

(2006) 11 DEL CK 0067
In the Delhi High Court
Case No : WP (C) No. 6619 of 2000

Ashok Kumar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 01-11-2006

Acts Referred:

Central Civil Services (Temporary Service) Rules, 1965 — Rule 5, 5(1)
Constitution of India, 1950 — Article 226, 309

Citation : (2009) 93 DRJ 115

Hon'ble Judges : Vipin Sanghi, J; Manmohan Sarin, J

Bench : Division Bench

Advocate : Pradeep Gupta, for the Appellant; G. Tushar Rao and Ashok Gurnani, for the Respondent

Final Decision : Dismissed

Judgement

Vipin Sanghi, J.—In this petition under Article 226 of the Constitution of India, the petitioner assails the order dated 18th September, 2000 passed by the Central Administrative Tribunal, Principal Bench, Delhi (for short 'The Tribunal') whereby the petitioner's Original Application No. 2070/1999 was rejected by the Tribunal. The petitioner had approached the Tribunal to assail Office Order dated 28.8.1999 issued by the respondents whereby his services had been terminated.

2. The facts in brief are that in the year 1994 the petitioner, who belongs to the Scheduled Class category, was appointed as an ad hoc Assistant Librarian in Dr. Ram Manohar Lohia Hospital, New Delhi. According to him, though his interview call letter dated 10.6.1994 and offer of appointment dated 21.1.1995 described the post as "Assistant Librarian (ad hoc)" and also stated that the post sanctioned by the Government of India is temporary up to 28.2.1995, it also stated that the post is likely to continue further. The petitioner claims that he was given to understand that the post for which he was selected was a regular post, but the expression "ad hoc" had been used merely because the recruitment rules were not framed.

3. He was issued an appointment letter dated 14.3.1995, with effect from 22.1.1995. This appointment letter also stated that his ad hoc appointment will not confer any right for regularization or benefits such as seniority, confirmation etc. The Medical Superintendent reserved the right to terminate the ad hoc appointment at any time without assigning any reason or giving any notice etc to the officer concerned.

4. The petitioner states that Recruitment Rules for the post of Assistant Librarian were framed under Article 309 of the Constitution in the year 1996, where after the respondent initiated the process of filling up the post vide Circular dated 1.4.1997 by inviting applications for two posts of Assistant Librarian, out of which one was reserved for Scheduled Caste category candidates. He represented against this move by requesting that he should be treated as regularly appointed to the said post. However, the respondent became active in 1999, with a view to favor another person, and held the process of interview. The petitioner was forced to participate in this process on account of his circumstances and on the strength of the assurances given to him by the respondents of his continuing in service.

5. The respondents issued Office Order dated 28th August, 1999 directing the termination of his services w.e.f. 25th September, 1999 on the ground that the petitioner was appointed as Assistant Librarian on ad hoc basis, and that the post is being filled up on regular basis by the candidates qualified for the said post and Therefore the petitioner's services would not be required beyond 25.9.1999.

6. The petitioner impugned this Office Order dated 28.8.1999 before the Tribunal, which dismissed the same by its order dated 18th September, 2000.

7. Before the Tribunal, the petitioner contended that his appointment could not be treated to be on ad hoc basis and the same was in fact preceded by a process of selection. He also relied upon O.M dated 30.3.1988 issued by the DOP&T to contend that the conditions stipulated for making appointments on ad hoc basis were not fulfilled and his appointment ought to be treated as a regular appointment. He also contended that in any case, in terms of letter dated 21.1.1995 he was entitled to one month's notice or pay in lieu thereof before his services could be terminated, and in this case neither of these conditions had been fulfilled, since, the notice was short of one month and he had not even been paid in lieu thereof. Consequently, he pleaded that his termination was illegal.

8. The Tribunal, however, did not find favor with the contentions of the petitioner and dismissed his Original Application. The Tribunal took note of the fact that at the time of the petitioner's appointment, there were no Recruitment Rules in force and the ad hoc appointment that was made, was governed by a letter/offer of appointment dated 21.1.1995. The Tribunal considered Clause 3(ii) of the said letter and concluded that the petitioner could be compensated for the period by which the termination notice fell short of one month. It also concluded that there

was no requirement that the pay in lieu of the period by which the notice fell short should be tendered simultaneously along with the notice and the said notice could not be said to be illegal or vitiated due to the same not being tendered simultaneously.

9. Before us, the petitioner has raised the same arguments as before the Tribunal. Firstly, we do not accept the submission of the petitioner that his appointment should have been treated as being on a regular basis merely because it was made after inviting applications from the Employment Exchange and after going through the process of selection. The respondents had, at all material times, made it amply clear that the vacancy itself was temporary, though likely to continue. The post itself had been described by the respondents as "Assistant Librarian (ad hoc)" in their letters dated 10.6.1994, 21.1.1995 and 14.3.1995. The reason given by the respondents is that the Recruitment Rules had not been finalised in 1995, which admittedly were framed only in 1996.

10. We, Therefore, do not accept the version of the petitioner that his appointment was against a regular vacancy. The impression carried by the petitioner, in any event, is not material to determine this issue. When the post itself was of a temporary nature, there was no question of the same being filled up on a permanent basis. Moreover, it would not be fair to other eligible candidates, who though eligible, may not have applied for the said post when the same was being filled simply because it was clearly stated to be "ad hoc" in character.

11. Secondly, we are unable to accept the submission of the petitioner that the termination order dated 28.8.1999 is illegal because he was relieved w.e.f. 25.9.1999, thereby giving him notice of less than one month and the same was not accompanied with payment in lieu of the shortfall in the notice period.

12. The letter of offer dated 21.1.1995, whereby the petitioner was informed of his selection for appointment, inter alia, contained the following terms and conditions:

3(i) The services are liable to be terminated at any time without notice or assigning any reason.

(ii) However after putting in a service of three months, the services are liable to be terminated by one month's notice given by either sides without assigning reasons. It will be open to the undersigned to pay in lieu of notice pay for the period by which the notice falls short of one month.

4. The other conditions of service will be governed by the Central Civil Services (Temporary Service) Rules and other relevant rules and orders in force from time to time.

13. The Appointment Letter dated 14.3.1995, on the other hand stated as follows:

...The ad hoc appointment will not confer any right for regularization of the same or for benefits such as seniority/confirmation etc. The Medical Superintendent reserves the right to terminate the ad hoc appointment date any time without assigning any reason or giving notice etc to the officer concerned.

14. Assuming that the terms of the offer of appointment governed the rights of the parties, which appear to be more favorable to the petitioner, it is clear that after the petitioner had put in three months service, his ad hoc appointment could be terminated by giving one months" notice. The respondent also had the option to give a shorter notice, and to make payment to the petitioner of pay in lieu of the period by which the notice fall short of one month. There is no requirement that such payment in lieu of notice period should be simultaneously tendered to the petitioner. The said payment can be tendered or recovered even subsequently. The obligation to make such payment is not required, by the terms of the contract, to be performed either before, or simultaneously with the exercise of the right to terminate the service of the petitioner. The act of termination is not prescribed to be achieved only by making payment of the amount representing the shortfall in the notice period, but by the termination letter/order which may be issued. The termination of the contractual employment is achieved when a notice/order of termination is issued. The expression "by which the notice falls short of one month" suggests that even when the notice period is less than one month, a notice of termination would suffice to terminate the employment. The act of termination is not prescribed to be performed only by payment of the amount by which the notice falls short of one month.

15. In the course of administration, it may be necessary to terminate an ad hoc appointment on short notice or without notice. The administration should not be obstructed in the efficient discharge of its functions and responsibilities by requiring the fulfillment ,as a pre-condition, of an obligation which is not otherwise required by contract or by law to be discharged as such.

16. On a reading of the contractual terms, we do not find that the respondent was required to make simultaneous payment to the petitioner of the amount of pay which would cover the period by which the notice fell short. Such payment can be made subsequently as well, and on this account the termination cannot be said to be illegal.

17. It has also been contended by the petitioner that under Clause 4 of the terms and conditions, the Central Civil Services (Temporary Service) Rules were to apply. Rule 5 of the CCS (Temporary Service) Rules, as relied upon by the petitioner reads as follows:

5. Termination of Temporary Service:

(1)(a) The services of a temporary Government Servant shall be liable to termination at any time by a notice in writing given either by the Government Servant to the appointing authority or by the appointing authority to the Government Servant.

(b) the period of such notice shall be one month;

Provided that the services of any such Government Servant may be terminated forthwith by payment to him of as sum equivalent to the amount of his pay plus allowances for the period of the notice at the same rates at which he was drawing them immediately before the termination of his services, or, as the case may be, for the period by which such notice falls short of one month.

18. He has also relied upon the two judge bench Judgment of the Supreme Court in the case of Smt. Kusum Gupta alias Kusum Bansal Vs. Haryana State Small Industries and Export Corpn., Chandigarh, . In this case, Bye-law No. 3.2(ii), which provided the termination clause read as follows:

3.2 Termination of Service

The services of an employee of the Corporation may be terminated by the Appointing Authority:

(i) ...

(ii) in the case of temporary employees by giving one month's notice on either side or, in lieu thereof pay for the period the notice falls short of one month.

19. The services of Kusum Gupta had been terminated by the respondent in that case by an office order, the relevant portion where of read as follows:

Office Order

The services of Mrs. Kusum Gupta working as Sales Assistant in Haryana Emporium, New Delhi are no longer required by the Corporation with immediate effect. She will be paid one month's pay plus allowances in lieu of notice period.

Sd/-

P.R. Kaushik

Managing Director

Ends .No. HIEC/Estt./6165 Dated 7-8-1980

20. Kusum Gupta was not paid simultaneously "one month's pay plus allowances in lieu of notice period".

21. The Supreme Court, while setting aside the judgment of the High Court observed as follows:

The bye-law is clear that the services of an employee could only be terminated by giving one month's notice or, in lieu of notice, by paying the salary etc for the period of one month. It would not be open to the employer to insist upon the production of 'no dues certificate' by the employee. In fact, we fail to see how the employer can insist upon the production of a 'no dues certificate' by the employee when the certificate has to be given by the employer. The employer is

the person who is in the know of things whether any amount is due from the employee or not. The employer cannot certainly take advantage of his failure to give a certificate to the employee and claim that he was entitled to withhold the one month's pay and allowances payable in lieu of the one month's notice on the ground of non-production of no dues certificate by the employee. We have no hesitation in allowing this appeal. The judgment and decree of the High Court are set aside. The judgment and decree of the Trial Court are restored with costs throughout.

22. The learned Counsel for the petitioner contended that the said decision was applicable in the facts of the present case, since it was not specifically provided in the service conditions in Kusum Lata's case as well, that the pay in lieu of the period by which the notice was short of the requisite period had to be tendered simultaneously with the notice or order of termination, and the Supreme Court had held the termination order to be illegal. The petitioner also relied upon the decision of the Supreme Court in the case of Prabhudayal Birari Vs. M.P. Rajya Nagrik Aapurti Nigam Ltd., . This decision merely relies on the judgment in the case of Kusum Gupta (Supra).

23. The two judgments cited by the counsel for the petitioner do not advance the case of petitioner, as the termination clause applicable in cited cases were materially different from the clause applicable in the case in hand. In the cited cases, the termination clause itself provided that the manner of termination, where the notice period was short of one month, was by making payment for the period by which the notice fell short of one month. That is not so in the case in hand.

24. On the other hand, the counsel for the respondent firstly pointed out that Rule 5 of the Central Civil Services (Temporary Service) Rules had no application in the facts of the present case, because Clause 4 itself stated that "the other conditions of service will be governed by...". His emphasis was on the expression "other" to say that since the condition relating to termination had been specifically provided for in Clause 3, so far as that aspect is concerned, the provisions of CCS (Temporary Service) Rules as contained in Rule 5 would have no application to the petitioner's case. His further submission is that, in any event, the text of Rule 5 as relied upon by the petitioner was not relevant, since the same stood amended. He referred to the decision of the Supreme Court in Municipal Corporation of Delhi Vs. Prem Chand Gupta, (2000) 10 SCC 115 , wherein the amended Rule 5 of the CCS (Temporary Service) Rules is noticed and dealt with by the Supreme Court. The relevant portion of this report reads as follows:

Once this conclusion is reached, the result becomes obvious. We have to treat the relevant rules as defined by Regulation 2 of 1959 to mean the latter Rules of 1965 which operated in April 1966 when the impugned termination order was passed against the respondent workman. In 1966, the relevant rule of the latter rules was Rule 5 which read as under:

5. Termination of temporary service. - (1)(a) The services of a temporary government servant who is not in quasi-permanent service shall be liable to termination at any time by a notice in writing given either by the government servant to the appointing authority or by the appointing authority to the government servant;

(b) The period of such notice shall be one month:

Provided that the services of any such government servant may be terminated forthwith and on such termination the government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of the notice at the same rates at which he was drawing them immediately before the termination of his services, or, as the case may be, for the period by which such notice falls short of one month.

The aforesaid Rule 5 of the latter rules as amended operated from 1.5.1965. The very same rule prior to its amendment reads as under:

5. Termination of temporary service. -(1)(a) The service of a temporary government servant who is not in a quasi-permanent service shall be liable to termination at any time by a notice in writing given either by the government servant to the appointing authority or by the appointing authority to the government servant;

(b) the period of such notice shall be one month:

Provided that the services of any such government servant may be terminated forthwith by payment to him of a sum equivalent to the amount of his pay plus allowances for the period of the notice at the same rates at which he was drawing them immediately before the termination of his services or, as the case may be for the period by which such notice falls short of one month.

A mere look at the earlier unamended Rule 5 of the latter Rules shows, as laid down by its the then unamended proviso, that services of a temporary government servant could not be terminated forthwith without payment to him of the compensation equivalent to the sum provided therein. Such offer of compensation, Therefore, was a condition precedent to such termination prior to the amendment of the proviso to the said Rule with retrospective effect by the latter amended Rule, as seen above. The amended proviso to Rule 5 of the latter Rules with effect from 1-5-1965 deleted the words "by payment to him" which were earlier found in the unamended proviso to Rule 5(1) of the latter Rules. Instead after the word "forthwith" the words "and on such termination the government servant shall be entitled to claim" were added. Thus, what was a condition precedent under the unamended proviso to Rule 5 of the latter Rules became a condition precedent. Consequently, after 1-5-1965, as per Rule 5 of the latter Rules there remained no necessity for the employer while forthwith terminating the services of a temporary government servant to offer him compensation simultaneously with the termination order. Such services could be

terminated forthwith and termination would immediately come into force. Payment of appropriate compensation as per the proviso to Rule 5 on or after 1-5-1965 could be effected even later on though of course, within reasonable time thereafter. This change in the Rule with effect from 1-5-1965 directly got attracted on the facts of the present case as the respondent-workman's services were terminated after this amendment came into force as his services were terminated on 29-4-1966, as seen earlier. The Division Bench of the High court placed reliance on the decision of this Court in Senior Superintendent, R.M.S., Cochin and Another Vs. K.V. Gopinath, Sorter, which had unfortunately not noticed the amended provision of the proviso of Rule 5 of the latter Rules and that is why the said decision was treated to be per incuriam by two later decisions of this Court. In the case of Raj Kumar Vs. Union of India (UOI) and Others, Alagiriswami, J. referring to the aforesaid amendment to Rule 5(1) of the latter Rules made the following pertinent observations in this connection in para 2 of the report:

2. It was not brought to the notice of the High Court that the proviso to Sub-rule (1) of Rule 5 of the Central Civil Services (Temporary Service) Rules, 1965 had been amended with retrospective effect from May 1, 1965.

After quoting the amended Rule 5 of the Latter Rules, it has been observed as under:

The effect of this amendment is that on 1-5-1965, as also on 15-6-1971, the date on which the appellant's services were terminated forthwith it was not obligatory to pay to him a sum equivalent to the amount of his pay and allowances for the period of the notice at the rate at which he was drawing then immediately before the termination of the services or as the case may be for the period by which such notice falls short. The Government Servant concerned is only entitled to claim the sums hereinbefore mentioned. Its effect is that the decision of this Court in Gopinath's case (supra) is not longer good law. There is no doubt that this Rule is a valid Rule because it is now well established that Rules made under the proviso to Article 309 of the Constitution are legislative in character and Therefore can be given effect to retrospectively. It follows that the decision of the Delhi High Court dismissing the appellant's writ petition is correct and this appeal will have to be dismissed.

The same view was taken in a later decision of this Court in the case of Union of India (UOI) and Others Vs. Arun Kumar Roy, : Union of India (UOI) and Others Vs. Arun Kumar Roy, wherein Khalid, J. speaking for the two Judge Bench of this Court reiterated the view of this Court in the case of Raj Kumar Vs. Union of India (UOI) and Others, for holding that the decision of this Court in Senior Superintendent, R.M.S., Cochin and Another Vs. K.V. Gopinath, Sorter, was no longer good law.

25. He also placed reliance upon the judgments of the Supreme Court in (i) Raj Kumar Vs. Union of India (UOI) and Others, (ii) Oriental Insurance Company Ltd.

v. T. Mohammed Raisuli Hassan (1993) 1 SC 553 , and (iii) Rakesh Kumar Singh Vs. Committee of Management, Raibarali, .

26. Coming to the aforesaid decisions, we find that the case of Raj Kumar v. Union of India (Supra) has been considered and dealt with by the Supreme Court in the case of Prem Chand Gupta (Supra). Therefore, we need say nothing more. In the case of Oriental Insurance Company Limited (supra), the services of the employee were terminated by a notice dated May 19, 1980 which was served upon the respondent-employee on May 26, 1980. As per the said notice of termination, the services were terminated with effect from June 18, 1980. Before the Supreme Court, it was contended by the employer, Oriental Insurance Company Ltd. that assuming that a probationers service was liable to be terminated with one month's notice, failure to serve one month's notice did not invalidate or vitiate the termination of the respondent's service effected by notice dated May 19, 1980 for service of such notice as a condition precedent for termination of the service of the respondent was not a mandatory requirement, the breach whereof could result in vitiation of the termination. It was further pleaded that in any event, non-service of such one month's notice before termination of the respondent's service, could have at the most, entitled him to claim one month's salary in lieu thereof and nothing else. The Supreme Court accepted this submission of the employer, Oriental Insurance Company Limited. The relevant portion of the said report reads as follows:

4. Admittedly, there was no statutory rule requiring one month's notice for termination by the appellant of the service of the respondent. It is only the term of appointment order, which stipulated for one month's notice or one month's salary in lieu thereof by either side to bring an end to the service of the respondent which is made the basis for claiming invalidation of termination. That term contained in Clause 10 of the appointment order reads:

10. This appointment is liable to be terminated at any time by giving one month's notice, in writing, on either side, or a month's salary in lieu of notice, without assigning any reason.

Breach of this condition, will entitled the company to recover from you one month's salary in lieu of notice.

5. When the above term in the clause relating to the condition of service of the respondent with the appellant is seen as a whole, there is nothing to indicate or suggest, even remotely, that non-service of one month's notice as a condition precedent for termination of the respondent's service would result in vitiation or invalidation of termination, if effected. On the contrary, the second part of the term contained in the clause, "breach of this condition, will entitled the company to recover from you one month's salary in lieu of notice" makes it obvious that the same would be the consequence if there was a breach of condition on the part of the company in that matter of service of one month's notice before termination of the respondent's service. Hence, we are constrained to hold that

the non-service of one month's notice in writing by the appellant to the respondent before terminating the latter's service did not invalidate or vitiate such termination. From this, it follows that Courts below had misread the said clause, by which either party was required to serve notice for putting an end to service of the respondent and consequently committed an apparent error in taking the view that non-service of one month's prior notice to the respondent had vitiated the termination of his service.

27. In *Rakesh Kumar Singh* (supra), the Supreme Court was considering a similar question regarding validity of the termination notice of an employee. The relevant service condition was contained in Regulation 25 framed under the U.P. Intermediate Education Act, 1921 and the same read as follows:

25. The services of a temporary employee (other than a probationer) or of a probationer during the terms of his probation, may be terminated at any time by giving him one month's notice or one month's pay in lieu thereof.

28. Admittedly, in this case also, neither one month's notice nor one month's pay in lieu thereof was given to the appellant, *Rakesh Kumar Singh* by the respondent. The Supreme Court held as follows:

6. Before we consider whether Regulation 25 can be said to be similar to the rule which fell for consideration in *K.V. Gopinath* case it is necessary to refer to an earlier decision of this Court in *State of U.P. v. Dinanath Rai*. In that case also this Court had to construe a rule for termination of services of a government servant in temporary service. It was as under:

(1) Notwithstanding anything to the contrary in any existing rules and orders on the subject, the services of a government servant in temporary service shall be liable to termination at any time by notice in writing given either by the government servant to the appointing authority, or by the appointing authority to the government servant.

(2) The period of such notice shall be one month given either by the appointing authority to the government servant, or by the government servant to the appointing authority/provided that in the case of the notice of the appointing authority; the latter may substitute for the whole or part of this period of notice pay in lieu thereof; provided further that it shall be open to the appointing authority to relieve a government servant without any notice or accept notice for a shorter period without requiring the government servant to pay any penalty in lieu of notice.

7. Construing that rule this Court observed as under:

The rule does not say that the pay should be given in cash or by cheque at the time the notice is issued. Knowing the way the governments are run, it would be difficult to ascribe this intention to the rule-making authority. There is no doubt that the government servant would be entitled to the pay in lieu of notice but this would be in the ordinary course.

8. This decision in Dinanath Rai case was considered by this Court in K.V. Gopinath case and distinguished by observing that : (SCC pp. 870-71, para 6)

No doubt the language of that rule is somewhat similar to the words of Rule 5 but there is an essential difference. The rule only means that the pay for 30 days or less may be substituted for service for the period of the notice. In other words, the rule only entitles the employee to pay for the period of the notice without laying down any condition as to when the payment is to be given.

9. Thus the consistent view of the Court is that where the rule permits giving of pay in lieu of the notice of termination and does not further provide as to when the payment is to be made, it only entitles the employee to pay for the period of the notice and payment of notice pay cannot be regarded as a condition precedent to the valid termination of service. But where the rule provides even by implication that payment to the employee of whatever is due to him should be simultaneous with termination of his service then fulfillment of that requirement has to be regarded as a condition precedent to the valid termination. In view of the words "terminated forthwith by payment" in the proviso to Rule 5(1)(b) this Court held that payment was intended simultaneously with termination and that was pointed out as the essential difference between Rule 5(1)(b) with which it was concerned in Gopinath case and the rule which was considered in Dinanath case.

29. In view of the aforesaid legal pronouncements of the Apex Court, the termination clause contained in the offer of appointment dated 21.1.1995 does not cast an obligation on the respondent to simultaneously tender pay in lieu of notice period for the period by which the notice falls short of one month while terminating the services of the employee concerned. Even when the services are terminated by a notice which falls short of one month, the act of termination is completed on issuance of such a notice. We cannot read into the said clause, a prescription that the notice of termination, if less than one month is necessarily to be accompanied by payment for the period by which the notice falls short of one month.

30. In view of our aforesaid discussion, it makes no difference to the result of the present case, whether we proceed on the basis of Clause 3 of the offer of appointment dated 21.1.1995, or on the basis of Rule 5 of the CCS (Temporary Service) Rules. In either case, there is no such requirement of tendering to the petitioner pay in lieu of the period by which the notice fell short of one month simultaneously.

31. We see no merit in this petition and same is Therefore dismissed, leaving the parties to bear their respective costs.