

**(1968) 07 OHC CK 0005**  
**In the Orissa High Court**  
**Case No : O.J.C. No. 146 of 1967**

Somanath Misra

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

**Date of Decision :** 17-07-1968

**Acts Referred:**

All India Services (Death-Cum-Retirement Benefits) Rules, 1958 — Rule 16(3)  
All India Services Act, 1951 — Section 3(1)  
Constitution of India, 1950 — Article 14, 309, 311, 311(2)

**Citation :** AIR 1969 Ori 37 : (1968) 34 CLT 1026 : (1969) 2 LLJ 308

**Hon'ble Judges :** S. Barman, C.J.;A. Misra, J

**Bench :** Division Bench

**Advocate :** R.N. Misra, R.C. Patnaik and P.K. Sengupta, for the Appellant; Govt. Advocate, for the Respondent

**Final Decision :** Dismissed

## Judgement

Barman, C.J.—In this writ petition. Sri Somanath Misra, a member of the Indian Administrative Service, challenges the order of the Government of India purporting to prematurely retire him from service in the public interest on the expiry of three months from the date of service of notice on him. The provision under which the Government purported to have passed the said order of retirement is Rule 16(3) of the All India Services (Death-cum-Retirement Benefit) Rules. 1958 made by the Central Government u/s 3(1) of the All India Services Act, 1951 after consultation with the Governments of the States.

2. Rule 18(3) under which the said order of retirement was passed is this:

"16(3). The Central Government, to consultation with the State Government may require a member of the Service who has completed 30 years of qualifying service or who has attained the age of 55 years to retire in the public interest provided that at least three months" previous notice in writing will be given to the member concerned."

The validity of this Rule as contravening Article 14 of the Constitution has been challenged as hereinafter discussed.

3. The impugned order of retirement of the petitioner passed by the Government of India is set out below:

GOVERNMENT OF INDIA MINISTRY OF HOME AFFAIRS

No. 29/19/66--AIS (II).

In pursuance of the powers conferred by Sub-rule (3) of Rule 16 of the All India Services (Death-cum-Retirement Benefit) Rules, 1958, the President, in consultation with the Government of Orissa is pleased to order the retirement of Sri Somanath Misra who attained the age of 55 years on 1st November 1966, from the Indian Administrative Service in the public interest on the expiry of three months' notice from the date of service of notice on him.

New Delhi, By order of the President 15th May, 1967.

Sd. P. K. Dave. Jt. Secretary to the Govt. of India

4. The facts leading to the passing of the impugned Central Government order of retirement are stated to be as follows: The petitioner who was born on November 1, 1911, entered the Provincial Civil Service of Orissa on March 9, 1936. After more than 20 years service during which he had several promotions, he was subsequently appointed to the Indian Administrative Service with effect from June, 14, 1957. In 1964 there was an enquiry against him for corruption initiated by the Central Bureau of Investigation which was subsequently taken over by the State Vigilance Commissioner which terminated in February 1966. It is said that he was acquitted of the charges. Somehow, the question was raised about the desirability of retaining him in service beyond the age of 55 years. In that connection the question of his integrity -- which was involved in the enquiry against him which had terminated in 1966 -- was taken into consideration and there was a suggestion to make a reference of his case to the Government of India so that he may be retired at the age of 55 years. Ultimately, in July 1966 the State Government is stated to have decided to continue the petitioner in service beyond 55 years. The petitioner's grievance is that after the State Government had taken this decision to retain him in service beyond 55 years, the Central Government wrongfully passed the impugned order of retirement on May 15, 1967 in terms aforesaid, purporting, as already stated, to act under Rule 16(3).

5. Although the State Government had taken the said decision to retain the services of the petitioner beyond the age of 55 years, it does not appear that this decision was made known to the Central Government. In the meantime, the Central Government after consideration of all the papers relating to the enquiry, including the Vigilance Commissioner's findings, in a communication addressed to the State Government on December 19, 1966, appears to have suggested that the petitioner may be retired from service. The reasons for taking this view were

mentioned in their letter. Ultimately on May 15, 1967 the petitioner was served with the impugned notice issued under Rule 16(3) after consultation with the State Government.

6. The grounds on which the petitioner challenges the validity of the impugned order of retirement are, in substance, these: If any action to retire him from service was to be taken by the Government it should have been taken prior to November 1, 1966 the date on which he attained the age of 55 years. The State Government's decision to keep him in service beyond 55 years having been taken after the termination of the enquiry, the subsequent notice to retire him which was no more than executive direction from the Government of India was without any basis; that the impugned retirement order was arbitrary, illegal and mala fide. The petitioner accordingly claims to continue in service even after he attained the age of 55, that is, until November 1, 1969, when he attains the age of 58 years which is the normal age of retirement on superannuation, of officers of the Indian Administrative Service. His further point is that any executive order directing the petitioner to retire from service from an earlier date in the public interest amounts to removal from service with a stigma and, as such, attracts the provisions of Article 311 of the Constitution. That apart, it violates the constitutional guarantee of equal protection of law under Article 14. It was further submitted on behalf of the petitioner that the term "public interest" in the notice issued in pursuance of Rule 16(3), is too wide and does not appear to provide any guiding principle for the exercise of the power to retire. Accordingly the notice given for his premature retirement as mentioned in the impugned order necessarily amounts to removal from service which requires the observance of the procedure laid down in Article 311 of the Constitution.

7. In support of his contentions the petitioner relied on certain Instructions of the Government of India laying down the criteria and procedure to be followed by the State Government while referring cases to the Central Government under Rule 16(3) with a view to ensure all India uniformity of operation of the said sub-rule and also to ensure equitable treatment in all cases of premature retirement. These Instructions are printed at pages 596-99 of the All India Service Manual (corrected upto May 1, 1967) issued by the Government of India, Ministry of Home Affairs under Rule 16(3). In the course of argument the petitioner relied on these Instructions, including Instruction No. 7 which is as follows:

"(7) Once it is decided to retain an officer beyond the age of 55 years, he should be allowed to continue up to the age of 58 without any fresh review unless this be justified by any exceptional reasons, such as his subsequent work or conduct or the state of his physical health, which may make earlier retirement clearly desirable. The Government of India feel that in order that an officer who is cleared for continuance at the stage of attaining the age of 55 years can settle down to another three years of work with a sense of security and those working under him accept his control and discipline without any reservation an annual review between the years of 55 and 58 would not be desirable. In arriving at this

view, they have among other factors taken into consideration the fact that at these stages, members of all India Services generally occupy very senior appointments on which particularly such a sense of security about their tenure is desirable in the public interest. Further, having arrived at an assessment in favour of further continuance in service at the age of 54, 12 years or so, there would ordinarily be no occasion for changing the assessment during the next three years, so that an annual review would serve little practical purpose. Finally, in any case, Sub-rule (3) of Rule 16 of the AIS (DCRB) Rules would enable appropriate consideration at any time in very exceptional circumstances.""

8. The petitioner's point is that once it was decided by the State Government to retain his services beyond 55 years, as an officer who had been cleared for continuance at the stage of attaining the age of 55 years, he should not have been prematurely retired before attaining the age of 58 years, according to the principle enunciated in Instruction No. 7 quoted above.

9. The question is: what is the effect of these Instructions in relation to the statutory rules made under the All India Services Act? It is open to the Government to issue instructions to regulate the service conditions without any rules made in exercise of the powers under the proviso to Article 309 of the Constitution; if the rules are silent, then such field as not covered by the rules may be covered by instructions which may be supplementary to the rules. This view is fully supported by the decisions of the Supreme Court who held that it is not obligatory, under the proviso to Article 309, to make rules regulating the recruitment before a service can be constituted or a post created or filled; this is not to say that it is not desirable that ordinarily rules should be made on all matters which are susceptible of being embodied in the rules. There is nothing in the terms of Article 309 of the Constitution which abridges the power of the Executive to act under Article 162 without a law; if there is a statutory rule or Act the Executive must abide by that Act or rule. In the present case, there is nothing in the Government of India's Instructions which is inconsistent or in any way in conflict with the statutory rules made under the All India Services Act. These instructions are for the guidance of the State Government while making recommendations to the Central Government. It is true that the Government cannot amend or supersedes statutory rules by administrative instructions, but if the rules are silent on any particular point, Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed. *B.N. Nagarajan and Others Vs. State of Mysore and Others*, ; *Sant Ram Sharma Vs. State of Rajasthan and Another*, .

10. Then, the validity of Rule 16(3) Itself was challenged on the ground that the said provision, as violative of Article 14 of the Constitution, is unconstitutional. The petitioner's point, in substance, is that the impugned Rule 16(3) is discriminatory in that it applies unequally to persons similarly situated and that the rule does not contain any guide line in its application. In our opinion, this argument is not tenable. When the Court is called upon to test the

constitutionality of any particular law attacked as discriminatory and violative of the equal protection clause, the broad principles which have to be borne in mind, as laid down by the Supreme Court are these: There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles; it must be presumed that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that discriminations are based on adequate grounds; in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of the legislation; while good faith and knowledge, of existing conditions on the part of the Legislature are presumed, if there is nothing in the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation. It is not essential for the legislation, to comply with the rule as to equal protection, that the rules for the guidance of the designated authority which is to exercise the power or which is vested with the discretion, should be laid down in express terms in the statutory provision itself. Such guidance may be obtained from or afforded by the preamble read in the light of the surrounding circumstances which necessitated the legislation, taken in conjunction with well known facts of which the court might take judicial notice or of which it is apprised by evidence before it in the form of affidavits, as an instance where the guidance can be gathered; or even from the policy and purpose of the enactment which may be gathered from other operative provisions applicable to analogous or comparable situations or generally from the object sought to be achieved by the enactment. *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, ; *Jyoti Pershad Vs. The Administrator for The Union Territory of Delhi*, .

11. Thus considered in the light of the guiding principles mentioned above. Rule 16(3) must be presumed to be constitutionally valid. The provision made in Rule 16(3) that such retirement can be made "in the public interest" is clearly indicative of the legislative intention of the rule purporting to give a guide line; it is not a bald arbitrary power, there is an intelligent differentia; the discrimination which is prohibited by Article 14 is treatment in a manner prejudicial, as compared with another person similarly circumstanced by the adoption of a law, substantive or procedural, different from the one applicable to that of other person. Equal protection of law does not postulate equal treatment of all persons without distinction; it merely guarantees the application of the same laws alike and without discrimination to all persons similarly situated. The power of the Legislature to make a distinction between persons and transactions based on real

differentia is not taken away by the equal protection clause: Jagannath Prasad Sharma Vs. State of Uttar Pradesh and Others, .

12. In the present case, the history of the amendment of Rule 16(3) is sufficiently indicative of the intention of the Legislature to evolve a differentia in relation to the officers who may be compulsorily retired. Before amendment, under the corresponding Rule 17(2) of 1958, a member of the Service could be required to retire if he had completed 30 years of qualifying service. The only preconditions were that the approval of the Central Government was to be taken and three months' prior notice in writing was to be given. Subsequently, in 1963 by an amendment the said provision was amplified in that the notice could be given at any time provided the officer had completed 30 years qualifying service or has attained the age of 55 years. In 1965, the rule was further amended and in fact completely recast in that besides introducing the clause relating to action being taken in the "public interest", it was for the first time that authority was conferred on the Central Government to issue notice provided the other conditions regarding consultation with the State Government and attainment of 55 years of age and 30 years of qualifying service by the officer were satisfied; the Government of India's Instructions, as supplemental to the Rules, afforded guidance to the State Government before making recommendations for retirement with a view to give equal protection to all officers. Therefore it cannot be said that such an order is discriminatory.

13. It was argued that the impugned order of compulsory retirement of the petitioner under Rule 16(3) amounts to punishment. This argument has no force. Indeed an order of such retirement after attainment of 55 years of age and Completion of 30 years qualifying service--as in the present case -- differs both from an order of dismissal and an order of removal in that it is not a form of punishment prescribed by the rules and involves no penal consequences inasmuch as the person so retired is entitled to pension proportionate to the period of his service, standing to his credit. The policy underlying Article 311(2) is that when it is proposed to take action against a servant by way of punishment and that will entail forfeiture of benefits already earned by him, he should be heard and given an opportunity to show cause against the order but that consideration can have no application where the order is not one of punishment and results in no loss of benefits already accrued. Thus the real criterion for deciding whether the order of terminating the services of a servant is one of dismissal or removal is to ascertain whether it involves any substantial loss of benefits already accrued or previously earned. Two tests are applied for ascertaining whether a termination of service by compulsory retirement amounts to removal or dismissal so as to attract the provisions of Article 311. The first is whether the action is by way of punishment and to find that out, it was necessary that a charge or imputation against the officer is made the condition of the exercise of the power: the second is whether by compulsory retirement the officer is losing the benefit he has already earned as he does by dismissal or removal. Applying these tests, the impugned order under Rule 16(3) cannot be

said to contain any charge or imputation nor can the order be held to be one of the dismissal or removal as it does not entail forfeiture of pension due for past service or other retirement benefits. This view is supported by the decision of the Supreme Court in *The State of Bombay Vs. Saubhagchand M. Doshi*, as subsequently clarified in *Dalip Singh Vs. The State of Punjab*, .

14. It was vehemently argued on behalf of the petitioner that the impugned order of retirement from service stated to be in the public interest carried with it an implied imputation of stigma on the petitioner, namely that his retention beyond the age of 55 was considered undesirable in the public interest. In support of this contention the petitioner relied on the letter dated December 19, 1966 from the Deputy Secretary to the Government of India. Ministry of Home Affairs, to the Chief Secretary to the Government of Orissa in which the Central Government while pointing out certain mistakes in the calculations made by the Enquiring Officer in connection with the disciplinary proceedings against the petitioner, proposed to the State Government to retire the petitioner compulsorily from service on his attaining the age of 55 years and to issue an order under Rule 16(3) for the reasons stated in the said letter. It was within a few months after the receipt of the said letter that the impugned order of retirement dated May 15, 1967 was issued. It was also contended that the impugned order of retirement was mala fide. In our opinion, these contentions are not tenable.

15. It is the settled law that where an order requiring a Government servant to retire compulsorily contains express words from which a stigma can be inferred, that order may amount to "removal" within the meaning of Article 311 but where there are no express words in the order itself which would throw any stigma on the Govt. servant, the Court cannot look into the background resulting in the passing of such order in order to discover whether some kind of stigma could be inferred. On the question of mala fides, the only relevant consideration is whether the order was made for ulterior purposes or purposes other than those mentioned in the order: *I.N. Saksena Vs. State of Madhya Pradesh*, and *Puranlal Lakhanpal Vs. Union of India (UOI)*, .

16. Considered in the light of the above the letter of the Central Government dated December 19, 1966, followed by the impugned order of retirement, cannot be looked into as furnishing a background for the retirement order. As regards mala fides, it was not pleaded in the writ petition: it was only for the first time in the rejoinder that the petitioner pleaded that the order of retirement is mala fide as alleged to be based on the comments on the report of a high powered Commission and the decision of the State Government on the disciplinary proceedings; the petitioner further alleged that the real character of the termination of service is to be determined by reference to the material facts that existed prior to the order.

17. These arguments are of no avail having regard to the powers conferred on the Central Government by Rule 16(3) in exercise of which the Central Government, by its order dated May 15, 1967, compulsorily retired the petitioner

in the public interest after he attained the age of 55 years and also after he completed 30 years qualifying service. Under the Government of India Instruction No. 7 wide power is given to the Central Government in that, finally, in any case Rule 16(3) would enable appropriate consideration at any time in very exceptional circumstances.

18. Further, the question whether or not the compulsory retirement of a particular officer is in the public interest before reaching 58 the normal age of superannuation but after he has attained the age of 55 years and also after he has completed 30 years of qualifying service -- as in the present case -- is not justiciable. That is a matter for the Government to decide. This view is founded on the position that under the rules, retirement can validly take place at two points of time: one at the stage when the officer has attained the age of superannuation according to the service conditions applicable to members of his service and the other at an earlier point of time prior to his attaining the normal age of superannuation. No doubt the second type of retirement is compulsory or premature retirement and may be forced on him in the public interest, but in order that this type of retirement may not operate as a punishment so as to attract the provisions of Article 311, two conditions must be fulfilled, namely that the officer should have attained an age at which he can hope to get the benefits of pension after a reasonably lone span of service; and secondly that the period of qualifying service must be so reasonably fixed that premature retirement may not take place at too early a stage in his career. The validity and legality of any rule, providing for premature retirement between these two points of time, should be tested in the light of these conditions; and so long as the age of premature or compulsory retirement and the period of qualifying service for such retirement, fixed by the rule are reasonable, then the order of retirement passed under that rule after fulfilling those two essential conditions cannot be questioned merely because the retirement is stated to be in the public interest. This view finds support from a number of decisions of the Supreme Court which have been noticed and analysed in a Division Bench decision of this Court in *Kanduri Sahu Vs. Nidhi Sahu and Others*, .

19. Now what happened in the present case is this: The normal age of retirement of the petitioner, on superannuation, according to the rules governing members of the Indian Administrative Service is fixed at 58 years; but Rule 16(3) provides that it is competent for the Government to retire any member of the Service prematurely (i.e. before attaining 58 years) if it is thought that such premature retirement is necessary in the public interest; the exercise of this power however is made subject to either of two conditions; either the officer concerned must have attained the age of 55 years or he must have completed 30 years qualifying service; in other words, normal retirement by superannuation occurs after attaining the age of 58 years while premature retirement in the public interest can be forced on the Government servant after he has attained 55 years or completed thirty years qualifying service. In the present case it will be noticed that by May 15, 1967 when the impugned order was passed, the petitioner had

already completed 30 years of service and also attained 55 years. Both the conditions necessary for the exercise of the power under Rule 16(3) have thus been fulfilled in this case. The requirement about prior consultation with the State Government before passing the order of retirement has also been satisfied.

20. The only question is whether the two conditions mentioned in Rule 16(3), one fixing the age of compulsory retirement at 55 and the other fixing 30 years qualifying service for such retirement, are reasonable. There can be no doubt that these conditions are reasonable and cannot be said to be arbitrary. A similar point arose for consideration before the Supreme Court in *T.G. Shivacharana Singh and Others Vs. The State of Mysore*, . In that case, the validity of Note 1 to Rule 285 of the Mysore Civil Service Rules, 1958 was under challenge. That note provided that Government may, in special cases, require any Government servant to retire at any time after he has completed 25 years qualifying service or on attaining 50 years of age where such retirement is considered necessary in the public interest, after giving three months' notice before he is so called upon to retire. The Note is similar in language and content to Rule 16(3) with which we are concerned here, but with this difference that according to the Mysore Civil Service Rules the normal age of retirement of a Government servant, on superannuation, was fixed at 55 years (as against 58 years in the case of the petitioner) and the Note 1 to Rule 285 provided for premature retirement in the public interest after the Government servant has attained the age of 50 years (as against 55 years fixed in Rule 16(3)) or after he has completed 25 years of qualifying service (as against 30 years as fixed in Rule 16(3)). While rejecting the contention that the said Note was void, their Lordships observed that the only conditions to be fulfilled before Government could exercise their power to act under Rule 285 were (i) that the Government servant concerned must have attained the age of 50 years or (ii) that he must have completed 25 years of qualifying service. Once either of these two conditions were fulfilled then it was competent for Government to exercise their power to retire a Government servant prematurely after giving three months' notice as provided in the Note to Rule 285. Their Lordships further held that whether or not the retirement of the petitioners (before their Lordships) was in the public interest was a matter for the Government to consider. Their Lordships did not accept the petitioner's plea that the order of retirement passed in that case was arbitrary or illegal. Such a question, their Lordships observed, may perhaps arise in a case where having fixed a proper age of superannuation, the rule of compulsory retirement permits a Government servant to be retired at a very early stage of his career. Such consideration did not arise in the Mysore case nor does it arise in the present case. On the other hand, the Mysore provision permitting premature retirement in the public interest at 50 years or after completing 25 years qualifying service was considered reasonable in the circumstances. In the present case also for reasons already stated, it is not possible for us to hold, on the materials placed before us, that the impugned order dated 15-5-1967 passed by the Central Govt. in exercise of the power under Rule 16(3) (which is similar in content to the

provision contained in Note 1 to Rule 285 of the Mysore Civil Service Rules) was arbitrary or illegal or suffered from the vice of mala fide.

21. The petitioner also claims that according to the Government of India Instruction No. 7, he as an officer who had been "cleared for continuance at the stage of attaining the age of 55 years" should be allowed to continue in service upto the age of 58 with a sense of security. This contention is based on what the petitioner states to be a decision taken by the State Government in July, 1966 (a few months before his attaining the age of 55 years) to retain him in service beyond 55 years. But this alleged decision of the State Government does not appear to have been communicated to the Central Government. Indeed, in the letter dated December 19, 1966, the Central Government for the first time proposed to the Orissa Government that the petitioner should be compulsorily retired and that an order under Rule 16(3) would be issued "on hearing" from the State Government. The tenor of the letter would have been different if the prior decision of the State Government to retain the petitioner beyond the age of 55 years had been communicated to the Central Government by that time. Nor does it appear that the decision was communicated at any subsequent stage. In fact, the Under Secretary to the Government of India, Ministry of Home Affairs, in his counter-affidavit dated September 2, 1967 also denies all knowledge of such a decision, in that it was stated in paragraph 7 of the counter-affidavit that the alleged decision of the State Government is "not known to the Government of India". It is, therefore, impossible to hold that the alleged decision of the State Government, stated to have been taken in July 1966 to retain the petitioner beyond the age of 55 years had been arrived at finally so as to give him a vested right to continue in service beyond the age of 55 years as claimed. In any case Rule 16(3) enables the appropriate consideration at any time as mentioned in Government of India Instruction No. 7.

22. In the result, therefore, the writ petition is dismissed, but there will be no order as to costs.

A. Misra, J.

23. I agree.