Office of the Chief Electoral Officer
Jammu and Kashmir

"Greater Participation for a Stronger Democracy"

Subject: Reference/case/petition u/s 18-C of J&K Municipal Act, 2000 for setting aside the election of private respondent Nos. 03 to 06 on the ground of defection.

ORDER No: CEO/ME/2019/538
DATED: 07-06-2019

1. This petition has been preferred by Smt. Pushpa Devi and Sh. Baljeet Singh, elected councillors of Municipal Council Kathua, to set aside the election of private respondent No. 03 as councillor of Municipal Ward No. 09, Kathua and President, Municipal Council, Kathua including the election of other private respondents on the ground of defection as the same is in violation of the J&K Municipal Act, 2000 (hereinafter referred to as Act) read with rules framed thereunder, on dated 26.12.2018;

2. The Chief Electoral Officer, J&K is the prescribed authority under section 18C of the Act to decide the question as to whether a member of the Municipality has become subject to disqualification. Accordingly, record pertaining to the reference/case was called from the Deputy Commissioner, Kathua and Chief Executive Officer, Municipal Council, Kathua. Notices of hearing were also served upon the parties to the instant reference/case seeking their personal appearance as well as providing them an opportunity of being heard;

3. Private respondent No. 1 and 2 provided the records. Objections/reply was submitted by the respondents. Several hearings in the case were conducted in which 15-05-2019 was the last one. Detailed arguments were advanced and heard from the Ld. Counsels for the parties;

4. Ld. Counsel for the petitioners in his arguments (oral as well as written) contended that private respondent Nos. 03 to 06 suffer from disqualification in terms of Section 18A of the Act (reproduced below) on the ground that they have given up membership of their original political party i.e. Congress party on whose mandate respondent Nos. 03 to 06 contested election for Councillor of Municipal Council, Kathua and also have acted in violation of the Whip issued directing respondents to remain present for election of President Municipal Kathua scheduled for 10-11-2018 at 12:30 p.m., for voting in favour of candidate supported by Indian National Congress.

18-A. Disqualification on ground of defection.

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

(a) If he has voluntarily given up his membership of such political party ; or

(b) If he votes or abstains from voting in such Municipality 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 Municipality (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 Municipality as a candidate set up by such political party.

***Explanation:-** for the purpose of this section,-*

(a) An elected member of a Municipality 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 or a Municipality 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.

5. Ld. Counsel for respondents rebutted the claim of the petitioners stating that after the result of elections to the Municipal Council Kathua, respondents convened a meeting on 28th October, 2018 and in the said meeting it was unanimously resolved and decided to form a separate group and four out of the five elected candidates i.e; by more than 2/3rd majority, after giving up the membership of the Congress party, formed a separate group and merged with Bhartiya Janta Party (BJP) and as such falls under the exception laid down under sub-section 2 of section 18B of the Act. Service/receipt of whip upon respondents was denied by Ld. Counsel for respondents;

Section 18-B of the Act dealing with merger reads as under:

18-B. Disqualification on ground of defection not to apply in case of merger

(1) A member of a Municipality shall not be disqualified under sub-section (1) of section 18-A where his original political party merges with another political party and he claims that he and any other member of his original political party, -

(a) have become members of such other political party or, as the case may be of a new political party formed by such member; or

(b) have not accepted the merger and opted to function as a separate groups

and from the time of such merger, such other political party or new political party or group, as the case may be, shall be deemed to be the political party to which he belongs

for the purpose of sub-section (1) of section 18-A and to be his original political party for the purposes of this sub-section.

(2) For the purposes of sub-section (1), the merger of the original political party of a member of a Corporation shall be deemed to have taken place if, and only if, not less than two-third of the members of the political party concerned have agreed to such merger.

Explanation :- For the purposes of this section "original political party", in relation to a member of the Municipality, means the political party to which he belongs for the purposes of this section.

6. Contention of the respondents regarding formation of a separate group and merger with Bhartiya Janta Party was rebutted by the Ld Counsel of the Petitioners by quoting various cases decided by the Hon'ble Supreme Court and Hon'ble High courts namely (i) Shah Faruq Shabir and others versus Govindrao Rama Vasave and another (ii) Kuldeep Bishnoi versus Speaker Haryana Vidhan Sabha and others (iii) Kedar Shashikant Deshpande etc, versus Bhor Municipal Council and others (iv) Asif Jahan Gattu versus Executive Officer Doda Municipal Corporation.

7. After listening to the Counsels and perusal of records, following issues emerge out of the case:

(a) When was the 'group' formed by the respondents? Before their election or after their election? Whether they contested election on political party mandate?
(b) What was the process adopted by the respondents to form the group? Whether by resolution group can be formed? Whether such resolution needs to be circulated among political parties concern, District Election Officer, Chief Electoral Officer (Election Authority), media, public information etc.? Whether such circulation/information of the resolution was undertaken?
(c) Whether after joining/ merger with a political party, 'the group' became member of that political party? When the members of the group became primary members of new political party? Whether they have resigned from the previous political party?
(d) Whether previous political party issued whip for voting in the elections to President, Municipal Council, Kathua? Whether whip was received by the group members? Whether whip was received by the District Election Officer? Whether whip was followed by the members of the group who were elected on that political party ticket/nomination?
(e) Whether the case attracts the provision of section 18 A or it has legal validity of section 18 B of the J&K Municipal Act, 2000 and whether merger is established as per the Act and material evidence available on record.

(f) Whether various judgments of the Hon'ble Supreme Court/High Court have dealt with such cases? What kind of order/direction/decisions have been passed by the Hon'ble Courts?

8. Above issues are examined in the following manner:-

8.1 The respondent through their affidavit (para 2) claim that 28th October, 2018 is a meeting "Unanimously resolved and decided to from a group and the said group of four members passed a resolution in merge with Bhartiya Janata Party, a recognised political Party. Five candidates of the congress Party were elected on Indian National Congress mandate and out of five, four candidates by a majority framed a separate group and then in one interest of the public to merge with Bhartiya Janata Party, a National Party. The situation arise only due to the undue pressure and undue influence exerted upon the answering responding by the Congress Party to support an independent candidate. They therefore formed a separate group and resigned from the Congress party, on the same day jointly and passed a resolution to merge in Bhartiya Janata Party."

With the above written claim, it comes out that there is a claim to form a group through resolution by the non-respondents no 3,4,5 and 06 who were elected as councillors to the Municipal Committee, Kathua on the Congress Party mandate, however there is no evidence available or provided that a meeting for the purpose was convened. No meeting notice has been made available which can suggest that elected councillors or other members of the congress Party were called for the meeting, on a particular venue, date and time. If resolution is passed in the meeting as claimed, no resolution has been made available. There is mention in the counter affidavit about undue pressure from the party on whose mandate they were elected as councillors to support an independent candidate. It is presumed that they were referring to support the independent candidate for the post of President MC, Kathua as has been mentioned in the whip issued by the congress Party.

8.2 It appears from the records made available that no legal process was adopted by the elected councillors or MC, Kathua in this case. No meeting notice issued mentioning subject matter of the meeting, no venue, time and date was fixed and the "resolution" has been passed orally, written resolution has never been prepared and therefore not circulated among the members of the group, to the political parties concerned, among the officials, media and was not even brought to the notice of electors who elected them on councillors position.

8.3 No documents has been made available which can suggest that they resigned from the original political party. On 15.5.19, the Ld Counsel for the respondents were asked to provide copy of the resignation from the original political party as well as joining of new party. The Ld. Council informed that they have not obtained the membership of Bhartiya Janata Party.

8.4 The original Party of the councillors, i.e congress Party has issued whip through its President District Congress Committee, Kathua (J&K, Dr Manohar Lal Sharma to the respondents on dated 08.11.2018 which is available on record . It reads as under,

" In terms of Section 18A, of Municipal Act 2000, You are hereby informed & directed, to remain present on 10-11-2018 at 12:30 PM sharp in the office of Municipal Council Kathua and vote for in favour of Mr Rajinder Singh S/o Saran Singh, elected councillor of municipal Council Kathua from Ward No.02 Kathua as a candidate, in the schedule meeting of Municipal Council Kathua for election of president. who has be set up as candidate for the post of president by the Kathua Development Front supported by INC for necessary compliance."

In the affidavit respondents mention that they have not received the copy of the whips but at para 2 of the affidavit they mention about undue pressure from the party to support independent candidate which suggest that they were having knowledge of the whip and its contents. Whip is also available in the official records of Dy. Commissioner, Kathua.

8.5 Section 18 A and 18 B of the J&K, Municipal Act 2000 reads as under:

"Section 18 A: Disqualification on ground of defection.

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

(c) If he has voluntarily given up his membership of such political party ; or

(d) If he votes or abstains from voting in such Municipality 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 Municipality (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 Municipality as a candidate set up by such political party.

***Explanation:-** for the purpose of this section,-*

(c) An elected member of a Municipality 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

(d) A nominated member or a Municipality shall, -

(iii) 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;

(iv) 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.

"Section 18-B:Disqualification on ground of defection not to apply in case of merger

(1) A member of a Municipality shall not be disqualified under sub-section (1) of section 18-A where his original political party merges with another political party and he claims that he and any other member of his original political party, -

(c) have become members of such other political party or, as the case may be of a new political party formed by such member; or

(d) have not accepted the merger and opted to function as a separate groups

and from the time of such merger, such other political party or new political party or group, as the case may be, shall be deemed to be the political party to which he belongs for the purpose of sub-section (1) of section 18-A and to be his original political party for the purposes of this sub-section.

(2) For the purposes of sub-section (1), the merger of the original political party of a member of a Corporation shall be deemed to have taken place if, and only if, not less than two-third of the members of the political party concerned have agreed to such merger.

Explanation :- For the purposes of this section "original political party", in relation to a member of the Municipality, means the political party to which he belongs for the purposes of this section.

Section 18-B talks about merger of original Political party with another political Party. Careful examination of section 18 (B) of the Act reveals that member of a Municipality shall not be disqualified under Sub-Section (1) of Section 18-A, where his original political party merges with another political party. In the instant case original political party has not merged.

Section 18-B (2) speaks that the merger of the original political party of a member of corporation shall be deemed to have taken place if, and only if, not less than two-third of the members of the political party concerned have agreed to such merger. In CWP No 2009 o 2013 titled Kuldeep Bishnoi Versus Speaker Haryana Vidhan Sabha the Hon'ble High Court of Punjab and Haryana order of 09.10.2014 has dealt the similar issue at length and has observed that:

"*The Court was actually discarding an argument that "the legislators were wearing two hats one as member of the original political party and the other as member of the legislative assembly and it would be sufficient to show that 1/3rd of the legislators have formed a separate group to infer a split. The paragraph spoke of two requirements; one, a split in the original party and two, group comprising of 1/3rd of the legislators separating from the legislative party. By acceding to the two hats theory, one of the limbs of para 3 would be made redundant or otiose. An interpretation of that nature has to be avoided to that extent if possible. Such an interpretation is also not warranted in the*

context."This is to explain that the deeming provision of what para 4(2)provides that 2/3rd members of the legislative party would lead to necessary inference of merger of the original political party merely answers one limb, namely, that 2/3rd members of the legislative party had agreed to the merger of the original political party. Other limb is the proof that the original political party actually merged. Both these aspects would require to be proved. It is this latter aspect that calls for a proof at the instance of the persons who wanted to take the benefit of such merger, viz., the benefit being not disqualified by the fact that they were shifting loyalties to another party from the party which sent them to the assembly.

Finding: The burden of proof of merger cast on the respondents not established. Constitutional mandate breached."

". The deeming provision will lose its value if there was a mismatch between the decision of the original political party and the legislature party.

It is not as if the respondents do not understand this simple logic. There would have been no attempt even before the Speaker in trying to bring any evidence of various party members before him to say that there had been a meeting of the political party on 08.11.2009, if it was not for a requirement that the original political must have taken a decision to merge. It was the congruence of their decision with the decision of the original political party through an agreement to such merger that makes possible for the defecting members not to incur disqualification. The words expressed are that 2/3rd of the members of the legislative party have agreed to such merger. Such merger must be a decision elsewhere namely of a decision of the original political party, apart from their own decision at the legislative party level."

In this case too original party has not taken decision on merger but elected councillors of the original party has taken decision of merger, therefore it does/not passes the test of law and merger as claimed by the respondents is not legal.

8.6 The various judgements of the Hon'ble Supreme Court/ High Court analysed below:

8.6.1 In the writ petition No. 4323 of 2011 titled **Shah Faruq Shabir and others versus Govindrao Rama Vasave and another,** wherein the full bench of Bombay High Court while dealing with the case of defection of members of Maharashtra Local Authority under the provisions of Maharashtra Local Authorities Members Disqualification Act, 1987 considered following two issues:

(i) Whether the term aghadi or front as defined under Section 2(a) of the Disqualification Act of 1986 would mean the party or aghadi on whose candidature the councillor is elected or would also include the aghadi of two or more municipal parties coming into existence after the elections are held?

(ii) Whether the term original political party or aghadi appearing in Section 5 would mean the party as its National level or would mean a municipal party?

The judgment on the above issues by the full bench of the Hon'ble Bombay High Court are as under:

"Section 2(a) defines the term "aghadi" or "front" means a group of persons who have formed themselves into a party for the purposes of setting up a candidate for election to a local authority. Reading the provision as it is and on consideration of the reasons set out in this judgement, it has to be inferred that the aghadi or front contemplated under Section 2(a) of the Disqualification Act of 1986 is necessarily a prepoll aghadi or front.

In the result,

(I) The answer to the first Issue, Whether the term aghadi or front as defined Under Section 2(a) of the Disqualification Act of 1986, would mean the party or aghadi on whose candidature the councillor is elected or would also include the aghadi or two or more municipal parties coming into existence after the elections are held, shall have to be recorded as the party or aghadi on whose candidature the councillor is elected, As a necessary consequence, the aghadi or front, within contemplation to Section 2(a) of the Disqualification Act of 1986, is a prepoll aghadi or front.

(II) Similarly, in view of the judgement of the Supreme Court in the matter of ***Mayawati v. Markandeya Chand & Others, reported in (1998) 7 SCC 517*** *(supra), as well as in view of the reasons set out in this judgement, it has to be concluded that the term "original political party" or "aghadi" appearing in Section 5, would mean the party at its National level and would not mean "municipal party". The Issue No. (II), referred for consideration is answered accordingly.*

It has been brought to our notice by learned Counsel appearing for both the parties that the elective term of the office of Municipal Council has already come to an end and grievance set out in this petition is merely rendered of academic interest.

In this view of the matter, instead of remitting the matter back to the learned Single Judge for disposal, we deem it appropriate to dispose of the writ petition.

Writ petition is accordingly disposed of. No order as to costs. Pending Civil Applications, if any, stand disposed of.

Order accordingly."

8.6.1.1 From the aforesaid Judgement of the High Court, it becomes clear that "agadhi" or "group" appearing in section 2 (a) of Maharashtra Local Authorities Members Disqualification Act, 1987 is necessarily a pre-poll "aghadi" or "party" or "group". Further the term "original political party" appearing in section 5 of Maharashtra Local Authorities Members Disqualification Act, 1987 (*pari materia* with section 18B of J&K Municipal Act, 2000) means the party at its National Level and would not mean "Municipal Party";

8.6.2 The Hon'ble High Court of Punjab and Haryana Court's order dated 09-10-2014 in C.W.P No. 2900 of 2013 titled **Kuldeep Bishnoi versus Speaker Haryana**

Vidhan Sabha and others was also perused in which the Court disqualified respondents on the ground of defection, while dealing with the case in which five out of six MLAs of Haryana Janhit Congress had merged with Congress party. Conclusive paras of the judgement are as under:

"If a mere reference to the municipal strength of more than 2/3rd declaring that they have agreed to merger of the original political party will not suffice in the light of challenge to it and that it would still be necessary for a speaker to decide that there had been such merger, the next issue would fall for consideration is the factual basis which was brought before the Speaker that could test the correctness of the decision. We have already set forth the limit of interference that is possible through a judicial review of the decision of the speaker. It may not be the appreciation of facts brought on material before it that would be subject of review. If the Speaker did not find need to elicit information from the President of the party legislators about the truth of their plea by way of corroboration, I would expect that the Speaker had some other material on the basis of which he could have acted that there was a merger of the original political party. In such a case the decision could pass the test. At an enquiry brought under para 6, there was surely an occasion to bring strength to the decision that had already been taken. It is at that time that the respondents had yet another occasion to prove what they were claiming that there had been a merger of the original political party. If the argument that the merger agreed to by them as members of the legislative party will not by itself be sufficient to prove the merger of the original political party by way we have interpreted para 4(2) in light of challenge under para 6, then it would be essential to examine whether the documents produced by respondent Nos. 3 to 6 were sufficient for the Speaker to come to the decision that he did originally on 09.11.2009 and for the affirmation of such a decision through the impugned order. We have already extracted the entire portion of the letter and as well as the minutes. They make no reference to any decision of the original political party and the letter merely expresses that members of the legislative party had considered and decided on the merger of the original political party. We have pointed out the insufficiency of merely the members of the legislative party deciding the original political party has merged to fulfil the requirement and save the members from disqualification. There ought to have been a decision of the original political party that merged with the Congress party.

The learned Senior Counsel appearing on behalf of the petitioner pointed out that at no point of time at the previous processing was any reference to any other meeting of the original political party for its decision to merge with Congress. It was for the first time when a reply was filed in CWP Nos. 14190 of 2010 that a case of meeting of the delegates of the original political party was brought in the replies of respondents Nos. 3 to 7. It was stated in paragraph 9 that a meeting was held on 09.11.2009 of the HJC (BL) where it was decided by overwhelming majority by the primary members of the party to merge the same with the INC. Both the parties stood merged on 08.11.2009 itself. In a separate

meeting on the same day, 5 members of HJC (BL) endorsed the decision taken by the primary members of the party. The learned Senior Counsel would argue on the following fallibilities/improbabilities to the plea of merger: (i) that even in the reply, there was no reference made as to the place where such meeting took place; (ii) there was no reference to any resolution as having been passed; (iii) there was again no reference about who called the meeting and whether notice had been given to all the members; (iv) when minutes of the meeting had been drawn up for the legislative party that the members of the legislative party had considered and decided merger of original political party, there was no resolution of the original political party for the merger of the party; (v) there were no records such as notices or video or audio recordings of any of the proceedings of the original political party; (vi) there was no representation even to the Election Commission to inform about the merger till 18.01.2013, that is, till after the decision of Speaker that is impugned in the writ petition; (vii) HJC (BL)had literally contested from 88 constituencies and the delegates were said to have been present and some of whom examined as witnesses before this Court were all persons drawn from that five constituencies that respondent Nos. 3 to 7 represented. Not one single delegate of any other constituency had been examined; (viii) each one of the witnesses who was examined was directly confronted with the questions that the meeting did not take place and there were not themselves delegates of the political party to which they were no more than mere denials when they ought to have had documentary proof of their contentions if the assertions were true; (ix) stereo typed affidavits had been prepared reproducing verbatim in a typeset that filled up merely the names of the respective deponents.

(c)Conduct of the petitioner at the time of enquiry, as pointed out by the respondents.

All the respondents would point out to the conduct of the petitioner in the course of cross-examination as a person not willing to speak truth and who was merely giving evasive answers; of a person who was not willing to admit the position of the father in the party; of his unwillingness to state why he did not file the minutes of the first meeting held on 23.10.2009; refusal to give the agenda for the meeting; unwillingness to state the content of the meeting that he had with the Chief Minister before the vote of confidence and refusal to give direct question whether his father was minister in the Government of Ch. Devi Lal from 1977 to 1979 and 1979 to 1986 when he responded that he did not know or as simple as a question as where he stayed whenever he came for holiday at Chandigarh. The questions and answers, I must observe were equally base; as frivolous as bordering on being ridiculous and at once, irrelevant. If a person was teased by asking questions whether his father Sh. Bhajan Lal was a Minister or where he spent his holidays at Chandigarh, it must be merely discarded as inconsequential and I am not prepared to weigh the character of evidence by the irreverent responses he gave. The responses were a reflection on the meaningless quality of some of the questions that were addresses to him.

(d)Respondents duty to adduce positive evidence of merger – Principles of burden of proof

If the key evidence of merger of the original political party has to be put to test, the necessary question would be who should take the burden of proof of establishing such a disputed question of fact. Since the decision had been taken and this was put to challenge in paragraph 6, would the petitioner require to discharge the burden of proof that there was no such meeting or whether the burden would still be on the person who had asserted that there had been a merger of the original political party. I would extend the normal rule of evidence in a situation like this, where the persons who are elected on a particular party ticket, namely, HJC (BL) were admittedly not any longer in that party. Constitution provides for a disqualification for defection and if such a disqualification was not to be applied, they were required to prove a particular fact that will enable them to apply for such an exceptional situation. The exceptional situation must be that there was a merger of the original political party. Section 101 to 104 of the Indian Evidence Act, 1872 bring out among other provisions, the burden of proof. Section 101 declares that whoever desires any Court to give a judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. In this case, a decision that there had been a merger alone enables a person to get over the disqualification. As far as the petitioner was concerned, it was enough that respondent Nos. 3 to 7 did not admittedly continue in the party which elected them. Section 102 is a corollary to Section 101 which says that burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. If the petitioner's case was to be rested that the respondents had moved over to yet another party which was an admitted fact and therefore, if no evidence had been given, the only way that disqualification would not operate was to say that there had been a merger of such political party which was the case propounded by respondent Nos. 3 to 7. Section 103 also is an illustration of how the burden of proof to a particular fact would required to be established when it says that the proof of any particular fact lies on that person who wished the Court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any particular person. This is also elicited in the judgment in Rajendra Singh Rana's case which we have referred to above. While adverting to issue of a claim for a split in the original political party in addition to showing that 1/3rd member of the legislative party have come out of the party, it is necessary to prove at least prima facie that such a split had taken place. The Court observed in para 37 that those who left the party will have prima facie to show by relevant materials that there has been a split in the original party. Considering the case that 37 MLAs staked a claim before the Speaker, it was required to show that 1/3rd of the members of the legislative party have come out and a plea that they were not required to produce any material in support of the split could not be accepted. The Court was actually discarding an argument that "the legislators were wearing two hats one as member of the original political party and the

other as member of the legislative assembly and it would be sufficient to show that 1/3rd of the legislators have formed a separate group to infer a split. The paragraph spoke of two requirements; one, a split in the original party and two, group comprising of 1/3rd of the legislators separating from the legislative party. By acceding to the two hats theory, one of the limbs of para 3 would be made redundant or otiose. An interpretation of that nature has to be avoided to that extent if possible. Such an interpretation is also not warranted in the context."This is to explain that the deeming provision of what para 4(2)provides that 2/3rd members of the legislative party would lead to necessary inference of merger of the original political party merely answers one limb, namely, that 2/3rd members of the legislative party had agreed to the merger of the original political party. Other limb is the proof that the original political party actually merged. Both these aspects would require to be proved. It is this latter aspect that calls for a proof at the instance of the persons who wanted to take the benefit of such merger, viz., the benefit being not disqualified by the fact that they were shifting loyalties to another party from the party which sent them to the assembly.

3. Finding: The burden of proof of merger cast on the respondents not established. Constitutional mandate breached.

In this case, there has been absolutely no proof of merger of the original political party. If I say that the decision of the Speaker in the first instance on 09.11.2009 was against constitutional mandate, I say so because the letter written by the legislators on 09.11.2009 and the decision taken on the same day were literally on no evidence produced. The evidence was that more than 2/3rd members of the legislative party had decided to merge. It offered no proof of the fact that the original political party had actually merged. The Speaker who had received the letter from the Congress Party that HJC (BL) had merged with them did not think it necessary surprisingly to look for a similar letter even from the leader of that political party which had merged. The decision in Rajinder Singh Rana's case (supra)is an authority for the position that Paras 4 and 6 are part of a single process and the decision that is taken under para 4 must stand test of enquiry when a contest is brought by any person in para 6. All that the person who sought for disqualification was entitled to say was the bare minimum, that there had been a defection from the original political party. If the slur of defection was to be effaced, it could be done only when there was a merger of the party itself. The only occasion when in spite of a claim for merger, the identity of the original party could subsist would be instances where a person who was elected from original political party was not prepared to accept the merger and continued to function as a separate entity. This is protected under Para 4(1)(b).In every other situation, the members who claimed a merger would require to show that as a matter of fact, there has been such a merger. The Speaker had no material at all to take such a decision. He had abdicated the constitutional trust in having to render a decision which was sacrosanct. No other authority could have adjudged on the plea of merger when a challenge was brought before him. The

Constitution that places the Speaker as the singular authority casts an additional burden which the regular Tribunals or Courts seldom confront. His consideration ought to have been whether there was a merger; that such merger was a merger of original political party and the member of legislature party agreed to such merger. If 2/3rd of such members agreed, it was deemed to be such merger. If less than 2/3rd, the benefit of deeming provision also would not operate. The requirement of 2/3rd of the members of the legislative party to accord to the merger of the original political party would deem such merger but that by itself would never have been sufficient. It is possible that the majority of the original political party actually took a decision not to merge but 2/3rd members of the legislative party deciding to merge. The deeming provision will lose its value if there was a mismatch between the decision of the original political party and the legislature party.

It is not as if the respondents do not understand this simple logic. There would have been no attempt even before the Speaker in trying to bring any evidence of various party members before him to say that there had been a meeting of the political party on 08.11.2009, if it was not for a requirement that the original political must have taken a decision to merge. It was the congruence of their decision with the decision of the original political party through an agreement to such merger that makes possible for the defecting members not to incur disqualification. The words expressed are that 2/3rd of the members of the legislative party have agreed to such merger. Such merger must be a decision elsewhere namely of a decision of the original political party, apart from their own decision at the legislative party level.

The Speaker's decisions at the first and at the second level are not vitiated merely by error in reasoning. The error is egregious. Significantly, in this case, the Speaker has not dealt with the evidence of any of the witnesses brought by the respondents in an attempt to prove that there was a meeting of the delegates of the party on 08.11.2009.All the affidavits were stereo typed and the recitals were the same setting out the alleged fact of their presence on 08.11.2009. The Speaker has made a sweeping observation that all the witnesses have spoken about the merger and nothing was elicited in the cross-examination. The expressions of how the Speaker has dealt with 68 witnesses are contained in one single sentence "there was no vital discrepancy in the dispositions and stood the test of rigorous cross-examination of Mr. Satya Pal Jain, Senior Counsel for Mr. Bishnoi. The statements were consistent and worth of credence (worthy of credence).

The reasoning adopted by the Speaker for coming to the decision is wholly against the mandate of the Constitution requiring the Speaker's satisfaction that 2/3rd members of the original political party merged with another party. The inference has been with reference to Para 4(2) in that more than 2/3rd of the legislature party has agreed to the merger. He has observed that there has to be a presumption to such a merger without looking for any evidence of whether the Speaker had before him particulars of the so-called decision of the original political party to merge. Adverting to the decision on the fact of whether

there was a meeting on 08.11.2009, the Speaker looked to the evidence of Sh. Kuldeep Bishnoi for an appraisal of whether his contention that the meeting did not take place was true or not. The consideration was that Kuldeep Bishnoi was admittedly not at the meeting and he could not have firsthand knowledge regarding what transpired at Karnal. He has again reasoned that no evidence of witness was produced by Kuldeep Bishnoi that there was no such meeting held at Karnal. The mistake was in completely reversing the burden of proof of what we have extracted elsewhere, that it was essentially on the persons who were contending that there was a meeting on 08.11.2009 and that the meeting resulted in a decision to merge. By inverting the burden of proof casting the burden on the petitioner, the Speaker committed a serious error in raising wrong questions to be answered by the petitioner and the absence of such answers as proof of the fact that the meeting did take place. It is not the failure to prove the absence of meeting that could result in a proper finding. The question to have been raised was whether there was a meeting on 08.11.2009 and there was sufficient proof for such an assertion. It was proof of a positive assertion that would bring home the proper result which in this case the Speaker failed to do. The Speaker has paraphrased the following points as establishing the meeting on 08.11.2009:-

(i) 75 delegates-cum-primary members out of 108 had decided regarding the merger.

(ii) No evidence had been produced by the petitioner that persons who were examined before him were not genuine members.

(iii) It was difficult to disbelieve the consistent testimony of 68 persons who claimed that there was a merger.

(iv)The predecessor-in-office who originally gave a decision on 09.11.2009 had decided the merger of two political parties.

The order accepting the merger on 09.11.2009 was hasty, sans basis and without undertaking the minimum of collection of data regarding the decision of the original political party. The second level decision through the order dated 13.1.2013 was on a wrong understanding on the purport of para 4(2), over simplification of believing the most artificial parrot like versions of persons drawn only from the constituencies of the defecting members and placing the burden on the petitioner to prove that the merger did not take place, factors leading to the illegality of the ultimate result. There was simply no objective consideration of every one of the vital parameters that could support a sound reasoning. Annexures P-1 and P-2 had weightless quality to lend to lend such proof. The decisions in Kihoto Hollohan's case, Jagjit Singh's Case and Rajendra Singh Rana's case surely allow for a judicial review in respect of a decision of speaker who acts as a Tribunal to see whether decision of the Speaker conforms to the mandate of the Constitution, which it does not.

V. Disposition

In the light of what has been dealt with in detail, I hold the impugned order rendered on 13.01.2013 by the Speaker to be bad in law and hence set aside. The consequences will

be that the original decision taken by the speaker on 09.11.2009 admitting the plea of merger of respondent Nos. 3 to 6 and the subsequent order accepting the plea of merger by respondent Nos. 7 on 10.11.2009 are also not valid. Respondents Nos. 3 to 7 invite the disqualification of being members of the House on the ground of defection under Para 2 of Schedule X to the Constitution. They are also disqualified to hold any remunerative political post for duration of the period commencing from the respective dates of voluntarily giving up their membership from the party viz.09.11.2009 for respondent Nos. 3 to 6 and from 10.11.2009 for respondent Nos. 7, as provided under Article 361B of the Constitution. However, any actions performed or decisions taken, while already occupying such remunerative political post till the time of pronouncement of this judgment shall not be rendered invalid. The writ petition is allowed. There shall be, however, no direction as to costs."

8.6.2.1 The nutshell of the aforesaid finding of the Hon'ble High Court is that where some Legislatures of a Political party merged with other political party when their original political party did not merge with the other political party- The merger of the said legislature is illegal and incurs disqualification on the ground of defection. Further, merger should be made by the original political party and not by few elected members;

8.6.3 The Hon'ble Supreme Court while hearing an appeal wherein six NCP councillors of Bhor Municipal Council left NCP and joined congress and formed Bhor Shahar Vikas Swabhimani Sangathana" the Sangathana" for short. Case of defection in terms of Maharashtra Local Authorities Members Disqualification Act, 1987 was filed against the said members before Additional Collector Pune, who by way of order dated 21-01-2010 disqualified the said councillors retrospectively. Aggrieved of the order, these defected councillors filed SLP before Supreme Court viz; Civil Appeal Nos. 10452-10457 of 2010 (arising out of SLP Civil Nos. 7477-7482 of 2010) titled **Kedar Shashikant Deshpande etc, versus Bhor Municipal Council and others, etc.** in which Hon'ble Court under paras 18 and 19 of the Judgement has concluded as under:

"Even otherwise also, the plea of appellants that their front had merged with Congress (I) has no factual basis. There is nothing on record to indicate that Congress(I) had permitted the front of the appellants to merge with the said party nor there is any evidence showing that the appellants were permitted to join Congress(I) party. Section 5 of the act contemplates the merger of the original political party or Aghadi or Front with another political party or Aghadi or Front and by virtue of such merger if a Member of the original political party becomes a member of such other political party then he can avail the protection under section 5 of the Act from disqualification under section 3 of the Act. In this case the original political party of the appellants was NCP. It is not the case of the appellants that their original party NCP had merged with other political party viz Congress (I) at any point of time. In this case what is admitted by the appellants is that they had separated from their original political party viz., NCP and

had formed a separate group known as Bhor Shahar Vikas Swabhimani Sangathana party. Therefore, this court is of firm opinion that provisions of section 5 are not attracted to the facts of the present case and, plea based on merger cannot be accepted. Mr. Shekhar Naphade, learned senior advocate for respondent Nos. 4 and 5 submitted that the petitioners had incurred disqualification under section 3(1)(a) of the Act as they had voluntarily given up membership of NCP. In response to this argument it was contended by Mr. Arvind V. Savant, learned senior counsel for the appellants that this point was never urged either before the Additional collector or before the High Court and, therefore, the same should not be permitted to agitated for the first in SLP nor the same should be considered by the Court in the appeals filed by disqualified appellants. On consideration of rival submissions, this Court finds that what is ought to be contended by respondents is legal effect of the proved facts on the record of the case. The point which is sought to be argued by the learned counsel for the respondent Nos. 4 and 5 is a pure question of law and the Court has to merely look to the admitted facts of the case. To ascertain whether the appellants have incurred disqualification in terms of section 3 (1)(a) of the Act it is necessary for the Court to notice the said provisions. Section 3(1)(a) reads as under:

"3.(1) Subject to the provisions of Section 5 a councillor or a member belonging to any political party or aghadi or front shall be disqualified for being a councillor or a member---

(a) If he has voluntarily given up his membership of such political party or aghadi or front;"

The fact that the 6 appellants had contested election as Councillors of Bhor Municipal Council, District Pune as candidates of NCP is not in dispute. It is also not in dispute that Mr. Yashawant Baburao Dal who was appointed as Pratod/Gatneta of NCP had submitted the information in Form-III as per Rule 4(1) of the Rules mentioning that each of them was elected as Councillor and was affiliated to political party namely NCP. It is the specific case of appellants that after elections of President and Vice-President of Bhor Municipal Council on July 19, 2008, the appellants had left NCP nadformed Bhor Vikas Swabhimani Sanghathana on December 22, 2009. It is also their case that Mrs. Jay Shree Rajkumar Shinde who has filed SLP arising out of Writ Petition No. 966/10 was appointed Pratod of the Sanghathana. On December 23, 2009 she had given a letter to the District Collector to that effect, she had also submitted Form-I as per Rule 3(1)(a) of the Rules, whereas, all the 6 appellants had submitted Form-III as per Rule 4(1) of the Rules. Thus it is admitted by the appellants themselves that they had left NCP party. What is the effect of admitted fact has to be taken into consideration by this Court. As mentioned above Section 3(1)(a) without any qualification or rider provides that a Councillor or member belonging to any political party or aghadi or front shall be disqualified, if he has voluntarily given up his membership of such political party or aghadi or front. Te provisions are absolute in terms and are mandatory. The mandate

given by the legislature cannot be ignored by the Court while hearing appeals arising out of petitions filed before the High Court under Articles 226 and 227 of the Constitution. The learned counsel for the appellants could not argue before this Court that the appellants had not incurred disqualification in terms of section 3(1)(a) of the Act. The only contention which was raised was that the plea was advanced for the first time by the learned for respondents before the Supreme court and, therefore, the same should not be taken into consideration. As observed earlier, this Court is of the opinion that the Court has not to investigate or inquire into any facts at all but has to consider the legal effect of proved facts. The legal effect of proved and admitted facts is that the appellants had incurred disqualification in terms of section 3(1)(a) of the Act and, therefore they are not entitled to any of the reliefs in the present appeals.

On consideration of the rival submission advanced at a bar by the learned counsel for the parties, this Court finds that this plea raised by the learned counsel for respondents does not involve at all determination of any question of fact. Here also the Court will have to consider the legal effect of admitted and proved facts. The record of the case indicates that after election results were published in Maharashtra Government Gazette of June 27, 2008, one independent councillor i.e Mr. Vittal@Lahu Ramchandra shinde had joined NCP immediately that is on the same date itself. Thus, the strength of NCP Councillors in Bhor Municipal Council, District Pune, was of 9 Councillors. The record unerringly establishes bed on June27, 2008 Mr. Yashawant Baburao Dal who has filed SLP No. 7479 of 2010, was appointed as Pratod/Gatneta of NCP. The record would further show that on December 21, 2009 Mr Yashawant Baburao Dal had resigned from the post of Pratod/Gatneta of NCP and the resignation was accepted on December 22, 2009. In place of Mr. Y.B. Dal, NCP Councilor Mr. Ganesh Anant Pawar was appointed as Pratod. Thereafter, the 6 appellants who had left NCP had formed the Sanghathana and Mrs. Jayshree Rajkumar Shinde was appointed as Pratod of the said Sanghathana. It is the case of the appellants themselves that 6 councillors of the Sangathana and eight councillors of congress (I) had submitted a requisition dated December 29, 2009 for moving no confidence motion against the president Mr. Vital Shinde. The evidence on record shows that before the six councillors of the Sangathana along with eight councillors of Congress(I) had submitted requisition for no confidence motion against president on December 29, 2009, a whip was issued to the appellants and other members of the NCP on December 23, 2009 by Mr. Ganesh Anant Pawar who was Pratod of NCP, requiring the appellants and others not to vote in favour of any resolution of motion for removal of the president and vice president of the Bhor Muncipal Cuncil and not to sigh any requisition for calling meeting for the removal of the president and the vice president. The assertion made by respondent Nos. 4 and 5 is that the whip was sought to be served on the appellants but they had refused to give acknowledgement and therefore the said whip was published in the newspaper dated December 8, 2009. There is no manner of doubt that the Pratod of NCP had sensed that a move was afoot to bring no

confidence motion against the president and vice president of Bhor Muncipal Coouncil by the appellants who were belonging to NCP, and therefore, it had become necessary for him to issue whip to the councillors of NCP to restrain the appellants and others from joining the move for removal of president or vice president of the council. The whip which was published in the newspaper December 28, 2009 forms part of the record. There is no manner of doubt that by the said whip it was directed to councillors of NCP not to sign any requisition for bringing a motion of no confidence and also not to support any such no confidence motion. Despite the whip, the appellants had not only signed the requisition requesting the collector to call a meeting for consideration of no confidence motion against the president but had also infact voted in favour of the said motion. This is evident from the contents of the letter dated December 29, 2009 addressed by Mrs. Jayshree Rajkumar Shinde who was Pratod of the Sangthana to the Collector. Section 3(1)(b) of the Act reads as under:

"(1) Subject to the provisions of section 5 a councillor or a member belonging to any political party or aghadi or front shall be disqualified for being a councillor or a member-

(b) If he votes or abstains from voting in any meeting of a Municipal Corporation, Municipal Council, Zilla Parishad or, as the case may be, Panchayat Samiti contrary to any direction issued by the political party or aghadi or frnt, person or authority and such voting or abstention has not been condoned by such political party or aghadi or front, person or authority within fifteen days from the date of such voting or abstention:

Provided that such voting or abstention without prior permission from such party or aghadi or front, at election of any office, authority or committee under any relevant Municipal law or the Maharashtra Zilla parishads and Panchayat Samitis Act, 1961 shall not be condoned under this clause;

Explanation—for the purposes of this section-

(a) a person elected as Councillor, or as the case may be, a member shall be deemed to be belong to the political party or aghadi or front, if any, by which he was set up as candidate for election as such Councillor or member;

(b) a nominated councillor shall-(i) where he is a member of any political party or aghadi or front on the date of his nomination be deemed to belong to such political party or aghadi or front;

(iii) In any other case, be deemed to belong to the political party or agahdi or front of which he becomes, or as the case may be, first becomes a member of such party or aghadi or front before the expiry of six months from the date on which he is nominated;

(c) a nominated member, in relation to a Panchayat Samiti, includes an associate member, referred to in clause (c) of sub-section (1) of section 57 of the, Maharashtra Zilla Parishads and Panchayat Samitis Act, 1991".

8.6.3.1 *An analysis of the above-noted provisions makes it more than clear that a Councillor or a member belonging to any political party or aghadi or front shall be disqualified for being a Councillor or member if he votes or abstains from voting in any meeting of Municipal Corporation, Municipal Council, Zilla Parishads or, as the case may be, Panchayat Samiti contrary to any direction issued by the political party or aghadi or front to which he belongs."*

8.6.4 The Hon'ble High Court of J&K in a case 2008 (2) JKJ 748 High Court titled **Asif Jehan Gattu versus Executive Officer Doda Municipal Corporation** 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."

8.6.4.1 The above decision of Hon'ble High Court, J&K conveys clearly 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 the Respondents (Elected members who claim to have merged with another party leaving the party on whose mandate they were elected) had the knowledge of the whip issued by their original party as they have stated

in their counter affidavit that there was undue pressure from their party to support an independent candidate therefore they decided to leave the party and from a group.

9. In view of the aforesaid position set forth by the Hon'ble Supreme Court and High Courts, principles, procedures and processes related to the matter have been laid down amply in unequivocal terms.

10. In the instant case/reference, the merger, as claimed by the respondents, does not fall under the exception laid down under sub-section 2 of section 18B of the Act, as the **"original political party"** of the respondents i.e, Congress party has not merged with Bhartiya Janta Party, as such respondents cannot claim the protection of sub-section 2 of section 18B of the Act. Moreover, separate group, as claimed by the respondents, has been formed after the conclusion of elections to Municipal Council Kathua i.e, post poll and **not pre-poll** - the party or group on whose candidature the councillor is elected. It has been claimed that the group has merged with the Bhartiya Janta Party and the elected members have become members of BJP. Only four (04) out of five (05) elected members have given up the membership of the Congress party to join Bhartiya Janta Party and not their "original political party" i.e, Congress party. However, the respondents failed to produce any records to show that any meeting has been convened or any resolution has been passed or any notice/representation had been made to the Election Authority or District Election Officer, Kathua to inform about the formation of separate group and its merger with BJP by 2/3rd majority. The respondents however have admitted that they have given up the membership of Congress party i.e, their original political party.

In the instant case/reference, records reveal that Whip was issued to the respondents with a direction, to remain present for election of President, Municipal Council Kathua scheduled for 10-11-2018 at 12:30 p.m., for voting in favour of candidate supported by the "original political party" of the respondents i.e, Indian National Congress (INC). Records also show that the copies of said whip have been sent to and received by the Office of the Deputy Commissioner, Kathua. The respondents however did not cast their vote in favour of the candidate (for elections to President, Municipal Council Kathua), supported by their "original political party" i.e, Indian National Congress, thus disobeying the Whip, attracting disqualification on defection under clause (b) of section 18A of the Act, though they (respondents) have admitted in their affidavit that their original party was pressurising to vote in favour of an independent candidate as the reason for leaving their original party.

Now, therefore, in exercise of the powers conferred under Section 18C of the Act and on the strength of the afore stated rule position, principles, procedures, processes settled by the Hon'ble Courts and reasons made out, the instant reference/case is disposed of with the conclusion that **the 'group' formed by the respondents was post-poll, without following due procedure and processes and they have contested elections on the mandate of their 'original political party' (Indian National Congress) i.e. the political**

party by which they were set up as candidates for elections as Member of Municipality and the 'merger' claimed by the respondents does not fall under the exception laid down in Section 18B of the Act, as the same is not between their original political party (Indian National Congress) and the Bhartiya Janta Party. Consequently, the respondents having admitted to have resigned and given up the membership of their original political party (Indian National Congress), formed a 'group', joined another party namely, Bhartiya Janta Party, and the group so formed merged with the Bhartiya Janta Party, do attract the provisions of defection under Section 18A(1)(a) of the J&K Municipal Act 2000 and are hence disqualified accordingly.

Shailendra.

Chief Electoral Officer,
J&K, Srinagar

No. 2020/CEO/ME/2019/202-210 **Dated:** 07**-06-2019**

Copy to:

1. Principal Secretary, Housing and Urban Development Department, Civil Secretariat, Srinagar for information and necessary action.
2. Deputy Commissioner, Kathua for information and necessary action.
3. Chief Executive Officer, Municipal Council Kathua for information and necessary action.
4. Smt. Pushpa Devi, W/o Sh. Ashok Raj R/o Ward No. 16, Kalibari, District Kathua for information.
5. Sh. Baljeet Singh S/o Sh. Chanan Singh R/o Ward No. 21, District Kathua for information.
6. Sh. Naresh Kumar, Councilor, Municipal Council, Ward No. 09, Kathua, District Kathua for information.
7. Sh. Rekha Kumari, Councilor, Municipal Council, Ward No. 06, Kathua, District Kathua for information.
8. Sh. Ajay Kumar, Councilor, Municipal Council, Ward No. 10, Kathua, District Kathua for information.
9. Sh. Renu Bala, Councilor, Municipal Council, Ward No. 12, Kathua, District Kathua for information. Through their Ld Counsel as well as dasti delivery by the Dy. Commissioner, Kathua.