

V. A. Subhadra

Vs

A. Satyavan and Others

State of Kerala and Another

Vs

A. Satyavan and Another

Civil Appeals Nos. 247 (N) and 248 (N) of 1975 (Appeals by Special Leave from the Judgment and Order, dated May 29, 1974, of the Kerala High Court in Original Petition No. 5463 of 1971)

(CJI A.N. Ray, K.K. Mathew, V.V. Chandrachud JJ)

22.08.1975

JUDGMENT

CHANDRACHUD, J. -

1. This appeal (Appeal 247 of 1975) by special leave arises out of the judgment of the High Court of Kerala in Writ Petition No. 5463 of 1971. That petition was filed by the 1st respondent A. Satyavan against the State of Kerala, the Director of the Department of Museums and Zoos, Trivandrum and the appellant Smt. V. A. Subhadra. The main relief sought by 1st respondent was that the order passed by the State of Kerala on March 18, 1971 appointing the appellant as an upper division clerk in the Department of Museums and Zoos be quashed.
2. The appellant was appointed as a lower division clerk in the department of Museums and Zoos, Trivandrum in 1949. She was confirmed in that post in 1950. The 1st respondent was appointed as a lower division clerk in the same department in 1955 and was confirmed in 1963. On April 9, 1962 the appellant, on her own request was transferred to the Department of Agriculture. That was an inter-department transfer. Though on transfer the appellant became the junior most employee in the Department of Agriculture, her rank and lies were maintained in the Department of Museums and Zoos.
3. In course of time a vacancy arose in the post of the upper clerk in the Department of Museum and Zoos. One M. S. Pillai was the seniormost lower division clerk in that department but when the post of promotion was offered to him he declined it on the ground of ill-health. The appellant was next in order of seniority amongst the lower division clerks in the Department of Museum and Zoos and since her rank and lien in the department were maintained, she was offered the post of the upper division clerk. She conveyed her inability to accept that post for the time being and thereupon the 1st respondent, who was next in order of seniority, was appointed provisionally as an upper division clerk. His appointment was made without prejudice to the claims of the seniors in the Department of Museums and Zoos.
4. On the retirement of M. S. Pillai, a permanent vacancy in the post of the upper division clerk

arose in the department of Museums and Zoos. On July 6, 1970 the appellant, who was working in the Department of Agriculture, conveyed her willingness to accept that post. By an order dated March 18, 1971 she was appointed as an upper division clerk and later on May 3, 1971 she was further promoted as a Senior Superintendent. Both of these appointments as also the order by which his representation was rejected by the Government were challenged in this writ petition by the first respondent.

5. The High Court of Kerala allowed the writ petition holding that under the relevant rules, the appellant was not entitled to be re-transferred to her parent department and without a valid order of re-transfer she could not be appointed as an upper division clerk in that department. The High Court therefore, quashed the order dated March 18, 1971 by which the appellant was appointed as an upper division clerk and the orders consequent upon it.

6. There are two things in favour of the appellant and they must first be mentioned. The order dated April 9, 1962 passed by the Director of Museums and Zoos by which the appellant was transferred to the Department of Agriculture expressly mentions that her lien and rank will be maintained in the department of Museums and Zoos. It is, therefore, plain that if and when the appellant rejoined the Department of Museums and Zoos in conformity with the rules and regulations, she would occupy the rank which she would have occupied but for her transfer to the Department of Agriculture. Secondly, the order dated April 4, 1968 passed by the Director of Museums and Zoos by which the 1st respondent was appointed as an Upper Division Clerk in the Department of Museums and Zoos mentions expressly that he was appointed in the higher post for the time being only and that the appointment was made without prejudice to the claims of his seniors. In the Department of Museums and Zoos the appellant was senior to the 1st respondent and, therefore, her claim of seniority would not be affected by the appointment of the 1st respondent as an Upper Division Clerk.

7. In spite of this position, the appellant's appointment as an upper division clerk in the Department of Museums and Zoos is invalid because such an appointment could be made only if, in the first place. The appellant was entitled under the relevant rules to return to her parent department. It was common ground that the appellant's right to return to the Department of Museums and Zoos was governed by the notification issued by the Government of Kerala on January 2, 1961. Paragraph 2 of that notification reads thus :

A permanent person need not be required to relinquish his permanency. He may be permitted to retain his permanent lien in the old post until he is confirmed in the new unit or department, but he can come back to the old unit or department only if and when there is no vacancy for him to continue in the new unit, or if for any reason his pay in the substantive post in the parent department becomes higher than the pay of the new post held by him.

It is clear from this provision that person can return to his parent department in one of the two contingencies only. He can return if there is no vacancy for him to continue in the new unit to which he is transferred. Admittedly, there was a vacancy available to the appellant in the Department of Agriculture in which she could have continued and, therefore, this clause has no application. The second contingency in which a person can return to his parent Department is if his pay in the substantive post in the parent department becomes higher than his pay in the post held by him in the department to which he is transferred. The question which arises for consideration is whether by reason of this clause, the appellant was entitled to go back to her old unit. If she could validly go back, there is no doubt that it was open to the Government to appoint her to the post of an Upper

Division Clerk.

8. The High Court, in our opinion, was right in taking the view that "pay in the substantive post in the parent department" means the pay attached to the post substantively held by the employee on the date of transfer to another department. Since the substantive post held by the appellant on the date of her transfer to the Department of Agriculture was that of a lower division clerk, what must be considered is whether the pay which the appellant would have drawn in that post, had she continued in her parent department, had for any reason become higher than the pay drawn by her in the post held by her in the Department of Agriculture. It is undisputed that the pay which the appellant would have drawn as an upper division clerk in her parent department on March 18, 1971 was not higher than the pay which she was drawing in the Department of Agriculture. Since under paragraph 2 an employee can come back to his old unit or department, "only if and when" either of the two conditions is satisfied, the appellant was not entitled to return to her parent department. Unless she be validly reverted to her old unit, she could not be appointed to a post higher than the one substantively held by her in that unit on the date of her transfer.

9. It is urged on behalf of the appellant that the pay which she would draw in the post of an upper division clerk in the parent department, after her retransfer to that department, would be higher than the pay which she was drawing in the post which she was holding in the Department of Agriculture and, therefore, she would be entitled to return to her parent department under the second of the two conditions mentioned above. It is impossible to accept this contention. The substantive post held by the appellant, apart from the impugned order of promotion, was that of a lower division clerk in the Department of Museums and Zoos. The comparison, therefore, has to be between the pay of that post and the pay of the post which the appellant was holding in the department to which she was transferred.

10. The order dated March 18, 1961 by which the appellant was appointed as an upper division clerk in the Department of Museums and Zoos is, therefore, illegal and was rightly quashed by the High Court. The order dated May 3, 1971 further promoting the appellant as a Senior Superintendent must fall with that order. The appeal is accordingly dismissed.

Civil Appeal No. 248 of 1975

11. This appeal is filed by the State of Kerala against the same judgment of the High Court which gave to the appeal just disposed of by us. In accordance with the view taken by us in C. A. No. 247 of 1975, this appeal must be dismissed.

12. While admitting these two appeals, this Court had directed that the Government of Kerala shall pay the costs of the 1st respondent, A. Satyavan, in any event. Accordingly the Government of Kerala shall pay the costs of the 1st respondent. Costs shall be in one set only.

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