

## **Krishena Kumar vs S.P. Saksena And Ors. on 2 February, 1973**

**Equivalent citations: AIR1973SC1065, 1973LABLC607, (1973)3SCC775, AIR 1973 SUPREME COURT 1065, 1973 3 SCC 775, 1973 LAB. I. C. 607, 1973 (1) SERVL R 665**

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**Bench: A.K. Mukherjea, A.N. Grover, K.K. Mathew**

### **JUDGMENT**

A.N. Grover, J.

1. This is an appeal by certificate from a Judgment of the Delhi High Court dismissing a petition under Article 226 of the Constitution filed by the appellant challenging a notice dated August 22, 1966 in respect of his retirement and also a notification dated December 3, 1966 declaring that he had been retired from service.

2. The appellant joined service in class III in the Railway Audit in the year 1927. He was promoted to the higher class and was ultimately appointed substantively to the post of Assistant Audit Officer in the Northern Railway Audit Office in August 1959. In January 1963 he was made Officiating Deputy Chief Auditor in the same Railway. However, on July 4, 1964 he was reverted from that post to that of Divisional Audit Officer. On March 10, 1965 he was reverted to his original substantive post, namely, that of the Assistant Audit Officer. It is unnecessary to give details of other facts and events including those which were alleged in the writ petition filed in the Delhi High Court on August 30, 1965 (C.W. Petition No. 509-D of 1956) which is still pending.

3. By means of a notice dated August 22, 1966 issued under the signature of the Chief Auditor, Northern Railway, under Clause (i) of Rule 56 of the Fundamental Rules as substituted by the Fundamental Rules (6th Amendment) 1965 by means of a notification dated July 21, 1965, the appellant was informed that he would be retired from service with effect from November 25, 1966 on which date he would be attaining the age of 55 years. The last part of the notice was as follows:

This has also been approved by the Comptroller and Auditor General of India.

In the Gazette of India dated December 3, 1966 it was notified as follows:

Shri Krishena Kumar a Permanent Assistant Audit Officer has retired from Government service with effect from the afternoon of 24th November 1966.

Thereafter the appellant filed a writ petition in the High Court under Article 226 of the Constitution challenging the order of his retirement.

4. A number of contentions were raised before the High Court. We need mention only those which have been pressed before us. The first is that the notice dated August 22, 1966 and the notification dated December 3, 1966 had not been issued by a competent authority. The second point raised was that both the notice and the order of retirement were invalid as no opinion in fact was formed by the competent authority to the effect that it was in the public interest to retire the appellant under Clause (i) of Fundamental Rule 56. One or two other contentions were mentioned but not seriously pressed and therefore they require no examination.

5. For disposing of the first contention it is necessary to refer to Clause (i) of Fundamental Rule 56 which is in the following terms:

Notwithstanding anything contained in this Rule, the appropriate authority shall, if it is of the opinion that it is in the public interest to do so, have the absolute right to retire any government servant after he has attained the age of fifty-five years by giving him notice of not less than three months in writing.

Note I. 'Appropriate authority' means the authority which has the power to make substantive appointment to the post or service from which the Government Servant is required or wants to retire"

The case of the appellant was that it was only the Comptroller and Auditor General who was the appropriate authority within the meaning of Note I and who alone was competent to take action and make order under Clause (i) of Fundamental Rule 56. Since it was the Chief Auditor who had issued the notice the same was invalid and the subsequent notification relating to appellant's retirement would consequently also become invalid. The High Court considered the various provisions on which reliance was placed particularly those relating to the appointing authority as defined in the Central Civil Services (Classification, Control and Appeal) Rules as also Rule 5 of those Rules providing for protection of rights and privileges conferred by any law or' agreement. The High Court expressed the view that when the term "appropriate authority" had been defined in the Note to Rule 56 itself that definition alone would be applicable and no resort could be had to the definition of "appointing authority" in the Central Civil Services (Classification, Control and Appeal) Rules. As regards the change made by notification dated November 29, 1962 with regard to the appointing authorities which included the Chief Auditor of Railways so far as the Assistant Audit Officers were concerned the High Court negatived the contention that the said notification had not been made in accordance with Article 148(5) of the Constitution after prior consultation with the Comptroller and Auditor General. It was held that the notification had been issued by the President in pursuance of Rule 11(2) of the Central Civil Services (Classification, Control and Appeal) Rules, 1957 which had been made by the President in exercise of the power conferred by the proviso to

Article 309 and Clause (5) of Article 148 of the Constitution and after consultation with the Comptroller and the Auditor General. That Rule empowered the President to make a general or special order specifying the authorities competent to make the appointments mentioned in Rule 11(2). It has been sought to be argued before us also that the conditions of Article 148(5) of the Constitution had not been satisfied and therefore the notification which constituted the Chief Auditor among others as the appointing authority was invalid and the said authority could not be regarded as the appropriate authority within the terms of Note I to Rule 56 of the Fundamental Rules.

6. In our Judgment the contention sought to be raised did not arise for the short reason that according to the appellant himself the Comptroller and Auditor General was the competent authority within the meaning of Note 1 to Clause (i) of Fundamental Rule 56. The notice of retirement dated August 22, 1966 clearly states that the same had been approved by the Comptroller and Auditor General. Mr. S. Ranganathan the then Comptroller and Auditor General of India who was impleaded as respondent No. 2 filed an affidavit in the High Court to the effect that the notice of retirement had been issued with his approval and that he was of the opinion that it was in the public interest to retire the appellant after he had attained the age of 55 years. There can be no manner of doubt, therefore, that although the notice had been signed by the Chief Auditor it had been done with the approval and under the authority of the Comptroller and Auditor General of India. On this short ground the first contention based on the lack of competency for taking action under Clause (i) of Fundamental Rule 56 cannot possibly be sustained.

7. On the second submission our attention has been drawn to the fact that the arguments in the writ petition in the High Court had concluded on September 10, 1968 but additional affidavits were sought to be filed by respondents on the following day which were admitted on the record by the High Court. However, it is not disputed that the High Court gave full opportunity to the appellant to file a counter affidavit. One of the supplementary affidavits was that of Mr. S. Ranganathan, Comptroller and Auditor General of India. This is what he said in para 2 of his affidavit:

That the notice of retirement (Exhibit B) was issued by respondent No. 1 with my approval. I studied the provisions of the amended Fundamental Rule 56. I studied the recommendations of the Committee consisting of Shri S.P. Saksena, Chief Auditor, Northern Railway, Miss P. Lal, Deputy Chief Auditor, Northern Railway, and Shri P.C. Doshi Deputy Chief Auditor, Northern Railway, which met on 24-5-1966 to consider the petitioner's suitability for retention in service beyond the age of 55 years and also considered the physical capacity, work and conduct of the petitioner as revealed from the official records in order to form an opinion whether it was in public interest to retire the petitioner after he had attained the age of 55 years or not. After a consideration of this material I was of the opinion that it was in public interest to retire the petitioner after he had attained the age of 55 years. On 22-8-1966, I approved the issuance of the Notice of retirement (Exhibit B) by Respondent No. 1 to the petitioner.

Annexure R-4 which appears to have been filed along with this affidavit contained the report of a committee with the Chief Auditor as Chairman and the Deputy Chief Auditor (Admn.) and the Deputy Chief Auditor (Divisional) as members which met on May 24, 1966 to review the case of the appellant. It is stated in that annexure that the committee decided to review his case from the point of view of physical fitness, integrity and efficiency. After giving the various details the committee expressed the following opinion in para 6 of its report:

Taking into account all the above facts, the committee was of the opinion that it would be neither in public interest nor in the interest of his own personal longevity to retain Shri Krishena Kumar in service beyond the age of 55 years.

The Committee further directed that the minutes of the meeting may be forwarded to the Comptroller and Auditor General of India. It is clear from the affidavit of the Comptroller and Auditor General Clause 2 of which has been reproduced above that he studied the recommendation of the committee and also considered the physical capacity, work and conduct of the appellant as revealed from his official records in order to form an opinion whether it was in public interest to retire the appellant after he had attained the age of 55 years. It was only after consideration of the entire material that he formed the opinion that it was in public interest to retire him. We are wholly unable to see how in the presence of this material any argument can be raised that the appropriate authority did not form any opinion that the retirement of the appellant would be in public interest.

8. Lastly it has been pointed out to us that neither the emoluments due to the appellant nor the amount due on account of the contributions to the Railway Contributory Provident Fund or the government contributions to the Provident Fund etc. have been paid to the appellant and that he is being deprived of the amount due to him to which he is legally entitled. This matter was not raised in the writ petition and did not form the subject-matter of any inquiry or discussion by the High Court. We have no manner of doubt that the authorities concerned will, within a reasonable period, and if possible, not exceeding three months, pay to the appellant all the amount by way of salary, emoluments Provident Fund etc. to which he may be entitled under the law and the Rules.

9. With these observations the appeal is dismissed but we make no order as to costs.