

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

THURSDAY, THE 19TH DAY OF NOVEMBER 2015/28TH KARTHIKA, 1937

WP(C) .No. 8401 of 2012 (A)

PETITIONER(S) :

SHEREEFA BEEVI I.,
LOWER DIVISION CLERK,
TKM COLLEGE OF ARTS AND SCIENCE, KOLLAM-5.

BY ADVS.SRI.S.P.ARAVINDAKSHAN PILLAY
SMT.N.SANTHA
SRI.P.M.BALASUBRAMANIAN
SRI.PETER JOSE CHRISTO
SRI.S.A.ANAND

RESPONDENT(S) :

1. STATE OF KERALA,
REPRESENTED BY THE SECRETARY TO GOVERNMENT,
HIGHER EDUCATION DEPARTMENT, SECRETARIAT,
THIRUVANANTHAPURAM-695001.

2. DIRECTOR OF COLLEGIATE EDUCATION,
DIRECTORATE OF COLLEGIATE EDUCATION, VIKAS BHAVAN,
THIRUVANANTHAPURAM, PIN 695 033.

3. DEPUTY DIRECTOR OF COLLEGIATE EDUCATION,
THIRUVANANTHAPURAM-695033.

4. GOVERNING BODY OF THANGAL KUNJU MUSALIYAR COLLEGE OF
ARTS AND SCIENCE
KOLLAM, PIN 691 005, REPRESENTED BY ITS CHAIRMAN.

5. ANSAR KHAN.M.
SPECIMEN COLLECTOR, TKM COLLEGE OF ARTS AND SCIENCE
KOLLAM, PIN 691 005.

R1 TO R3 BY GOVERNMENT PLEADER SRI.T.R.RAJESH.
R5 BY ADV. SRI.C.RAJENDRAN
R4 BY ADVS. SRI.N.SUGATHAN
SMT.VARSHA BHASKAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
19-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER(S) EXHIBITS

EXHIBIT-P1. TRUE COPY OF THE ORDER NO.E1/8390/05/COLL.EDN. DATED 27.10.2005 OF THE DEPUTY DIRECTOR OF COLLEGIATE EDUCATION, THIRUVANANTHAPURAM.

EXHIBIT-P2. TRUE COPY OF THE ORDER NO.E1/8390/05/COLL.EDN DATED 24.10.2005 OF THE 2ND RESPONDENT.

EXHIBIT-P3. TRUE COPY OF THE JUDGMENT DATED 09.12.2011 IN W.P. (C) NO.32918/2005-R OF THIS HON'BLE COURT.

EXHIBIT-P4. TRUE COPY OF THE GOVERNMENT LETTER NO.13850/D3/03/COLL.EDN DATED 08.07.2005.

EXHIBIT-P5. TRUE COPY OF THE GOVERNMENT LETTER NO.3847/D3/99/COLL.EDN DATED 03.11.1999.

EXHIBIT-P6. TRUE COPY OF THE LETTER NO.E1/8390/05 DATED 11.08.2005 OF THE DIRECTOR OF COLLEGIATE EDUCATION.

EXHIBIT-P7. TRUE COPY OF THE ORDER NO.F4/2537/12/COLL.EDN DATED 21.03.2012 OF THE DIRECTOR OF COLLEGIATE EDUCATION.

RESPONDENTS' EXHIBITS : NIL

/TRUE COPY/

P. A. TO JUDGE.

K.VINOD CHANDRAN, J.

W.P.(C) No.8401 of 2012

Dated this the 19th day of November, 2015

J U D G M E N T

The petitioner is aggrieved with Ext.P7 order. The issue agitated in the above case is with respect to the seniority of the petitioner and the 5th respondent. Admittedly, both the petitioner and the 5th respondent were first appointed under the 4th respondent as Last Grade Servants; in the T.K.M. Arts and Science College. The 5th respondent was the admitted senior of the petitioner in the Last Grade Service.

2. When a leave vacancy arose on 16.03.1992, the petitioner being test qualified, despite she being junior to the 5th respondent, was appointed in the leave vacancy as LDC from 16.03.1992. While the petitioner continued so, the 5th respondent also acquired test qualification and he was also promoted to a leave vacancy on 16.10.1992. The 5th respondent stood reverted, on the incumbent who had proceeded on leave joining back for duty. Subsequently, a post of LDC arose on retirement on 01.06.2003. The essential question to be considered is as to who is entitled, whether the 5th respondent or the petitioner.

3. The learned counsel for the petitioner would rely on

Direct Recruit Class-II Engineering Officers' Association and Others v. State of Maharashtra and Others [1990 KHC 818] to contend that, the petitioner having been continued in the leave vacancy and holding the post of LDC at the time when the vacancy arose, the petitioner should be appointed. The learned counsel would also specifically refer to Rule 27(a) to further buttress his contention.

4. The learned counsel for the 5th respondent, who is admittedly retired as of now, would place reliance on ***Kunjukrishnan Nair v. State of Kerala [1991 (1) KLT 686]*** to contend that, merely because the petitioner was promoted in a leave vacancy, the seniority in the feeder category cannot be ignored, when a regular vacancy arise. Ext.P7, order rejecting the claim of both the petitioner and the 5th respondent, obviously is an order in a representation disposed of, on the direction of this Court in a writ petition filed by the 5th respondent, against the promotion and approval of the petitioner in the post of LDC as on 01.06.2003.

5. Referring to Rule 27(a), this Court is unable to find that, there is any prescription that, the appointment to the leave vacancy should also be considered as the first appointment in a

service, class, category or grade. It is to be noticed that, the explanation excludes appointment under Rule 9 or appointment by promotion under Rule 31. Hence what is indicated in Rule 27 (a) is only an appointment to a substantive post and not to a leave vacancy.

6. A reading of **1990 KHC 818** also does not command a different conclusion. The specific reliance placed is on clause (B) of paragraph 44, which is extracted hereunder :

“ (B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.”

The said clause has no application, since the petitioner cannot have a case that, she was regularised in the post of LDC on 01.06.2003. The petitioner was promoted on 01.06.2003, which was challenged by an admitted senior of the petitioner in the feeder category. There can be no question of regularisation in the higher post.

7. The petitioner had been appointed on a leave vacancy and had been continued till the date, even when the vacancy arose, only based on the fortuitous circumstance that, the incumbent in whose leave vacancy the petitioner was

appointed, extended for a longer period. Hence, the petitioner cannot claim any seniority over and above that of the 5th respondent who is an admitted senior to the petitioner in the feeder category. Merely on being continued in a leave vacancy in the higher post, there can also be no claim put forward to be considered for promotion to that post, over an admitted senior in the lower post. Further it is also to be noticed that, on the date of arising of the vacancy, both the petitioner and the 5th respondent were qualified. The decision of the Division Bench of this Court in **1991 (1) KLT 686** answers the specific question put forth by the petitioner. Following extract from paragraph 7 assumes relevance :

“This is a clear authority for the proposition that a person who secures provisional promotion in a leave vacancy is not entitled to claim any preference in the matter of promotion when a regular vacancy arises against his senior, who has become qualified for promotion as on the date on which the regular vacancy has occurred. The crucial point to be noticed is that everyone who is duly qualified is entitled to have his case considered as on the date on which the regular vacancy arises, depending upon his seniority in the feeder category. The right to consideration depends upon the further question as to whether the person is senior most in the feeder category and as to whether

he has all the qualifications prescribed for the post. The fact that junior has qualified himself by passing the prescribed test earlier than his senior is not relevant. What is relevant is as to who are all qualified on the date of occurrence of the regular vacancy."

8. The learned counsel for the petitioner would contend that, a reading of the said decision would indicate that, all the petitioners in the said case were reverted prior to the date on which the vacancy arose. But that is of no consequence, since it has already been found that, the mere fortuitous circumstance of the extension of a leave vacancy for a longer period would not confer a better right on a person, who is appointed to such leave vacancy, overriding the claim of an admitted senior in the feeder category. The petitioner, definitely for the purposes of promotion, has to be considered as junior to the 5th respondent, since her first appointment in the feeder category is subsequent to the 5th respondent's appointment.

9. The learned Government Pleader however has a different contention even going by Ext.P7 order. The learned Government Pleader takes me through the entire order at Ext.P7 which indicates that, both the petitioner and the 5th respondent could not have been promoted on 01.06.2003, since there were not enough vacancies available, especially for reason of the de-

linking of pre-degree from the colleges.

10. The petitioner however contends that, the petitioner's promotion had been approved on the strength of Ext.P5 and she has been receiving salary in the higher post. However, the approval at Ext.P1 does not indicate that, the same has been made under Ext.P5. On reading of Ext.P5, this Court does not find that, the same is applicable to the petitioner's case at all. It deals with regular appointment of persons, who were appointed and continued in leave vacancies. The petitioner was in the regular employment in the Last Grade Servants' post and was only promoted to the post of LDC on a leave vacancy. There is no question of regularisation of the petitioner and Exts.P4 and P6 have been passed on a misunderstanding of the Government Order at Ext.P7. The petitioner's claim was not one of being thrown out for reason of no vacancy existing. The petitioner's claim was for preferential consideration for promotion, over her senior, by reason of her continuance in the higher post in a leave vacancy.

11. In such circumstances, the petitioner cannot have a claim for appointment, especially since the 5th respondent is found to be senior of the petitioner. The petitioner was

continued on the basis of the interim order and the 5th respondent never challenged Ext.P7. The 5th respondent is also said to have retired on 30.04.2015. The 5th respondent cannot claim any relief in this writ petition.

12. However, the continuance of the petitioner in the post as LDC would be subject to the verification of the vacancy position, which the 2nd respondent shall consider in accordance with law, with reference to the year in which the promotions were granted and successive vacancies arose, within a period of three months from the date of receipt of a certified copy of the judgment. It is made clear that, the petitioner's seniority in the post of LDC shall be adjusted in accordance with the orders of the 2nd respondent so passed but, however no recovery shall be made from the salary of the petitioner, since she has continued for long in the post, with approval from the Government. However on no vacancy existing as on the date of her promotion i.e: 01.06.2003, and none arising thereafter, then she shall be reverted, without any recovery effected.

The writ petition stands disposed of.

Sd/-
K.VINOD CHANDRAN, JUDGE