

(2022) 02 SHI CK 0049

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No.2711 Of 2017, 2208 Of 2020

Baldev And Others

APPELLANT

Vs

State Of Himachal Pradesh And Others

RESPONDENT

Date of Decision : 22-02-2022

Acts Referred:

Constitution Of India, 1950 — Article 309
Fundamental Rules, Vol I — Rule 56

Citation : (2022) 02 SHI CK 0049

Hon'ble Judges : Mohammad Rafiq, CJ;Ajay Mohan Goel, J;Jyotsna Rewal Dua, J

Bench : Full Bench

Advocate : Adarsh K. Vashista, A.K. Gupta, Abhyendra Gupta, Manik Sethi,
Ashok Sharma, Nand Lal Thakur

Final Decision : Allowed

Judgement

Mohammad Rafiq, CJ

1. A Division Bench of this Court observed 'apparent conflict' in the decisions rendered by different Benches of this Court regarding interpretation of Rule 56 of Fundamental Rules (in short 'F.R.') vis-à-vis notification dated 10.05.2001 amending this Fundamental Rule in the State of Himachal Pradesh as well as circular dated 22.02.2010 clarifying the amendment and its applicability. For authoritative pronouncement on the subject, the matter has been referred to the Larger Bench vide following order dated 28.12.2019:-

1. "Apparently there appears to be a conflict in the decisions rendered by different Benches of this Court with regard to the interpretation of FR 56.

2. In LPA No. 196 of 2010, titled Bar Chand vs. State of H.P. & others, decided on 21.10.2010, it was observed that all those who had been appointed even if on daily waged service prior to 10.05.2001, would be entitled to continue upto the age of 60 years.

3. However, the aforesaid judgment has later on been distinguished, as one

rendered per incuriam, since the position under the Rules was not considered in that case and this was so stated clearly by a Division Bench (Coram: The Hon'ble Mr. Justice Kurian Joseph, Chief Justice {as his Lordship then was} and The Hon'ble Mr. Justice Sanjay Karol, Judge, {as his Lordship then was}) in LPA No. 298 of 2011, titled State of H.P. & others vs. Chuni Lal Beldar, decided on 22.11.2011, relevant paras whereof reads as under:

"The State has come up in appeal against the judgment dated 24th February, 2011. The issue pertains to continuance of Class IV employee upto the age of 60 years. There is no dispute on the question of law that all those who have been appointed in regular service as Class IV employee prior to 10.5.2011, they are entitled to continue upto the age of 60 years. In LPA No. 196 of 2010 titled as Bar Chand vs. State of H.P. and others decided on 21st October, 2010, this Court had observed that all those, who have been appointed even if on daily waged service prior to 10.5.2001 would be entitled to continue upto the age of 60 years. That judgment has been later distinguished as one rendered per incuriam since the position under the Rules was not considered in that case. What was considered in that case was the Notification issued by the Government. As per the amendment in FR 56, only those who have been regularly appointed/regularized in service prior to 10.5.2001, they alone will be entitled to continue upto 60 years.

2. Learned Single Judge in the judgment under appeal has followed LPA No. 196 of 2010, which is no more a good law in view of the position under law that being a judgment rendered per incuriam it has no precedential value and it is no more binding. As far as the facts of the case of the petitioner are concerned, it is an admitted fact that he had entered regular service only in the year 2007, though he was on daily waged service prior to 2001. Only in case the writ petitioner entered regular service before 10.5.2001, he would be entitled to continue upto the age of 60 years."

4. Similar issue came up before one of us (Justice Tarlok Singh Chauhan, J.) in CWP No. 7140 of 2012, titled Gian Singh vs. State of H.P. and others, decided on 24.09.2014, wherein after placing reliance upon a decision rendered by a Coordinate Bench of this Court (Coram: The Hon'ble Mr. Justice Sanjay Karol, Judge, as his Lordship then was) in CWP No. 1837 of 2012, titled Tara Chand vs. State of H.P. & others, decided on 21.08.2014, the age of retirement was held to be 60 years.

5. The Judgment rendered in Gian Singh's case (supra) has been affirmed by learned Division Bench of this Court in LPA No.

194 of 2015, titled State of H.P. & others vs. Gian Singh, decided on 03.12.2015 and it has been held that daily wagers appointed prior to the amendments carried out in the FR 56, have right to continue till the age of 60 years and they would not retire at the age of 58 years.

6. This judgment apparently is in direct conflict with the judgment rendered by

another Division Bench of this Court in Chuni Lal Beldar's case (supra).

7. The issue in question is likely to come up repeatedly before this Court, therefore, it would be desirable that an authoritative pronouncement qua the issue in question be made by a Larger Bench of the Court.

8. Accordingly, the Registry is directed to place the matter before Hon'ble the Chief Justice for constitution of the Larger Bench to resolve the issue."

2. The matter revolves around F.R. 56 and its amendments carried out by the respondent-State.

2(i). F.R. 56 pertains to 'retirement'. F.R. 56(a), (b) and (e) as they existed in the year 1997, read as under:-

"F.R. 56. (a) Except as otherwise provided in this rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years.

(b) A workman who is governed by these rules shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years.

Note.- In this Clause, a workman means a highly skilled, skilled, semi-skilled, or unskilled artisan employed on a monthly rate of pay in an industrial or work-charged establishment.

(e) A Government servant in Class IV service or post shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years:

Provided that a Class IV employee of the Secretariat Security Force who initially enters service on or after the 15th day of September, 1969, shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years.

Provided further that a Group 'D' employee recruited as Pioneer in the General Reserve Engineer Force (GREF) on or after the 25th day of September, 1993, shall retire from service on the afternoon of the last day of the month in which he attains the age of 50 years:

Provided also that a Group 'D' employee recruited or redesignated as Pioneer in the General Reserve Engineer Force (GREF) prior to the 25th day of September, 1993 and having attained the age of 50 years shall retire from service on the afternoon of the last day of the month in which he is declared by the appropriate authority as medically unfit and/or physically incapacitated to satisfactorily discharge the duties assigned to him."

F.R. 56(e) was deleted by the Central Government vide notification dated 13.05.1998, whereby certain other amendments were also carried out in various clauses of F.R. 56.

2(ii). State of Himachal Pradesh however carried out its own amendment in F.R. 56 vide notification dated 30.07.1998. F.R. 56(a), (c), (d) and (e) were amended as under:-

“(a) Except as otherwise provided in this rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years.

(c) A workman referred to in Clause (b) may be granted extension of service, under very special circumstances to be recorded in writing, after he attains the age of sixty years with the sanction of the appropriate authority.

(d) A Government servant to whom Clause (a) applies, other than a workman referred to Clause (b), may be granted extension of service after he attains the age of fifty-eight years with the sanction of the appropriate authority if such extension is in the public interest and the grounds therefor are recorded in writing:

Provided that no extension under this clause shall be granted beyond the age of sixty years except in very special circumstances:

Provided further that the appropriate authority shall have the right to terminate the extension of service before the expiry of such extension by giving a notice in writing of not less than three months in the case of a permanent or a quasi-permanent Government servant, or, one month in the case of a temporary Government servant, or, pay and allowances in lieu of such notice.

(e) A Government servant in Class IV service or post shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years:

Provided that a Class IV employee of the Secretariat Security Force who initially enters service on or after the 15th day of September, 1969, shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years.”

2(iii). In exercise of powers conferred by proviso to Article 309 of the Constitution of India, F.R. 56(b) and (e) were further amended by the State of Himachal Pradesh on 10.05.2001 as under:-

“In exercise of the powers conferred by proviso to Article 309 of the Constitution of India, the Governor, Himachal Pradesh is pleased to make following rules further to amend the Fundamental rules, in their application to the State of Himachal Pradesh, namely:-

1. Short title and 1. (1) These Rules may be called commencement:- Fundamental (in their application to the State of Himachal Pradesh) Amendment Rules, 2001.

(2) These shall come into force from the date of publication in the Rajpatra

Himachal Pradesh.

Amendment of 2. In Rule-56 of the Fundamental Rules- rule-56- (a) After clause (b) the following proviso shall be inserted, namely:-

"Provided that a workman appointed on or after the date of publication of this notification in the Rajpatra Himachal Pradesh shall retire from service on the afternoon of the last day of the month in which he attains the age of 58 years."

(b) After proviso to clause (e) the following second proviso shall be inserted, namely:-

"Provided further that a Class-IV Government servant appointed on or after the date of publication of this notification in Rajpatra Himachal Pradesh shall retire from service on the afternoon of the last day of the month in which he attains the age of 58 years."

By order

Sd/-

F.C.-cum-Secretary (Finance) to the

Government of Himachal Pradesh"

The notification came into force from 11.05.2001, when it was published in the Gazette. As per the above amendment, a workman appointed after 10.05.2001 shall retire from service in the afternoon of the last day of the month in which he attains the age of 58 years. Also as per the amendment, a Class-IV government servant appointed on or after 10.05.2001 shall retire from service in the afternoon of the last day of the month in which he attains the age of 58 years.

2(iv). The effect of 2001 amendment was that all those workmen and Class-IV employees, who were appointed on and after 10.05.2001, were to retire on attaining the age of 58 years. Prior to this amendment, their age of superannuation in terms of notification dated 30.07.1998 was 60 years. A question arose as to what would be the age of superannuation of those, who were appointed/engaged on daily wage basis prior to 10.05.2001. A clarification was issued in this regard by the Department of Personnel on 22.02.2010 as under:-

"No.PER (AP)-C-B(2)-1/2006-Vol.-VIII

Government of Himachal Pradesh,

Department of Personnel (AP-III)

Dated Shimla-171002

22nd February, 2010.

From

The Secretary (Personnel) to the

Government of Himachal Pradesh.

To

1. All the F.C./Principal Secretaries/Secretaries to the Government of Himachal Pradesh, Shimla-171002.
2. All Divisional Commissioners in Himachal Pradesh.
3. All Heads of Departments in Himachal Pradesh.
4. All Deputy Commissioners in Himachal Pradesh.

Subject:- Age limit for disengagement of a daily wager.

Sir,

I am directed to say that consequent upon amendment in Rule-56 of the Fundamental Rules vide Government of Himachal Pradesh, Finance (Regulations) Department Notification No.Fin(C) A(3)- 3/98 dated 10th May, 2001, the issue of fixing the age of disengagement of a daily wager in all the departments had also been engaging the attention of the Government for sometime past. After careful consideration, the Government has now decided that the people who are engaged on daily wages they will also be governed by the same set of age restriction of disengagement as is applicable to regular Government employees. As such, the Class-IV daily wager engaged prior to 2001 i.e. when said notification of limiting the age of Class-IV Employees was reduced from 60 to 58 years will cease to be in the employment at the age of 60 years and no daily wager deployed after the reduction of the age limit in 2001 will be retained after attaining the age of 58 years. Similarly, all Class-III and above employees if working on daily wage will cease to be employed at the age of 58 years. There should be no ambiguity in this matter and all departments are to follow this age restriction.

2. The policy regarding regularization of daily waged persons remain as circulated vide this office letter No.PER (AP)-C-B(2)-1/2006-Vol.-VII (Loose-2), dated 28.8.2009.

3. The above instructions may kindly be brought to the notice of all concerned for strict compliance.

Yours faithfully,

Sd/-

Deputy Secretary (Personnel) to the Government of Himachal Pradesh"

(emphasis supplied)

The Government clarified that a Class-IV daily wager engaged prior to 2001 amendment will continue to serve till the age of 60 years, whereas a daily wager engaged after 2001, will cease to be in service on attaining the age of 58 years.

3. Certain decisions of this Court involving 2001 amendment and circular dated 22.02.2010 as indicated in the reference order dated 28.12.2019 are being noticed hereinafter:-

3(i). Bar Chand Versus State of H.P. & Ors.

(LPA No.196 of 2010, decided on 21.10.2010)

The issue before the Division Bench was whether the appellant engaged as a Daily Waged Beldar on 05.09.1994, i.e. prior to coming into force of 2001 amendment, was entitled to continue in service till the age of 60 years or not. The Court considered the circular dated 22.02.2010 and held that those daily waged Class-IV employees, who were engaged as such prior to 2001 amendment, can continue in service till they attain the age of 60 years. It was further held that the restriction of continuing in service upto the reduced age of 58 years will apply only to those who were engaged after 2001 amendment. Relevant para of the judgment reads as under:-

"3. The learned Single Judge took the view that since the petitioner has been regularized in service after 2001, he is entitled to continue only up to 58 years. But, as clearly stated in the circular, no distinction whatsoever is made as to regular service. In fact the expression used is daily wagger engaged prior to 2001. Admittedly, the petitioner was engaged as Beldar in 1994. The restriction up to the age of 58 years would apply only in the case of those engaged on daily wages after 2001 when the retirement age was reduced to 58 years. In view of the above circumstances, we set aside the judgment of the learned Single Judge, allow the writ petition with the direction that the petitioner shall be permitted to continue up to the age of 60 years. He shall be engaged forthwith with continuity of service at any rate within a period of one week from the date of production of copy of this judgment. It is made clear that the period during which the petitioner was kept out of service shall be treated as duty for all purposes except the actual wages. In other words, there shall be continuity of service for all purposes except the actual wages since the petitioner has not actually worked during the period."

3(ii). State of H.P. & others Versus Chuni Lal (LPA No.298 of 2011, decided on 22.11.2011)

The Division Bench in this case was considering the age upto which Class-IV employees could serve. The Bench held that:-

(a). All those who were appointed in regular service as Class-IV employees prior to 10.05.2001 can continue to serve till they attain the age of 60 years.

(b). Bar Chand Versus State of H.P. & others (LPA No.196 of 2010), decided on 21.10.2010, holding that daily wagers appointed prior to 10.05.2001 can continue till the age of 60 years, is per incurium as rule position was not considered in Bar Chand's case, supra. As per 10.05.2001 amendment, only regularly appointed/ regularized in service prior to 10.05.2001 can continue in

service upto the age of 60 years.

(c). Writ petitioner therein engaged on daily wage basis prior to 10.05.2001 was made regular in the year 2007. Since he was regularized after

10.05.2001, therefore, his age of superannuation will be 58 years and not 60 years. The appeal filed by the State was accordingly allowed.

The judgment reads as under:-

"The State has come up in appeal against the judgment dated 24thFebruary, 2011. The issue pertains to continuance of Class IV employee upto the age of 60 years. There is no dispute on the question of law that all those who have been appointed in regular service as Class IV employee prior to 10.5.2011, they are entitled to continue upto the age of 60 years. In LPA No.196 of 2010 titled as Bar Chand vs. State of H.P. and others decided on 21stOctober, 2010, this Court had observed that all those, who have been appointed even if on daily waged service prior to 10.5.2001 would be entitled to continue upto the age of 60 years. That judgment has been later distinguished as one rendered per incurium since the position under the Rules was not considered in that case. What was considered in that case was the Notification issued by the Government. As per the amendment in FR 56, only those who have been regularly appointed/regularized in service prior to 10.5.2001, they alone will be entitled to continue upto 60 years.

2. Learned Single Judge in the judgment under appeal has followed LPA No. 196 of 2010, which is no more a good law in view of the position under law that being a judgment rendered per incurium it has no precedential value and it is no more binding. As far as the facts of the case of the petitioner are concerned, it is an admitted fact that he had entered regular service only in the year 2007, though he was on daily waged service prior to 2001. Only in case the writ petitioner entered regular service before 10.5.2001, he would be entitled to continue upto the age of 60 years.

3. In that view of the matter, the appeal is allowed, the judgment under appeal is set aside and the writ petition is dismissed."

3(iii). Tara Chand Versus State of H.P. & others (CWP No.1837 of 2012, decided on21.08.2014):-

The writ petitioner therein was engaged as a Class-IV daily wager in the year 1991 and regularized w.e.f. 01.09.2006. On 26.09.2011, the respondents granted him work charge status retrospectively w.e.f. 01.01.2001.

Learned Single Judge noticed the 2001 amendment to F.R. 56, the clarification dated 22.02.2010, the judgment passed in Bar Chand's case supra and observed that the petitioner was regularized prior to 10.05.2001, therefore, was entitled to continue in service till he attained the age of 60 years. Since the petitioner had crossed the age of superannuation, i.e. 60 years, at the time of decision of his writ petition, the respondents were directed to give him all monetary benefits for

the period in question. Relevant paras from the judgment are as under:-

"2. Petitioner was engaged as a daily wage worker in the year 1991. His services were regularized w.e.f. 01.09.2006, by the Divisional Forest Officer, Wildlife Division Kullu, District Kullu, H.P., vide office order dated 11.09.2006. Respondents did not consider the petitioner's case for regularization in the light of decision rendered by the apex Court in Mool Raj Upadhyaya Versus State of H.P., 1994, Supp. (2) SCC 316 as also this Court in Gauri Dutt and others Versus State of H.P., Latest HLJ 2008 (HP) 366 as such vide judgment dated 03.05.2011 rendered in CWP No. 2360 of 2011, titled as Tara Chand Versus State of H.P. and others, State was directed to consider the petitioner's case, in accordance with law. Pursuant thereto, vide order dated 26.09.2011 (Annexure P-1) now petitioner's case stands considered and respondents have granted him work charge status with effect from 01.01.2001.

3. In the light of such development, petitioner is legally entitled to continue to serve the State up to the age of 60 years. Policy so communicated vide order dated 22.02.2010 (Annexure P-7), which reads as under is evidently clear and squarely applicable.....

4. The question of applicability of Fundamental Rules, 2001, so amended on 10.05.2001 (Annexure P-3) would not arise. It applies only to those employees who stand appointed on or after the date of amendment of Rules, which was so done in the year 2001. In the instant case, work charge status stands accorded to the petitioner with effect from 01.01.2001, date prior to the amendment of Rules. In fact, the issue is no longer res integra and squarely covered by the decision rendered by this Court in LPA No.196 of 2010, titled as Bar Chand Versus State of H.P. & Others.....

5. As such, present petition as prayed is allowed. Petition was filed in the year 2012. Petitioner who has now crossed the age of superannuation i.e. 60 years hence shall be deemed to be in service. Consequently respondents are directed to take all consequential actions, including disbursement of monetary benefits, in accordance with law, within a period of three months from the date of production of copy of this order, failing which, thereafter, petitioner shall be entitled to interest thereupon @ 9% per annum. Needless to add, petitioner shall be entitled to all consequential benefits of pension etc., if otherwise permissible, in accordance with law."

Though the above judgment did not notice the judgment in Chuni Lal's case, supra, however, the fact remains that the petitioner in Tara Chand's case was regularized prior to 10.05.2001. Therefore, even going by the ratio in Chuni Lal's case, supra, the petitioner in Tara Chand's case having been engaged and regularized as Class-IV employee prior to 2001 amendment would have continued to serve till the age of 60 years.

3(iv). Gian Singh Versus State of H.P. and others (CWP No.7140 of 2012, decided on 24.9.2014):-

The petitioner therein was appointed as a Daily Wager on 01.09.1992. Learned Single Judge held him entitled to be regularized w.e.f. 01.01.2000, i.e. on completion of eight years of continuous service. On that basis, the petitioner was not only engaged prior to 10.05.2001, but he was also deemed to have been regularized prior to 10.05.2001, therefore, following the judgment rendered in Tara Chand's case supra, he was held entitled to continue in service till the age of 60 years. The petitioner therein had also crossed the age of 60 years at the time of decision of his writ petition, therefore, the respondents were directed to disburse monetary benefits to him for the period in question. This judgment was affirmed in LPA No.194 of 2015, decided on 03.12.2015.

4. We have heard learned counsel for the parties at length. According to the learned counsel for the writ petitioners, the law laid down in Bar Chand's case is the correct interpretation of applicable rules/notifications and circulars, whereas, according to the learned Advocate General, it is the judgment rendered in Chuni Lal's case, which properly interprets the applicable rules/ amendments/circulars.

We hereinafter notice the sum and substance of the above decisions mentioned in the reference order dated 28.12.2019:-

4(a). Bar Chand's case:-

The Division Bench held that the circular dated 22.02.2010 did not differentiate between daily waged and regular Class-IV service. Those daily wagers, who were engaged prior to 10.05.2001, were held entitled to serve till the age of 60 years and those daily wagers, who were engaged after 10.05.2001, were held entitled to work till the age of 58 years. The writ petitioner (therein) engaged prior to 10.05.2001 and regularized after 10.05.2001 was held entitled to serve till the age of 60 years.

4(b). Chuni Lal's case:-

The judgment in Bar Chand's case, supra, was held per incurium since it did not consider the rule position. It was held that in accordance with the amendment carried out by the respondents-State on 10.05.2001 in F.R. 56, only those Class-IV employees, who were regularly appointed/regularized in service prior to 10.05.2001, could continue to serve till the age of 60 years. While allowing State's appeal, it was held that the writ petitioner though was engaged on daily wage basis prior to 10.05.2001, but was regularized after this date, could only continue to serve upto the age of 58 years.

4(c). Tara Chand/Gian Singh's case:-

The judgment in Tara Chand's case followed the decision in Bar Chand's case and did not take into consideration the judgment rendered in Chuni Lal's case. However, even if the judgment in Chuni Lal's case had been considered in Tara Chand's case, then also the outcome would not have been different since in Tara Chand's case, the petitioner was engaged and regularized prior to 10.05.2001. Similar was the position in Gian Singh's case, wherein the petitioner was held

entitled to be regularized w.e.f. 01.01.2000, i.e. prior to 10.05.2001. The judgment passed by Id. Single judge in Gian Singh's case was upheld by the Ld. Division Bench in LPA no. 194/2015. While affirming the judgment, Id. Division Bench held that the writ petitioner was entitled to be regularised prior to 10.5.2001 therefore fetters of age restriction placed under 2001 amendment were not applicable to him.

5. Notifications/Clarification with respect to F.R. 56(e) and their effect:-

5(i). Vide notification dated 30.07.1998, State of Himachal Pradesh amended F.R. 56(e) as under:-

"(e) A Government servant in Class IV service or post shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years:

Provided that a Class IV employee of the Secretariat security force who initially enters service on or after 15th day of September, 1969 shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years."

As per F.R. 56(e) as amended by the State on 30.07.1998, a government servant in Class-IV 'service or post' was to retire from service on attaining the age of 60 years. The word used in F.R. 56(e) was 'service or post'.

5(ii). On 10.05.2001, further amendment was carried out in F.R. 56(e) by adding second proviso as under:-

"Provided further that a Class-IV Government servant appointed on or after the date of publication of this notification in Rajpatra Himachal Pradesh shall retire from service on the afternoon of the last day of the month in which he attains the age of 58 years."

The 2001 amendment came into force from the date of publication in the Gazette, i.e. on 11.05.2001. The amendment was to the effect that all those Class-IV government servants appointed on or after 10.05.2001 could continue to serve only upto 58 years of age. The amendment used the word 'appointed' and not 'engaged'.

The amendment though leads to a definite conclusion that those who were appointed/engaged on daily wage basis in Class-IV services and regularized prior to 10.05.2001 could continue to serve upto the age of 60 years, however, the position was not clear in the amendment qua those employees, who were engaged on daily wage basis in Class- IV services prior to 10.05.2001 and were continuing as such on 10.05.2001 and regularized after 10.05.2001.

5(iii). In order to clarify the situation, the Government issued a circular on 22.02.2010 (extracted earlier). In terms of this circular, the amendment notification dated 10.05.2001 was made applicable to the Class-IV daily wagers as well. Those daily wagers, who were engaged prior to 10.05.2001, were to

continue till the age of 60 years. However, such of the daily wagers, who were engaged after 10.05.2001, could serve till the age of 58 years.

5(iv). A vacuum still remained in the notification/clarification about the superannuation age of daily wager engaged prior to 10.05.2001, but regularized after 10.05.2001. To meet this situation, another notification was issued on 21.02.2018, amending F.R. 56(e) yet again. This notification has not been noticed in the reference order dated 28.12.2019. Relevant portion of the notification reads as under:-

"Short title and commencement:-

(1) These rules may be called Fundamental (in their application to the State of Himachal Pradesh) First Amendment, Rules, 2018.

(2) These rules shall come into force from the date of publication in the Rajpatra (eGazette), Himachal Pradesh.

Amendment of rule-56

In rule-56 of the Fundamental Rules, after the second proviso to clause (e), the following third proviso shall be inserted, namely:-

"Provided further that a Class-IV Government servant appointed on parttime/daily wages basis prior to 10-05- 2001 and regularized on or after 10-05- 2001 shall retire from service on the afternoon of the last day of the month in which he attains the age of 60 years."

The above amendment inserting third proviso in F.R. 56(e) came into force from the date of publication in the Gazette, i.e. on 22.02.2018. The gist of the amendment was that with effect from 21.02.2018, Class-IV government servants appointed on part-time/daily wage basis prior to 10.05.2001 and regularized on or after 10.05.2001, were to retire on attaining the age of 60 years. It was the date of first appointment/engagement, which was made the basis for their continuation in service till the age of 60 years and not the date of regularization. A corrigendum has also been issued by the State on 10.06.2019 to the effect that for the word 'appointed' used in the notification dated 21.02.2018, the word 'engaged' shall be substituted.

F.R. 56(e) as it stood on 22.02.2018 (with corrigendum) now reads as under:-

"(e) A Government servant in Class IV service or post shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years:

Provided that a Class IV employee of the Secretariat Security Force who initially enters service on or after the 15th day of September, 1969, shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years.

Provided further that a Class-IV Government servant appointed on or after 10.05.2001 shall retire from service on the afternoon of the last day of the month in which he attains the age of 58 years.(2001 amendment)

Provided further that with effect from 21.02.2018 a Class-IV Government servant engaged on part- time/daily wages basis prior to 10-05-2001 and regularized on or after 10-05-2001 shall retire from service on the afternoon of the last day of the month in which he attains the age of 60 years.(2018 amendment)”

Answering the Reference:-

6(i). Conflict in the Judgments;- There appears to be a very thin difference in the line of approach taken in the judgments referred to in the reference order dated 28.12.2019. The view taken in Bar Chand’s case was held to be per incurium in the judgment delivered in Chuni Lal’s case. A different approach was adopted by the Division Bench in Chuni Lal’s case, which held that both engagement and regularization of a Class-IV employee had to be prior to 10.05.2001 to enable him to continue to serve till the age of 60 years, whereas, in Bar Chand’s case, relying on the circular dated 22.02.2010, supra, it was held that if engagement on daily wage basis was prior to 10.05.2001, then, such an employee could continue to serve till he attained the age of 60 years, irrespective of date of his regularization. The judgment in Chuni Lal’s case was, however, not brought to the notice of the learned Single Judge in Tara Chand’s case. In Tara Chand’s case, learned Single Judge followed the judgment in Bar Chand’s case. Similarly, in Gian Singh’s case, learned Single Judge followed the judgment delivered in Tara Chand’s case. The judgment in Chuni Lal’s case was not noticed by the learned Single Judges either in Tara Chand’s case or in Gian Singh’s case.

6(ii). Age of Continuance in Service:-

6(ii)(a). In terms of 2001 amendment of F.R. 56(e), such of the Class-IV employees, who were engaged on daily wage basis prior to 10.05.2001 and regularized also prior to 10.05.2001, are entitled to continue to serve till the age of 60 years. This position is acknowledged in the judgments rendered in Bar Chand as well as Chuni Lal’s cases, supra.

6(ii)(b). Such of the Class-IV employees, who were engaged on daily wage basis prior to 10.05.2001 and regularized after 10.05.2001 were not given the benefit of continuation till the age of 60 years in Chuni Lal’s case. The judgment in Chuni Lal’s case was based upon the interpretation of F.R. 56(e), as amended by the respondents-State vide notification dated 10.05.2001.

6(ii)(c). In terms of the State notification dated 21.02.2018 carrying out further amendment in F.R. 56(e), with effect from 21.02.2018, all daily wagers appointed prior to 10.05.2001 and regularized on or after 10.05.2001 are to continue to serve till the age of 60 years. This amendment is post the decisions rendered in Bar Chand and Chuni Lal’s cases, supra and has not been noticed in the reference order dated 28.12.2019. While affirming the judgment of Id. Single

Judge in Gian Singh's case, Id. Division Bench though did not notice Chuni Lal's judgment but held that writ petitioner's date of regularisation was prior to 10.5.2001 therefore reduced age of 58 years introduced in 2001 amendment would not be applicable to him.

7. There is now no confusion regarding employees falling in para 6(ii)(a) above. These employees can continue to serve till they attain the age of 60 years. However, an anomalous situation has developed amongst the employees falling in para 6(ii)(b) & 6(ii)(c). The employees falling in above para 6(ii)(b) and 6(ii)(c) for all practical purposes belong to the same category and are similarly situated. Both sets of employees were engaged on daily wage basis prior to 10.05.2001 and regularized after 10.05.2001. Such of the employees engaged on daily wage basis prior to 10. 05.2001 and regularized after 10.05.2001, if were in service on 21.02.2018, will continue to serve till they attain the age of 60 years. On the other hand, such of the employees, who were engaged on daily wage basis prior to 10. 05.2001 and regularized after 10.05.2001, but have retired before the issuance of notification dated 21.02.2018, will not get the benefit of notification dated 21.02.2018. This to our mind is wholly discriminatory. Similarly situated employees are being treated differently. The employees, who were engaged on daily wage basis prior to 10.05.2001 and regularized after 10.05.2001, constitute one homogenous class. Differential treatment to the employees falling in same homogenous class is impermissible. In fact, amendment carried out in F.R. 56(e) on 21.02.2018 suggests that the date of regularization will have no impact upon the superannuation age. Date of engagement is the determinative factor. If a daily wager is engaged prior to 10.05.2021, then he is entitled to serve till 60 years of age irrespective of date of his regularization. This was held so in Bar Chand's case, decided on 21.10.2010. However, at the time of decision in Bar Chand's case, the amendment dated 21.02.2018 had not been carried out in F.R. 56(e). Therefore, though later judgment in Chuni Lal's case dated 22.11.2011, holding the decision in Bar Chand's case as per incuriam cannot be faulted as it was based upon strict interpretation of F.R. 56(e) as amended by the State at that time. However, in view of subsequent amendment of F.R. 56(e) on 21.02.2018 in the interregnum, situation has undergone further change. Reference made to the larger Bench is not only to decide about the inconsistency in the decisions referred therein, but also to put at rest related issues coming or likely to arise before different benches. Therefore, we hold that:-

(i). There is an apparent inconsistency or conflict between the decisions referred to in the reference order dated 28.12.2019, which lies in a very narrow compass, as noticed in para 6(i) above. In Chuni Lal's case, the decision rendered in Bar Chand's case was held to be per incuriam. The decision in Chuni Lal's case was based upon interpretation of F.R. 56(e) as it existed in the State at that time. But the judgment delivered in Tara Chand's case did not notice the decision in Chuni Lal's case. The judgment in Gian Singh's case in respect of continuation in service was based upon the verdict in Tara Chand's case. In both these

judgments, learned Single Judges did not notice the judgment delivered in Chuni Lal's case. In Letters patent appeal, the Division Bench while affirming the judgment passed by the Id. Single Judge in Gian Singh's case though did not notice the judgment rendered in Chuni Lal's case however the amendment dated 10.5.2001 reducing the superannuation age from 60 to 58 years was held to be not applicable to the writ petitioner, who was held entitled for regularisation prior to 10.5.2001.

(ii). Inconsistency between Bar Chand and Chuni Lal now stands, not just resolved, but rather dissolved, in view of notification dated 21.02.2018 amending F.R. 56(e), issued by the State, which has now reinforced and reiterated what was held in Bar Chand's case, i.e. date of regularization of a class IV daily wager whether prior or after 10.05.2001, will make no difference to the age of his continuing in service. It is the date of engagement, which is the decisive factor. If date of engagement/appointment is prior to 10.05.2001, the Class-IV employee will continue to serve till 60 years of age. In case, it is later than 10.05.2001, then restriction in age upto 58 years will apply.

(iii). There cannot be any discrimination amongst similarly situated Class-IV employees belonging to one homogenous class. Therefore the retirement date, of such of those employees, who had been engaged on daily wage basis prior to 10.05.2001, but regularized after 10.05.2001 and have actually been retired prior to the issuance of notification dated 21.02.2018 at the age of 58 years, shall be deemed to be the date when they otherwise attained the age of 60 years. Since these employees have not actually worked beyond the age of 58 years, therefore, they will not be entitled to the actual monetary benefits of wages/salary etc. for the period of service from the date of their actual retirement till deemed dates of their retirement. However, they will be entitled to notional fixation of their pay for the period in question for working out their payable pension and payment of consequential arrears of pension accordingly.

Reference is accordingly answered. The writ petitions be now placed appropriately before the respective Benches.