

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WP(C) No.780/2008**

% **Date of decision : 22.04.2008**

Rajni Atri Petitioner

Through: Mr.V.K. Mishra, Advocate.

Versus

The Office of the District & Sessions Judge Respondent

Through: Ms.Avnish Ahlawat with Ms.Latika
Chaudhary and Ms.Nidhi Gupta,
Advocates.

CORAM :-

HON'BLE MR. JUSTICE ANIL KUMAR

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| 1. Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. To be referred to the reporter or not? | NO |
| 3. Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

1. The petitioner has impugned the order dated 3rd February, 2006 terminating her services under the proviso of sub Rule (1) of Rule (5) of Central Services (Temporary Service) Rule, 1965 and adjustment of her one month salary in lieu of notice period from the amount of excess salary already drawn by her.

2. The petitioner was appointed as a Lower Division Clerk on a temporary basis pursuant to order dated 12th July, 1999. The petitioner remained absent without sanctioned leave from 23rd July, 2005 to 25th August, 2005 and thereafter she was absent for considerable period on medical leave.

3. No application was filed by the petitioner for leave nor any medical certificate was produced by the petitioner seeking sanction of leave on any cogent ground from 23rd July, 2005 up to 25th August, 2005. Consequently a show cause notice dated 24th August, 2005 was issued to her asking as to why the period of her absence be not treated as break in service and she was further asked to rejoin the duties. Pursuant to show cause notice to the petitioner, she filed a reply contending that on account of unavoidable circumstances of illness of her son, she could not attend the office from 23rd July, 2005 to 25th August, 2005 and a medical certificate was also produced by her along with a letter dated 31st August, 2005. The medical certificate dated 31st August, 2005 was by a medical practitioner who did not stipulate as to for how long the absence was necessary for the petitioner.

4. The petitioner remained absent even thereafter and for subsequent periods she filed the applications and produced the medical

certificates. The petitioner had produced a medical certificate of Stephen's Hospital advising rest from 25th October, 2005 to 31st October, 2005 for seven days.

5. The period of absence of the petitioner from 23rd July, 2005 to 25th August, 2005 was treated as break in service and recovery for the said period was ordered to be made from her salary by letter dated 27th January, 2006 which was communicated to her which order has not been challenged by the petitioner.

6. Even after un-sanctioned leave up to 25th August, 2005, the petitioner sought leave for further periods. The petitioner sought medical leave from 3rd September, 2005 to 9th September, 2005. Thereafter from 10th September, 2005 to 31st September, 2005 and submitted a certificate dated 25th October, 2005 up to 31st October, 2005. Further medical leave was sought from 1st November, 2005 to 8th December, 2005 and yet further leave from 9th December, 2005 to 29th December, 2005. Against the medical certificate leave was sought till 30th January, 2006 and thereafter from 31st January, 2006 to 3rd February, 2006.

7. The order of termination of the services of the petitioner is as under:-

“The office of the District and Sessions Judge: Delhi

ORDER

In pursuance of the Proviso to Sub-Rule (1) of Rule (5) Central Civil Services (Temporary Service) Rules, 1965, I, Shiv Narain Dhingra, District and Sessions Judge, Delhi, hereby terminating forthwith the services of Ms.Rajani Atri w/o.Shri Jitender Kumar, one month salary in lieu of notice period has been adjusted against the salary amount drawn by her in excess for the unauthorized absence period w.e.f.23.02.2005.

Sd/-
SHIV NARAIN DHINGRA
DISTRICT AND SESSIONS JUDGE, DELHI
Dated Delhi: 03.02.2006”

8. Learned counsel for the petitioner has contended that the order dated 3rd February, 2006 is punitive and is not termination simplicitor, therefore, the termination order is not sustainable and has relied on (2000) 5 SCC 152, Chandra Prakash Shahi v. State of U.P. and Others; (1966) 1 SCR 825, Jai Shanker v. State of Rajasthan; 145(2007) Delhi Law Times 588 (DB), Mahesh Chand v. Union of India & Others and AIR 1975 SC 915, Ramchandra Keshav Adke v. Govind Jyoti Chavare and Others in support of his contention that the termination order is illegal and unlawful and is liable to be set aside. The Rule 5 of the Central Civil Services (Temporary Service) Rules contemplates that the services of a temporary government servant can be terminated at any time by a notice in writing given by the appointing authority to the government

servant or even by the government servant to the appointing authority and such notice shall be for a period of one month. Rule 5 also contemplates that the services can be terminated forthwith and in such a case government servant would be entitled to claim a sum equivalent to amount and his pay plus allowances for the period of notice at the same rate at which he was drawing them immediately before the termination of his services or as the case may be for the period for which such notice fall short of notice of one month.

9. Rule 5 of Central Civil Services (Temporary Service) Rules, 1966 is 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 service 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.”

10. Learned counsel for the petitioner has very vociferously contended that the termination order is not in consonance with the form II under the Rules. Form II provided under the Rule is as under:

“

FORM II

Order of termination of service issued under the Proviso to sub-Rule (1) of Rule 5 of the Central Civil Services (Temporary Service) Rules, 1965.

In pursuance of the Proviso to sub-rule (1 of Rule 5 of the Central Civil Services (Temporary Services) Rules, 1965, I, _____(name and designation) hereby terminate forthwith the services of Shri/Shrimathi/Kumari _____ and direct that he/she shall be entitled to claim a sum equivalent to the amount of his/her pay plus allowances for the period of notice at the same rates at which he/she was drawing then immediately before the termination of his/her service, or, as the case may be, for the period by which such notice falls short of one month.

Station:

Date: _____ Signature of the Appointing Authority”

11. The plea of the petitioner is that the termination is bad as pay plus allowance for one month has not been paid and consequently the termination is bad and is not sustainable in view of the Rule contemplating that in case of immediate termination, the temporary employee shall be entitled to claim the sum equivalent to the pay and allowances for one month.

12. From the reading of the proviso of the said rule, it is apparent that non-payment of the amount of pay and allowances for one month in lieu of the notice period will not make the termination order invalid, as only a right is given to the temporary employee to claim the sum. In case of petitioner, by order dated 27th January, 2006, it was held that her absence without the sanctioned leave for the period 23rd July, 2005 to 25th August, 2005 was to be treated as break in service and she would be liable to pay back the salary paid to her for the said period. The said order had not been challenged by her and, therefore, the petitioner became liable to pay the said amount. The amount which petitioner became entitled in lieu of one month notice was, therefore, adjusted from that amount which has already been paid.

13. In these circumstances, the order dated 3rd February, 2006 impugned by the petitioner cannot be vitiated on this ground as has been alleged on behalf of the petitioner.

14. Perusal of the order also reflects that this is simple termination and cannot be termed punitive. The petitioner remained absent for various periods from 23rd July, 2005. For the period 23rd July, 2005 to 25th August, 2005, neither any application was filed nor any medical certificate in support of the plea for the sanctioned leave was given and consequently a show cause notice dated 24th August, 2005 was given.

15. For the other periods, the petitioner sought medical leave along with medical certificates for which no action has been taken against the petitioner. In the circumstances, it is not possible to infer that the termination is punitive. The petitioner has not been able to attend the services since 23rd July, 2005 and the leave had been extended from time to time. The absence was without sanctioned leave up till 25th August, 2005 and thereafter the absence was with sanction leave. Consequently the order terminating the services was passed without disclosing the reason for termination cannot be termed punitive. There are no allegations of mis-conduct against the petitioner nor any preliminary inquiry was held. The show cause notice was given to her for her unsanctioned leave from 23rd July, 2005 to 25th August, 2005 in which order was passed that she will not be entitled for her salary as her leave had not been sanctioned. Merely on the basis of an order passed that she will not be entitled for salary from 23rd July, 2005 to 25th August, 2005, the order of termination simplicitor cannot be termed to be punitive. For the period after 25th August, 2005 the leave was sanctioned and no punitive action was taken against her.

16. The Apex Court in Chandra Prakash (supra) after considering various previous decisions had held that a probationer has no right to hold the post and his services can be terminated at any time during or

at the end of probation on account of general unsuitability for the post in question. If for determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an inquiry is held and it is on the basis of that inquiry that decision is taken to terminate his services, the order will not be punitive in nature. But if there are allegations of misconduct and an inquiry is held to find out the truth of misconduct and an order terminating the services is, thereafter, passed on the basis of that inquiry, the order would be punitive in nature as the inquiry was held not for assessing the general suitability of the employees for the post in question but to find out the truth of allegations of misconduct against him. In the case of petitioner, there are no allegations of misconduct except that she remained absent without sanctioned leave from 23rd July, 2005 to 25th August, 2005 for which her salary had already been deducted. The leave was sanctioned thereafter for various periods from 3rd September, 2005 to 9th September, 2005; 10th September, 2005 to 31st September, 2005 ; 25th October, 2005 upto 31st October, 2005; 1st November, 2005 to 8th December, 2005 and further leave from 9th December, 2005 to 29th December, 2005; 30th January, 2006 and thereafter from 31st January, 2006 to 3rd February, 2006 with sanctioned leave.

17. In the circumstances, the motive is not to dismiss the petitioner for any specific mis-conduct. In the circumstances, exercising the power under Rule 5 by the concerned authority cannot be termed to be punitive nor the order of termination simplicitor dated 3rd February, 2006 can be termed illegal and unlawful.

18. The petitioner is also not entitled for any relief on the basis of ratio of the Chandra Prakash Shahi (supra). The case relied on by the petitioner is also distinguishable inasmuch as in that case a preliminary inquiry was instituted against the petitioner as a result of quarrel with two other constables and the probationer was found to be involved in that case and having indulged in the action of indiscipline and mis-behavior and therefore, thereafter by an order he was terminated and it was contended that his termination was simplicitor and not punitive which was declined by the Apex Court holding that the termination of the probationer was punitive. Apparently, the case of the petitioner is distinguishable.

19. In Jai Shanker (supra) relied on by the petitioner, the Apex Court was dealing with the case of the Head Warden in Rajasthan who was in the permanent services of the State who had sought extension of leave on medical grounds which was not replied rather he received a communication stipulating discharge of his services. In those

circumstances, it was held that the constitutional protection given to the Government employees by Article 311 could not be taken away in the manner as had been done in that case. Apparently, the case of the petitioner is clearly distinguishable from the case relied on by the petitioner. Similarly in the matter of Mahesh Chand (supra), the Division Bench of this court was considering the disproportionate punishment to the government servant for the gravity of misconduct. In the case of the petitioner, she has not been dismissed on account of over staying or any other reason as the leave for the period 23rd July, 2005 to 25th August, 2005 was not sanctioned and subsequently the leave claimed by the petitioner was sanctioned. The termination of the petitioner in the facts and circumstances is discharged simplicitor.

20. Learned counsel for the petitioner has also relied on Ramchandra Keshave Adke (supra) to contend that when a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and other methods of performance are necessarily forbidden. Considering the rule in that case, the Apex Court had held that the rule clearly applies where the whole aim and object of the legislator would be plainly defeated if the command to do the things in a particular manner is not complied as a prohibition to do it in any other manner will not be permissible. The Apex Court in this case was concerned with the requirement of Section 5(3) (b) and Rule 2(a) of Bombay Tenancy and

Agricultural Lands Act. It was held that the rules are obligator and not directory. The Apex Court had held that the rule was attracted with full force in that case because of non verification of the surrender in requisite manner and non-verification in the requisite manner would frustrate the very purpose of the provision. Apparently in the case of the petitioner, the termination has been done under Rule 5 which contemplates that services can be terminated by giving one month's notice and for the period of one month, the employee shall be entitled to claim a sum equivalent to the amount of his pay and allowance. The rule does not lay down that in case the pay and allowance equivalent are not paid along with the notice, the termination shall be invalid or bad in law. In any case, by another order it was held that the petitioner was not entitled for salary for the period 23rd July, 2005 up to 25th August, 2005 as she remained absent without sanctioned leave and which order had not been challenged by the petitioner. Therefore, she became liable to refund the salary for the said period which amount has been adjusted towards the pay and allowances of one month period in lieu of the notice and, therefore, it cannot be said that there has been violation of Rule 5 of Central Civil Services (Temporary Service) Rules. The said rule contemplates that no reason should be mentioned in the termination order.

21. Perusal of the order dated 3rd February, 2006 shows unequivocally that there are no reason for termination of services of the petitioner and consequently it cannot be said that it is in violation of rule or any law laid down by the Apex Court. The impugned order dated 3rd February, 2006 cannot be held to be invalid or unlawful on any of the grounds as has been alleged by the petitioner and she shall not be entitled for interference by this Court under Article 226 of the Constitution of India. The writ petition is without any merit and it is therefore, dismissed.

April 22, 2008.
‘Dev’

ANIL KUMAR, J.