

**State of U. P. and Another Vs. Arvind Kumar Singh**

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**Court :** Allahabad

**Decided On :** Oct-18-2000

**Reported in :** 2000(4)AWC3419; (2001)1UPLBEC206

**Judge :** G. P. Mathur and ;Shitla Pd. Srivastava, JJ.

**Acts :** Uttar Pradesh Subordinate (Co-operative and Panchayat (Auditors' Service Regulations, 1980 - Regulation 25; Uttar Pradesh Subordinate (Co-operative and Panchayat) Auditor Service Rules, 1980 - Rules 5, 15(2), 18 and 19; [Constitution of India](#) - Article 309

**Appeal No. :** Special Appeal Nos. 1114-15 of 1999

**Appellant :** State of U. P. and Another

**Respondent :** Arvind Kumar Singh

**Advocate for Def. :** R. B. Tripathi, ;R. N. Singh, ;G. K. Singh, ;V. K. Singh and ;S. M. Mishra, Adv.

**Advocate for Pet/Ap. :** H. R. Mishra, Adv. and ;S.C.

**Judgement :**

**Shitla Pd. Srivastava, J.**

1. These two Special Appeals have been filed by the State of Uttar Pradesh against the judgment and order passed by the learned single Judge dated 8.7.1997 in two writ petitions. Civil Misc. Writ Petition Nos. 26550 of 1996 and Civil Misc. Writ Petition No. 15363 of 1996 both filed by the respondent Arvind Kumar Singh against State of Uttar Pradesh and others.

2. The facts giving rise to the present Special Appeal filed by the petitioner in Civil Misc. Writ Petition No. 15363 of 1996 are that the petitioner challenged the Government Order No. Audit 4325/10.94-300 (1) 1993 TC dated 31.5.1995 and prayed for striking out clause (2) of the aforesaid Government order fixing a cut off date on 31.3.1989 for exemption of departmental examination. It is stated by the petitioner in this writ petition that Uttar Pradesh Public Service Commission issued an advertisement No. A-3/E-4/87-88 in the month of February, 1988 for the selection on the post of Auditors (Co-operative and Panchayat). The petitioners have alleged that they appeared in the examination on the basis of the aforesaid advertisement, which was held in the month of October, 1988 and the petitioners were finally selected in the written test and viva voce for the post of Auditor in the grade of Rs. 1,200-2,040 and selection list was published on 11.3.1991 by the Chief Audit Officer. Co-operative Society and Panchayat U. P., Lucknow. U is further stated that names of some of the petitioners were published in the selection list and names of some of the petitioners were published in the supplementary list. Petitioners' case is that on the basis of the aforesaid selection list, the petitioner Nos. 1 and 2 joined the post on 23.3.1991 and 27.3.1991 respectively and other petitioners also joined the post on different dates in the month of March 1991. It is further stated that their services were governed by the regulations namely, U. P. Subordinate (Co-operative and Panchayat) Auditors Service Regulations. 1980 (hereinafter referred to as the Regulations). The contention of the petitioners is that Rule 25 of the aforesaid Regulations deals with the criteria of seniority and promotion according to which seniority suitability was criteria for the mode of promotion and earlier promotions were made on the basis of the existing regulation and there is no other mode of promotion but the State Government issued an order dated 31.5.1995 specifying a new mode for promotion/upgradation for the post of Auditor/Senior Auditors from the grade of Rs. 1,200-2,040 to Rs. 1,400-2,600. The petitioners have further stated that according to clause (2) of the

aforesaid regulation, a departmental examination is to be conducted and an Auditor who has completed two years of service on such post is eligible to appear in the said examination and if he passed in the said departmental examination, he will be entitled for promotion/ upgradation to the post of Senior Auditor but there is an exemption clause in the aforesaid clause (2) fixing a cut off date, according to which an auditor who was appointed on such post in the pay scale of Rs. 1,200-2,040 on or before 31st March, 1989. was exempted from such departmental examination. It is further stated that according to the schedule annexed along with the aforesaid Government Order, they were entitled for upgradation on the basis of 80%-20% ratio on the existing posts on the relevant date i.e., 1.1.1986 and 31.3.1989. The petitioners' contention is that as per clause (2) of the Government Order some persons were entitled for promotion/upgradation in the scale of Rs. 1,400-2,600 under the exemption clause even without appearing in the departmental examination.

3. The grievance of the petitioners is that though the petitioners were selected against the sanctioned post in accordance with the existing regulations and there was no provision of any departmental examination but in view of the Government Order as the petitioners were appointed after cut off date i.e., 31.3.1989. they were being compelled to pass the departmental examination for promotion/upgradation in the grade of the Senior Auditor, i.e., in the pay scale of Rs. 1,400-2,600 although they have already completed 15 years of continuous service and ten months departmental training and confirmed on the post of Auditor. It is further stated by the petitioners that in pursuance of the aforesaid Government Order dated 31.5.1995, the Chief Audit Officer, has published a list of Senior Auditors in the grade of Rs. 1,400-2,600 on 19.2.1996. The petitioners' contention is that the Government Order dated 31.5.1995 so far as it fixes a cut off date 31st March 1989 for exemption from the departmental examination is absolutely illegal, the prayer is for declaration of clause (2) of the impugned Government Order as ultra vires to the Constitution.

4. The second writ petition was also filed in which common question of facts and law were involved. The facts of the other writ petition were that the petitioner Arvind Kumar Singh was appointed as an Auditor under U. P. Subordinate (Co-

operative and Panchayat) Auditor Service Rules. 1980 in March. 1991. It is stated that under Rule 5 of the aforesaid Rules, the source of recruitment has been provided. Sub-rule (2) of Rule 15 provides that recruitment to the post of Senior Auditor shall be made by promotion from amongst the permanent Auditors working in the pay scale of Rs. 280-460. Further proviso to sub-rule (2) provides that auditors who were recruited before March 7, 1975 and who are not graduate, shall not be eligible for promotion to the post of Senior Auditor unless they have rendered continuous service for ten years as Auditors, it is further stated that vide Government order dated 31.3.1995 amending the earlier Government Order dated 7.7.1989. by which revised pay scales were accepted. The contention of the petitioner is that from the order dated 7.7.1989. It does not appear that by this order any designation or nomenclature of the post of auditor was changed. The order simply accepted the revised pay scales fixed under the report of the Samta Samiti by the order dated 31.5.1995. nomenclature of the post of auditor created under the existing rules was sought to be changed and para 2 also provides that it shall be necessary for those auditors who have been appointed after March 31, 1989, to appear in the written test for further promotion as Senior Auditor in the pay scale of Rs. 1,400-2,600. The grievance of the petitioner in this writ petition was that the petitioner's services were governed by the Rules of 1980 under which all the auditors were eligible to be promoted as Senior Auditor as provided under the Rules which was amended by order dated 28.7.1997 which provides that criteria for promotion to the post of Senior Auditor was seniority subject to rejection of unfit, therefore, without amending Rules of 1980. the procedure for promotion cannot be changed.

5. The main contention of the petitioner before the learned single Judge was that the rules which have statutory force could not be changed by an executive order and unless the rules are amended, the petitioners are entitled to be considered for promotion under Rule 19 and cannot be compelled to appear in the test on the basis of the Government Order.

6. The learned single Judge held that there cannot be any dispute that the rules having statutory force cannot be rendered ineffective or set at naught by an executive order and rules of 1980 have been framed by the Governor of the State

of Uttar Pradesh under Article 309 of the Constitution and there cannot be any doubt about the status of the Rules of 1980 that they are statutory in nature and could not be changed by the executive order dated 31.5.1995. The learned single Judge has disposed of both the writ petitions with the direction to the respondents to effect the promotion of the petitioners from the post of Auditor to the post of Senior Auditors in view of Rule 18 of the Rules of 1980. It was also made clear by the learned single Judge that Rules of 1980 have been amended subsequently, then this direction shall not be binding.

7. We have heard the learned counsel for the parties and have perused the record. It has been submitted by the learned standing counsel that the view taken by the learned single Judge is contrary to law as it is always open for the employer to take examination for selecting the candidates on the post of Senior Auditor. His further contention is that there is no conflict between the Government Order dated 31.5.1995 and statutory rules framed under Article 309 of the [Constitution of India](#) as only the mode of promotion has been changed and it was decided by the Government that those Auditors who were appointed after the year 1989 they should appear in the departmental examination and only then they can be promoted on the post of Senior Auditor but the learned single Judge has completely ignored this aspect of the case.

8. Before discussing the arguments of the learned counsel for the parties. It is necessary to see earlier Rules and the amended Rules. The relevant portion of the U. P. Subordinate (Co-operative and Panchayat) Auditor Service Rules, 1980, as quoted by the petitioners, are reproduced below. Rule 25 of the Regulation deals with the criteria of seniority and promotion, which is as under :--

^25- T;s'Brk&,rn/khu ;FkkmicfU/kr dsflok; izR;sd oxZ ds inksa ij T;s'Brk ekSfyd :i ls fu;qfDr ds vkns'k dsfnukd ls vo/kkfjr dh tk;sxh vkSj ;fn nks ;k vf/kd O;fDr ,d gh fnukd dksfu;qDr fd;s tk;sa rks mudh ijLij T;s'Brk ml e ds vuqlkj ftlesa fu;e 22 dsv/khu mudh fu;qDr dh xbZ gks vo/kkfjr dh tk;sxh A

ijUrq %

1- Isokes lh/ks HkrhZ fd;s x;s O;fDr;ksa dh ijLij T;s'Brk ogh gksxh tks muds p;uds le; vk;ksx }kjk vo/kkfjr dh tk;s A

2-inksUufr }kjk fu;qDr fd;s x;s O;fDr;ksa dh ijLij T;s'Brk ogh gksxh tksinksUufr ds le; muds }kjk ?k`r ekSfyd in ij jgh gks A

fVli.kh% tgg fu;qfDRk ds vkns'k ls dksbZ ,slk fof'k'V fiNyk fnukadfofufnZ'V fd;k tk;s tc ls fdlh O;fDRk dh ekSfyd :i ls fu;qfDr dh tkuh gks-tks fdlh LFkk;h in ij fdlh Li'V fjDr ds izfr ifjoh{kk ij dh tkuh gks] ogkml fnukd dks ekSfyd fu;qfDr ds vkns'k dk fnukd le>k tk;sxk A vU; ekeyksaesa mldk rkRi;Z vkns'k tkjh fd;s tkus ds fnukd ls gksxk A

;fn lh/ks HkrhZ fd;k x;k dksb ZO;fDr fdlh fjDr dks mls izLrko fd;s tkus ij fcuk fdlh ;qfDr&;qDr dkj.k dsdk;ZHkkj xzg.k djus esa vlk/kkj.k :i ls vf/kd le; yrsk gs rks vk;ksx ls vuqeksnuizklr djus ds i'pkr~ mls dksfV e lwph esa vU; O;fDr;ksa ls uhps j[kk tk ldrkgS dkj.kksa dh fof/k ekU;rk ds IEcU/k esa fu;qfDr izkf/kdkjh dk fofu'p; vfUregksxk A\*\*

9. The Government Order dated 31.5.1995 specifies the new mode of upgradation from the post of Auditors to the post of Senior Auditors from the pay scale of Rs. 1.200-2,040 to Rs. 1.400-2.600 has been filed by the petitioners as Annexure-2 to the writ petition. This Annexure-2 is a letter issued by the Joint Secretary, U. P. Government. Paragraph 2 of the said letter is relevant, which is quoted below :

^2- eq>s ;g Hkh dguk gS fdT;s'B ys[kk ijh{k d in ij izksUufr gsrq ijh{k foHkkxh; ijh{k ds uke lsj[kh tk;s vkSj bl ijh{k eas cSBus ds fy;s ,sls ys[kk ijh{k vgZ gksaxs ftudh dels de 2 o'kZ dh ys[kk ijh{k ds in ij Isok gks tkrh gS A bls ikl djus dsi'pkr~ gh T;s'B ys[kk ijh{k ds in ij izksUufr gsrq in /kkjd vgZ gksxk Afnukad 31-3-1989 rd tks in /kkjd ys[kk ijh{k osrueku :- 1]200&2]040 esafu;qDr fd;s tk pqds gSa mu ij ijh{k ikl djus dh 'krZ ykxw ugha gksxh A fnukad1-4-1989 ;k bls ckn fu;qfDr ys[kk ijh{k }kjk foHkkxh; ijh{k ikl djus ds i'okr~gh T;s'B ys[kk ijh{k ds in ij rSukr fd;k tk;sxk blh izdkj T;s'B ys[kkijh{k xzsM&1 in ij izksUufr gsrq nwljh ijh{k lhfuj; vkMhVj xzsM&1ijh{k ds uke ls j[kh tk;s A bl ijh{k esa cSBus ds fy; ,sls in /kkjd vgZ gksaxstks T;s'B ys[kk ijh{k ds in ij dk;Zjr gksa vkSj mUgksaus de ls de 5o'kZ dh Isok iwjh dj yh gks A T;s'B ys[kk ijh{k lhfuj; vkMhVj xzsM&1ijh{k mkh.kZ djus ds i'pkr~ gh T;s'B ys[kk ijh{k xzsM&1 ds in ijizksUufr gsrq vgZ gksaxs A mijksDr

foHkkxh; ijh{kk ,oa lhfuj vkMhVj xzsM&1ijh{kk ds iB~;e vkfn fu/kkZfjr fd;s tkus ds lEcU/k esa vkns'k vyx ls tkjh fd;stk;saxs A i;k lsok fu;ekoyh esa mijksDrkuqlkj la'kks/ku gsrq vko';d dk;Zokgh 'kh?kzdh tk;s A\*\*

This paragraph 2 of the aforesaid Government Order has been challenged by the petitioners to be ultra vires.

10. After hearing the learned standing counsel, we are of the view that there cannot be any dispute that this Annexure-2, a Government order issued on 31st May, 1995, is neither an amendment to the existing rules nor it has statutory force, therefore, it cannot override the statutory rules framed under Article 309 of the [Constitution of India](#). The Apex Court of the country has held in K. Kuppusamy and another v. State of Tamil Nadu and others, (1998) 8 SCC 469, on this point that the statutory rules cannot be changed by the executive order. The relevant portion of the Judgment is quoted below :

'The short point on which these appeals must succeed is that the Tribunal fell into an error in taking the view that since the Government had indicated its intention to amend the relevant rules, its action in proceeding on the assumption of such amendment could not be said to be irrational or arbitrary and, therefore, the consequential orders passed have to be upheld. We are afraid this line of approach cannot be countenanced. The relevant rules, it is admitted, were framed under the proviso to Article 309 of the Constitution. They are statutory rules. Statutory rules cannot be overridden by executive orders or executive practice. Merely because the Government had taken a decision to amend the rules does not mean that the rule stood obliterated. Till the rule is amended, the rule applies. Even today the amendment has not been effective, As and when it is effected ordinarily, it would be prospective in nature unless expressly or by necessary implication found' to be retrospective. The Tribunal was, therefore, wrong in ignoring the rule.'

11. Other case on the point is Union of India and others v. Arun Kumar Roy. (1986) 1 SCC 675. the relevant portion of which are quoted below :

'16. A notification has no statutory force. It cannot override rules statutorily made governing the conditions of service of the employees. The notification is dated August 26, 1967. Rule 5 (1) (b) was amended in 1971 with retrospective effect from May 1, 1965. The rule has necessarily to govern the service conditions and not the notification.

17. The effect of Rule 5 of the Rules fell to be considered by this Court in two decisions, viz. Senior Superintendent, R.M.S. u. K. V. Gopinath and Raj Kumar v. Union of India. The respondent relied strongly upon the following observations in (1972) 3 SCR 530 at 532 : SCC 869, para 3.

The proviso to sub-rule (b) however gives the Government an additional right in that it gives an option to the Government not to retain the services of the employee till the expiry of the period of the notice : if it so chooses to terminate the service at any time it can do so 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 rate 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'. At the risk of repetition, we may note that the operative words of the proviso are 'the services of any such Government servant may be terminated forthwith by payment.' To put the matter in a nutshell, to be effective the termination of service has to be simultaneous with the payment to the employee of whatever is due to him. We need not pause to consider the question as to what would be the effect if there was a bona fide mistake as to the amount which is to be paid. The rule does not lend itself to the interpretation that the termination of service becomes effective as soon as the order is served on the Government servant Irrespective of the question as to when the payment due to him is to be made. If that was the intention of the framers of the rule, the proviso would have been differently worded. As has often been said that if 'the precise words used are plain and unambiguous, we are bound to construe them in their ordinary sense', 'and not to limit plain words in an Act of Parliament by considerations of policy. If it be policy, as to which minds may differ and as to which decision may vary.'

This decision was rendered on February 18, 1972. It was the validity of an order dated September 25, 1968, terminating the respondent therein, that was in question in that case. We would like to observe, with respect that the amendment brought into Rule 5 (1) (b), with effect from May 1, 1965, escaped the notice of the Bench that decided that case. The error was subsequently corrected by another Bench of this Court in the decision in Raj Kumar v. Union of India, SCC 14, para 2. SCC (L & S) 199, para 2 by stating :

The effect of this amendment is that on May 1, 1965, as also on June 15, 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 them 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 hereinbeforementioned. Its effect is that the decision of this Court in Gopinath case is no 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.'

12. After going through these two judgments and relevant Government Orders, we are of the opinion that the view taken by the learned single Judge does not require interference by this Court and both the Special Appeals are hereby dismissed. The Judgment is being pronounced in Special Appeal No. 1115 of 1999, which will govern the Special Appeal No. 1114 of 1999 also. A copy of this judgment be placed in the file of Special Appeal No. 1115 of 1999 also.

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