issued upon all the Councilors of Indian National Congress including above mentioned Councilors that they shall not support/sign any kind of resolution/memorandum at the behest of Mayor or Deputy Mayor of Srinagar Municipal Corporation but surprisingly the above mentioned Councilors signed a memorandum for reviewing of the decision of Hon'ble High Court passed in OWP No. 18-78/2019 titled Danish Shafi Bhat & Ors Vs State of J&K & Ors against party whip as such rendering them liable for dis-qualification from membership of the Srinagar Municipal Corporation in terms of provisions of J&K Municipal Act 2000. The acts of commission and omission of the above mentioned Councilors is clear case of defection and deserve to be disqualified from the membership of Srinagar Municipal Corporation.

3. The applicant has accordingly prayed that the application/reference be accepted and the election of above mentioned Councilors be set-aside.
4. The applicant subsequently filed an application for amendment in the main application with the prayer to read Sections 34C of the Jammu and Kashmir Municipal Corporation Act 2000 in the original application instead of Section 18A of the Jammu and Kashmir Municipal Act 2000 wherever mentioned as the same has happened due to oversight and mistake and the case be dealt

under the provisions of J&K Municipal Corporation Act, which was allowed.

5. The Deputy Mayor Srinagar Municipal Corporation vide communication No. SMC/DM/PS/953-54 dated 14-06-2019 addressed to Chief Electoral Officer J&K has stated as under:-

"Kindly find enclosures that the councilors who have recently joined J&KPC (J&K Peoples Conference) with their will & consent without any fear and force, therefore further course of action may be taken accordingly under the relevant provisions of law and please here onwards consider and officially register them as Corporators of J&K Peoples Conference".

6. The enclosures mentioned supra include application submitted by 12 Corporators dated 5-05-2019 addressed to Secretary/ Commissioner Srinagar Municipal Corporation alongwith the notings of the file in which name, signature and thumb impression of the applicant also exists.
7. The applications were diarized and notices were issued to the parties to remain present on 28-06-2019 at 3 p.m and accordingly parties appeared alongwith their Counsels on the scheduled date and time. Applicant, Shafat Gaffar Mir submitted affidavits on his behalf and on behalf of the other four (04) Councilors i.e Farooq Ahmad Dar, Zahoor Hussain Rather, Ghulam Rasool Hajam & Mst Syeda Hameed duly attested by the Judicial Magistrate 1st Class, wherein it has been deposed that they have contested the elections of Municipal Corporation on the party ticket of Indian National Congress and were declared successful and continue to be the members of the Indian National Congress and have not resigned from Indian National Congress; neither have joined any other political party nor have formed any separate group at any point of time.
8. Mr. Basharat Bin Qadir, Councilor also filed an application wherein he has submitted that reference has been filed by one of the Councilors namely Shafat Gaffar and he is member of Indian National Congress and holds Vice Chairmanship of ULB and as such is interested party in seeking the removal of the defected Councilors who have illegally and without any authority from Indian National Congress supported J&K Peoples Conference. Besides he has also submitted that claim of the defected



members that they have merged with J&K Peoples Conference is an abuse of law and does not fulfill the criteria of basic merger and prayed that the applicant being interested party be impleaded as party in the reference so that justice is done. Accordingly, the said application was admitted.

9. A document is also on record wherein 12 (twelve) Corporators which include applicant and non-applicants, signed by 07 Councilors reads as under:-

"We, the following Municipal Corporators of Srinagar Municipal Corporation, Srinagar extended our unconditional support to the Mayor and Deputy Mayor of the Corporation as per the result of elections held in the month of November 2018. This is being done purely for smooth functioning of the corporation and in the interests of public, who are presently suffering due to administrative skirmishes between Mayor and Deputy Mayor. This is for the information of the Commissioner SMC that we have not resigned from Indian National Congress, we continue to be basic members/corporators of Indian National Congress".

10. The non-applicants have filed reply wherein they have submitted that reference under Section 34C of J&K Municipal Corporation Act 2000 filed by applicants is completely misconceived and deserves to be dismissed at its threshold on the ground that a conscious and thoughtful decision in writing was taken which was duly signed and authenticated by thumb impressions of 12 Corporators of Srinagar Municipal Corporation and was submitted to Secretary/Commissioner, Srinagar Municipal Corporation which include the present applicant as well and made clear to the Commissioner that the Corporators belonging to the Indian National Congress merge and extend unconditional support to J&K Peoples Conference. It is apt to mention that the Corporation has 16 Councilors from Indian National Congress declared by the Notification No. 2119/CEO/ME/E.NOTI/2018/16650-685 dated 22-10-2018 out of which 12 Corporators have merged with J&K Peoples Conference under the provisions of statutory law. The merger of 12 Corporators was followed by written reference to the Secretary/Commissioner of Srinagar

Municipal Corporation in accordance with the Section 34A and 34B which provides for protection in case of merger of members of Corporation who are Councilors in two third majority as such are deemed to be members of J&K Peoples Conference. The present reference for setting aside election of Councilors is absolutely unwarranted unauthorized and completely alien to the statutory provision of law and J&K Municipal Corporation Act 2000 hardly provides any such action to set aside the election of Councilors on the grounds which are vexatious, bald and completely made in ignorance of law. It has also been submitted by the non-applicants that applicants have submitted one forged communication to Secretary/Commissioner Municipal Corporation contrary to the merger which took place on 06-05-2019 on behalf of all who merged with the J&K Peoples Conference and have made the forged and fabricated signatures in the letter which has been forwarded by the Secretary to the Police concerned for lodging appropriate criminal proceedings against all applicants who are before your authority and on this count reference is liable to be dismissed.

11. Commissioner, Srinagar Municipal Corporation vide his communication No. SMC/CS/849-852 dated 9-07-2019 has forwarded:-

- a) Copy of Notification No. 2119/CEO/ME/E.noti/2018/16650-686 dated 22-10-2018
- b) Copy of meeting notice dated 30-10-2018
- c) Copy of result of election for the post of Mayor & Deputy Mayor of Srinagar Municipal Corporation
- d) Copy of minutes of 1st meeting of general council SMC (Urdu) issued vide No. SMC/GS/CS/140-230 dated 27-11-2018
- e) Copy of meeting notice of 5th session of general council of SMC dated 7-05-2019 followed by revised meeting notice dated 28 & 29 May 2019
- f) Copy of order passed by the Hon'ble High Court on 28-05-2019 in WC (C) 1878/2019 titled Danish Shafi Bhat & Ors Vs State of J&K for deferment of the election of the Standing Committee of the SMC which were scheduled to be conducted on 28 & 29 May 2019.

12. In reference to this office letter No. 5402/CEO/LS/MISC/2019/411-12 dated 17-07-2019 the Commissioner Srinagar

Municipal Corporation vide communication No. SMC/CS/1029 dated 24-07-2019 has informed that first meeting of Corporation was held on 6th November 2018 to conduct the election of Mayor and Deputy Mayor, Srinagar Municipal Corporation and the notice to this effect was issued under No. SMC/CS/1-90 dated 30-10-2018. It has been also mentioned that a communication was issued by the Jammu and Kashmir Pradesh Congress Committee vice president addressed to Chief Electoral Officer J&K with a copy to Commissioner Srinagar Municipal Corporation as well on 03-11-2018 whereunder Mr. Aijaz Rasool Bhat, Corporator elected from ward No. 12 of Srinagar Municipal Corporation was appointed as Chief Whip to the elected party Corporators for the upcoming election in Srinagar Municipal Corporation. It has been further stated that after following due course of rule of J&K Municipal Corporation (Procedure and Conduct of Business) Regulation, 2005 the election of Mayor & Deputy Mayor were conducted and result of election of post of Mayor and Deputy Mayor was issued vide No. SMC/CS/123-36 dated 6-11-2018. It has also been mentioned that vide communication dated 14-05-2019, Mr. Shafat Gaffar Councilor has been appointed as Chief Whip of Indian National Congress in Srinagar Municipal Corporation. The copies of the communications mentioned have been enclosed which are part of record.

13. The Commissioner Srinagar Municipal Corporation vide his communication No. SMC/CS/1242 dated 02/09/2019 has submitted as:-

"a) No copy of any Whip has been received during the election of Mayor and Deputy Mayor of Srinagar Municipal Corporation.

b) No copy of any Whip has been received from the Indian National Congress/J&K People's Conference after election of Mayor and Deputy Mayor of Srinagar Municipal Corporation."

14. Learned counsel for applicant, argued that non-applicants 1 to 7 suffer from defection in terms of Section 34A of Municipal Corporation Act 2000 on the ground that they have given up membership of their original political party i.e Indian National Congress on whose mandate they have contested election as Councillors of Srinagar Municipal Corporation and joined another

political party namely J&K Peoples Conference and have also acted against the party whip as such have defected and deserve to be disqualified, however he could not explain the position of applicant whose signature and thumb impression also appeared in the communication made to SMC dated 05-05-2019.

15. The non-applicants pleaded that they are members of Indian National Congress and have given unconditional support to the Mayor and to the Deputy Mayor purely in the interest of public for smooth functioning of the Corporation and continue to be basic members/Corporators of Indian National Congress.
16. The Counsel for the applicant in rebuttal argued that non-applicants have given up the membership of the Indian National Congress and joined J&K Peoples Conference as such are liable for disqualification in terms of Section 34A of J&K Municipal Corporation Act 2000. It has also been argued that non-applicants have not given support to the Peoples Conference but have joined the J&K Peoples Conference which is evident from the application submitted to Secretary/Commissioner Srinagar Municipal Corporation on 05-05-2019 by 12 Corporators for officially registering them Corporators of J&K Peoples Conference, besides pleaded that non-applicants have violated party whip and deserve to be disqualified in view of the law laid down by Hon'ble High Court in case title Asif Jahan Gattu versus Executive Officer Doda Municipal Corporation.
17. After hearing the parties and perusal of the record following issues emerged:-
 - i. Whether the non-applicants have given up the membership of Indian National Congress and attract the provisions of Section 34A for disqualification.
 - ii. (a) Whether non-applicants have violated the party whip for which they are liable for disqualification.
(b) Whether non - reply of the show cause notice Issued by the chief whip amounts to non obedience of whip.



- iii. Whether the non-applicants continue to be the members of Indian National Congress or have been removed from the basic membership of the Indian National Congress.
 - iv. Whether application dated 05-05-2019 addressed to Secretary/Commissioner Srinagar Municipal Corporation can be construed as admission of merger on the part of non-applicants.
 - v. Whether the facts and circumstances of case titled **Asif Jehan Gattu versus Executive Officer Doda Municipal Corporation** (2008 (2) JKJ 748 HC) decided by Hon'ble High Court of J&K are similar to this case and to what extent applies to this case as argued by the Counsel of the applicant.
18. One email received by the office on 11-10-2019 from General Secretary J&K PCC reads as under:-

"I Channi Singh General Secretary JKPCCC informs your goodself that:

As desired by the worthy JKPCCC President, as per our records neither the councilors of the municipal corporation Srinagar, whose matter regarding defection is pending disposal before the forum, have been removed from the basic membership of party nor they have changed their stand after winning on party tickets.

As such it is requested your good self to dispose off the matter under consideration before the forum as withdrawn".

19. The President J&K Pradesh Congress Committee through INC General Secretary certifies that non-applicants have not been removed from the basic membership of the party nor they have changed their stand after winning on party ticket and have not given up their membership from their original political party and continue to be the members of the Indian National Congress. Hence, the argument of the applicant that non-applicants have

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given up the membership of the Indian National Congress holds no merit.

20. (a) On the issue of violation of the party whip or not, it is important to ascertain whether any whip was issued by the party or not which has been violated by the non-applicants. To clarify the issue it is important to reproduce the communication of the Commissioner Srinagar Municipal Corporation bearing No. SMC/CS/1242 dated 02/09/2019 which reads as:

" a) No copy of any Whip has been received during the election of Mayor and Deputy Mayor of Srinagar Municipal Corporation.

b) No copy of any Whip has been received from the Indian National Congress/J&K People's Conference after election of Mayor and Deputy Mayor of Srinagar Municipal Corporation."

(b) After repeated advise and direction the applicant could not provide a copy of whip issued by him, who was Chief Whip of INC during the above election, for the purpose of voting for the post of Mayor of SMC.

21. The communication of the Commissioner Municipal Corporation Srinagar clarifies that no whip during the election of Mayor or Deputy Mayor was received from Indian National Congress or J&K Peoples Conference. Besides the applicant has not produced any document evidencing the fact that party whip was issued which has been violated by non-applicants, however show cause notices have been issued after the election of Mayor and Deputy Mayor SMC. Show cause notice cannot be construed as whip. It is therefore evident that no whip was issued to the non-applicants as such violation of same does not exist. The applicant who was Chief Whip of INC in the SMC has wrongly assumed that show cause notice is equivalent to whip and in case of non-reply of the show cause notice issued by him, copies of which he has provided and are available in the file amounts to non-obeyance of Whip issued by the party and hence attracts action as was

made in the case titled Asif Jehan Gattu Vs Executive Officer, Doda Municipal Corporation (2008 (2) JKJ 748 (HC) is not a correct position and fact.

22. The perusal of the application dated 05-05-2019 reveals that 12 Corporators namely Shaheena Bhat, Shafat Gaffar Mir, Gulshan Bilal, Syeda, Nazia Yousuf, Farooq Ahmad Dar, Gh. Rasool Hajam, Zahoor Hussain Rather, Aijaz Rasool, Sobee Jan, Sara Bilal and Haseena Ali have signed and put their tumb impressions on the typed application submitted to Secretary/Commissioner Municipal Corporation which reads as:-

"We the following Corporators belonging to Indian National Congress hereby resign from the basic membership of the party and extend our unconditional support to J&K Peoples Conference. Since we constitute 2/3rd majority of the Congress Party's strength in the Srinagar Municipal Corporation, please here onwards consider and officially register us as Corporators belonging to J&K Peoples Conference in the Srinagar Municipal Corporation."*

** 'resign' word has been cut by hand and replaced with 'merger'.*

23. The careful examination of the application reveals that the word **resign** (which is typed) on the first line has been cut/crossed with pen and word merge has been incorporated by the pen which not only makes application doubtful but also does not connote clear meaning. By this hand-written insertion of word 'merge' makes the complete line meaningless as well as grammatically incorrect. It appears that signatories were not ready for resign/merge. Therefore resign word was cut and later on merge word was written. Document detailed at para 9 above available in the file strengthens this further. It could not be explained further by the non-applicants, that why "resign" word is mentioned in that letter as resignation letter is sent to the Party official. They could only say that when they signed papers there was nothing written at the top of that letter/memo.



24. It is apt to mention here that 5 councillors including applicants out of these 12 have submitted affidavits duly attested by judicial Magistrate wherein they have deposed that they continue to be members of INC and have not joined any other political party which is totally contrary to the contents of application. It is pertinent to mention here that a document is also on file under the name of twelve councillors, however, signed by 7 Councillors wherein it has been mentioned that "we extend unconditional support to Mayor and Deputy Mayor for smooth functioning of the Corporation in public interest and we have not resigned from Indian National Congress and continue to be basic members and Corporators of Indian National Congress." It is important to mention that Mr. Shafat Gaffer Mir who has filed the application /reference for disqualification for non applicants has also put his signature and thumb impression on the application dated 5.5.2019 which makes it more doubtful and illogical, in which the applicant's name, signature as well as thumb impression is available. The applicant could never explain whether he also has merged with another political party alongwith other corporators as his name and signature is there. He and other corporators said that signature and thumb impression were taken on a plain sheet and typed matter was inserted later by the Mayor. The letter of 05-05-2019 is with corrections, contradictions as such cannot be relied upon completely. Hence the application dated 05-05-2019 cannot be read as admission of merger on the part of non-applicants and applicant himself.

25. Section 34A of the J&K Municipal Corporation Act 2000 read as under:

"Section 34A: Disqualification on ground of defection.

(1) *A member of a Corporation belonging to any political party shall be disqualified for being a member of the Corporation -*



- (a) If he has voluntarily given up his membership of such political party ; or
- (b) If he votes or abstains from voting in such Corporation contrary to any direction issued by the political party to which he belongs or by any person or authority authorized by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned in writing by such political party, person or authority within fifteen days from the date of such voting or abstention.

(2) Notwithstanding anything contained in sub-section (1), a person who on the commencement of the Jammu and Kashmir Municipal Laws (Amendment) Act, 2005 is a member of a Corporation (whether elected or nominated as such) shall where he was a member of a political party, immediately before such commencement be deemed, for the purpose of sub-section (1), to have been elected as a member of such Corporation as a candidate set up by such political party.

Explanation:- for the purpose of this section,-

- (a) An elected member of a Corporation shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member or which he joins after such election; and
- (b) A nominated member of a Corporation shall, -
 - (i) Where he is a member of any political party on the date of his nomination as such member be deemed to belong to such political party;
 - (ii) In any other case, be deemed to belong to the political party of which he becomes, or, as the case may be first becomes a member.

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26. The Hon'ble High Court of J&K in case titled **Asif Jehan Gattu versus Executive Officer Doda Municipal Corporation**(2008 (2) JKJ 748 HC) has held that:-

"There is no merit in the contention of Mr. Johal. Section 18-A refers to the elected members of the municipality belonging to political parties. They being the representatives of their respective political parties on whose mandate they have been elected, are bound to follow the philosophy, policy and direction of that party. If one is not in agreement with the philosophy, policy, or direction of his own political party, it is always open to him to leave that party and re-contest the election, after vacating the seat. So long as he is member of a political party, he cannot be allowed to defy the direction of his political party. With a view to arrest defections and indiscipline of the elected members of political parties while voting in internal elections of the Municipalities, Section 18-A has been enacted. The petitioners have abused their position while being members of their political party and have violated the direction. The petitioner No. 1 was directed to vote in favour of respondent No. 4 by his own political party and instead he himself put up his candidature against respondent No. 4 on being proposed by petitioner No. 2 who stood also directed to vote for respondent No. 4. Such conduct of the petitioners was in clear violation of the Whip/ direction issued. The direction to vote in favour of a particular candidate issued to a person in itself implicitly includes a direction that he would not set up himself a candidate against such candidate or propose the name of someone else as a candidate against the candidate in favour of whom he has been directed to vote.

The further contention of Mr. Johal that no Whip can be valid unless its prior information has not been furnished to



the electoral officer is also without any merit, there being no such requirement of any law governing elections to the Municipality.

Therefore, there is no merit in the writ petition. Dismissed. Connected CMPs shall also stand dismissed. Record of the J&K Special Tribunal and authorities below be sent back forthwith."

The above decision of Hon'ble High Court, clearly conveys that elected members of a political party have to follow the whip issued by the political party. If they do not agree with that whip it is open to them to leave that party and re-contest the election, after vacating the seat. In the present case there is no evidence on record that a party whip has been issued as such question of violation of the whip does not arise. The applicant additionally, could not present any document about action taken by his party against the non-applicants, on the contrary the party letter mentioned about their continuance as member of the party and withdrawal of the subject matter under consideration.

In view of the above, the application is found without any merit in which the applicant has failed to prove defection as per section 34 of the J&K Municipal Corporation Act, 2000 as pleaded in the application and is accordingly dismissed.


Chief Electoral Officer,
J&K, Jammu

Dated: 10-01-2020

No. 2144/CEO/ME/2020/278-91
Copy to:

1. Principal Secretary, Housing and Urban Development Department, Civil Secretariat, Jammu for information.
2. Deputy Commissioner, Srinagar for information.
3. Commissioner, Srinagar Municipal Corporation for information.

4. Sh. Shafat Gaffar Mir, Councilor Ward No. 21 Batamaloo, District Srinagar for information.
5. Sh. Basharat Bin Qadir, Councilor Ward No. 24 Chattabal, District Srinagar for information.
6. Mst. Sobee Jan, Councilor, Municipal Ward No. 10 Natipora, District Srinagar for information.
7. Mst Sara Bilal, Councilor, Municipal Ward No. 64, Lakut Dal, District Srinagar for information.
8. Sh. Aijaz Rasool Bhat, Councilor, Municipal Ward No. 12, Budshah Nagar, District Srinagar for information.
9. Mst. Gulshan Bilal, Councilor, Municipal Ward No. 34, Syed Ali Akbar, District Srinagar for information.
10. Mst. Naziya Yousuf, Councilor, Municipal Ward No. 16, Humhama, District Srinagar for information.
11. Mst Haseena, Councilor, Municipal Ward No. 73 Chatterhama, District Srinagar for information.
12. Mst Shaheena, Councilor, Municipal Ward No. 7 Rajbagh, District Srinagar for information.
13. Incharge Website
14. Office file