

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

MONDAY, THE 14TH DAY OF SEPTEMBER 2015/23RD BHADRA, 1937

OP.No. 36571 of 2001 (D)

PETITIONER(S):

**K.K.SUBRAMANIAN
SENIOR GRADE TYPIST
G.C.D.A, COCHIN - 20**

**BY ADVS.SMT.V.P.SEEMANDINI (SR.)
SRI.T.R.RAJESH**

RESPONDENT(S):

- 1. G.C.D.A., REPRESENTED BY ITS SECRETARY
COCHIN – 20**
- 2. K.A. ABDUL HAJEED,
SENIOR GRADE TYPIST
G.C.D.A, COCHIN - 20**

**R,R2 BY ADV. SRI.M.V.BOSE
R,R1 BY ADV. SRI.M.V.JOSEPH
R,R.1 BY ADV. SRI.JIMMY GEORGE
R BY SRI.C.A.MAJEED**

**THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD
ON 14-09-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

OP.No. 36571 of 2001 (D)

APPENDIX

PETITIONERS EXHIBITS:

- EXT.P1 COPY OF THE JUDGMENT OF THE HON'BLE SUPREME COURT
DT.7.8.01.
- EXT.P2 COPY OF THE ORDER DT.12.9.01 PASSED BY THE 1ST
RESPONDENT.
- EXT.P3 COPY OF THE PROCEEDINGS DT.12.11.01 ISSUED BY THE 1ST
RESPONDENT'
- EXT.P4 COPY OF THE REPRESENTATION DT.19.11.01 SUBMITTED BY
THE PETITIONER TO THE 1ST RESPONDENT.

RESPONDENTS EXHIBITS: **NIL**

// TRUE COPY //

PA TO JUDGE.

SB

K. VINOD CHANDRAN, J.

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O.P No.36571 of 2001 - D

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Dated this the 14th day of September, 2015

J U D G M E N T

The petitioner is aggrieved with the fact that the petitioner has been proceeded with for recovery of amounts, he has allegedly drawn in excess; for reason of his having continued in a higher post, when he was not entitled to be so appointed to the higher post. The entire controversy arose with the 2nd respondent challenging a seniority list issued by the 1st respondent. Admittedly, the petitioner and the 2nd respondent were initially appointed as Lower Division Typist Gr.II in the 1st respondent. The petitioner, by direct recruitment through the P.S.C and the 2nd respondent by promotion from Last Grade Servant. The seniority dispute was with respect to their respective positions as Lower Division Typists.

2. The 2nd respondent was appointed as a L.D. Typist

on 27.03.1981. The petitioner was appointed so on 20.09.1986. A provisional seniority list was published, in which the 2nd respondent was placed on the top and the petitioner at rank No.2. The petitioner hence filed a representation against such fixation of seniority on the ground that the 2nd respondent did not have the essential qualification for appointment to the post, at the time of his initial appointment.

3. The G.C.D.A finding favour with the petitioners representation realigned the seniority putting the petitioner in the 1st position and two others at the second and third serial numbers; with the 2nd respondent placed behind them. The 2nd respondent challenged the same unsuccessfully in a writ petition and writ appeal. However, the SLP filed before the Hon'ble Supreme Court was allowed in favour of the 2nd respondent, as per Ext.P1. In the meanwhile, the petitioner continued in the higher post based on the seniority fixed by the 1st respondent.

The Hon'ble Supreme Court having allowed the claim of the 2nd respondent, seniority was re-fixed and the 2nd respondent is said to have been paid the entire salary even for the period, in which he did not work in the higher post. The 2nd respondent has retired. The amounts drawn by the petitioner in the higher post, is sought to be recovered by Ext.P3 on the ground that two persons cannot be allowed pay in the single post.

4. Admittedly the petitioner had worked in the higher post while the controversy with respect to the seniority was pending before this Court and the Hon'ble Supreme Court. The 2nd respondent's claim for seniority over the petitioner was allowed by Ext.P1 judgment. However, the direction was only to re-fix the seniority by preparing and publishing a fresh seniority list showing the 2nd respondent as senior to the petitioner and the two other persons, who were respondents in Ext.P1. There was no direction as such to pay the salary in the higher post to

the 2nd respondent for the period in which he was kept out of such higher post.

5. The G.C.D.A thought it fit to grant the 2nd respondent pay in the higher post, when the pay fixation was made; in accordance with the direction for preparation of a fresh seniority list as per Ext.P1. In fact the pay fixation should have been notional and the 2nd respondent ought to have been granted the pay only from the date on which the 2nd respondent was allowed to work in the higher post on the basis of the orders of the Hon'ble Supreme Court; on the principle of "no work no pay". Especially since, there was no direction to promote the 2nd respondent with retrospective effect or to fix pay his back wages in the higher post.

6. The petitioner who has worked in the said post discharging the duties assigned to the higher post, cannot be made liable for reimbursing the pay drawn in the higher post.

The issue with respect to the recovery would be squarely covered by the principle laid down as to when it shall not be made, stated in **State of Punjab and others v. Rafiq Masih (white washer) and others [(2015) 4 SSC 334]** clause (iv), of paragraph 18, which is extracted hereunder:

18 (iv): Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

7. In such circumstance, no recovery can be effected from the petitioner. The petitioner's continuance in the higher post was only on account of the wrong fixation of seniority, by the employees, which was set aside by the Hon'ble Supreme Court. However, even the interim order staying the recovery specifically noticed that the petitioner's down-scaling to a lower post can be allowed from the date on which the 2nd respondent has been promoted to the higher post. That order would also be

O.P No.36571 of 2001 - D

made absolute, especially noticing that the petitioner also does not challenge the said 'down-scaling'. Ext.P3 would stand set aside.

The writ petition would stand allowed.

**Sd/-
K. VINOD CHANDRAN,
JUDGE**

SB

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p.a to Judge.