
(2003) 11 AHC CK 0137

In the Allahabad High Court

Case No : C.M.W.P. No's. 25062 and 48494 of 2002

Panna Lal Singh and Another

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 12-11-2003

Acts Referred:

Constitution of India, 1950 — Article 14, 309

Citation : (2004) 1 AWC 544

Hon'ble Judges : R.K. Agrawal, J

Bench : Single Bench

Advocate : Yogesh Agarwal and Sanjay Srivastava, for the Appellant; Sudhir Agrawal, Addl. A.G. and S.K. Chand, S.C., for the Respondent

Final Decision : Dismissed

Judgement

R.K. Agrawal, J.—Both these writ petitions have been filed seeking a writ of mandamus commanding the respondents to treat the age of superannuation of the petitioners to be 60 years and permit them to continue in service upto 30th June, 2004. They also seek quashing of the second proviso to Fundamental Rule 56 (a) of Part II, Volume II of the Uttar Pradesh Fundamental Rules (hereinafter referred to as "the Fundamental Rules"), as substituted by the Uttar Pradesh Fundamental (Amendment) Rules, 2002, (hereinafter referred to as "the Amendment Rules"), vide notification dated 27th June, 2002, issued by the State Government.

2. While Civil Misc. Writ Petition No. 25062 of 2002, had been filed by two petitioners namely, Panna Lal Singh and Bacchan Lal Yadav, subsequently, Panna Lal Singh withdrew from the petition and, therefore, it has been pressed on behalf of Bacchan Lal Yadav only.

3. Since both the writ petitions raise common question of law, they have been heard together and are being decided by a common judgment.

4. Briefly stated, the facts giving rise to Civil Misc. Writ Petition No. 25062 of

2002 are as follows :

The petitioner Bacchan Lal Yadav was initially appointed on 10th August, 1966 as C.T. grade teacher in the Government College, Hardoi. He was promoted as L.T. grade teacher and was working in the Government Intermediate College, Allahabad. His date of birth is 1st September, 1943. He attained the age of 58 years on 31st August, 2001. Under the Government Order dated 21st March, 1984, the State Government had provided that those teachers including the Principals and Headmasters, who are working in the Government Colleges and Degree Colleges, if they attain the age of 58 years during the session after 1st July, and before 30th June, they will be granted extension of service on fulfillment of certain conditions till the end of the session, i.e., 30th June. In terms of the aforesaid Government Order, Bacchan Lal Yadav was allowed to continue till 30th June, 2002. In the meantime, the State Government took a decision to increase the age of retirement of all the Government employees from 58 years to 60 years. A notification was issued on 28th November, 2001, to that effect. It was also provided in the said notification that necessary steps for amendment of the Fundamental Rule 56 in the Financial Hand Book, Volume II, Part II, shall be taken by the Finance Department. The Governor of Uttar Pradesh framed the U.P. Fundamental (Amendment) Rules, 2002, which was notified by the notification dated 27th June, 2002, amending the Fundamental Rule 56. It was made effective from 28th November, 2001. The amended Fundamental Rule 56 (a) provided that the Government servant shall retire on attaining the age of 60 years on the last day of month in which he completes 60 years. However, it was further provided that, if any Government servant who, on 1st November, 2001, or before that day, had attained the age of 58 years and is on extension of service, he will retire on the expiry of the period of extension. Consequently, the petitioner had retired on 30th June, 2002.

5. In Civil Misc. Writ Petition No. 48494 of 2002, the petitioner, Smt. Usha Saxena was working on the post of the Principal in Pandit Deen Dayal Upadhyaya Rajkiya Kanya Uchchar Madhyamtk Vidyalaya, Maharajganj, district Sant Ravi Das Nagar. Her date of birth is 25th September, 1943. She attained the age of 58 years on 25th September, 2001. In terms of the Government Order dated 21st March, 1984, she was granted extension in service till 30th June, 2002. She claims that in view of the increase in the age of retirement from 58 years to 60 years, she is entitled to continue till 30th June, 2004.

6. In both these writ petitions, the validity of the second proviso to the Fundamental Rules 56 (a), as amended by the Amendment Rules, is under challenge.

7. I have heard Sri Yogesh Agrawal, learned Senior Counsel, assisted by Sri Sanjay Srivastava on behalf of the petitioners, and Sri Sudhir Agrawal, learned Additional Advocate General, assisted by Sri K. K. Chand, learned standing counsel, on behalf of the respondents.

8. Sri Yogesh Agrawal, the learned counsel for the petitioners, submitted that the age of retirement/superannuation has to be fixed taking into consideration certain criteria as enunciated by the Hon'ble Supreme Court in various decisions. According to him, on account of manifold development in the field of science, technology, health, general awareness and mental development, the age of retirement fixed as 58 years, had to be increased. He submitted that the increase in the age of retirement to 60 years should have been applied to all the Government employees who were in service at the time when the notification dated 28th November, 2001, was issued by the State Government. According to him, in the notification dated 28th November, 2001, the State Government has increased the age of superannuation from 58 years to 60 years for all the Government servants and, therefore, the second proviso inserted by the Amendment Rules in the Fundamental Rules 56 (a) denying the benefit of increase in the age of retirement to those Government employees who are on extension of service, as on 1st November, 2001, is wholly arbitrary, discriminatory and is liable to be set aside. According to him, the cut off date fixed in the second proviso, i.e., 1st November, 2001, as also enforcing the amendment with effect from 28th November, 2001, is wholly arbitrary. He relied upon the following decisions :

(i) Moti Ram Deka v. General Manager, North East Frontier Railway, AIR 1964 SC 600 ;

(ii) Air India v. Nargesh Meerza and Ors., AIR 1981 SC 1829 ; and

(iii) Workmen of the Bharat Petroleum Corporation Ltd., Bombay v. Bharat Petroleum Corporation Ltd, and Anr. AIR 1958 SC 356.

for the proposition that uniform retirement age should be made applicable to all the Government employees who are in service.

9. With regard to the submission that the cut off date fixed is arbitrary, he relied upon the following decisions :

(i) State of Rajasthan Vs. Gurcharan Singh Grewal and others, ;

(ii) Udai Pratap Singh v. State of Bihar. 1994 (3) SCC 451 ;

(iii) Dhan Raj and Others Vs. State of Jammu & Kashmir and Others, ;

(iv) Subrata Sen and Others Vs. Union of India and Others,

(v) Braithwaite Officers Association v. Union of India and Ors., 2002 (3) Education and Service Cases 230 ; and

(vi) D.B. Kauser Vs. Union of India (UOI) and Another,

10. He further submitted that the second proviso has no nexus or relation with the object of increasing the age of superannuation from 58 years to 60 years and being arbitrary, should be quashed.

11. The learned Additional Advocate General submitted that prior to its amendment, Fundamental Rule 56 (a) of the Fundamental Rules provided that every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of 58 years. However, he may be retained in service after the date of compulsory retirement with the sanction of the Government on public grounds which must be recorded in writing but he must not be retained after the age of 60 years except in very special circumstances. According to him the State Government, under the unamended Fundamental Rule 56 (a) has been empowered to retain a Government servant in service even after the date of compulsory retirement, i.e., after attaining the age of 58 years by the said Government servant on public grounds. The State Government instead of issuing individual orders for retaining the Teachers, Headmasters and Principals working in the Government educational institutions, by a general order issued on 21st March, 1984, directed for retaining such persons, who have retired on or after 1st July but before 30th June, till 30th June. He, thus, submitted that the age of retirement had not been increased in such cases but only the teachers have been retained in service. He further submitted that the State Government had treated such extension of service which was given under unamended Fundamental Rule 56 (a) to be counted for the purposes of calculation of pension, increments, etc. under Regulations 360, 361A and 520 of the Civil Service Regulations, as applicable in the State of U. P. Thus, no advantage or benefit can be drawn by the petitioners merely on the ground that the period during which the petitioners were in service on account of extension is to be counted for the purposes of pension, seniority and increments.

12. He further submitted that the State Government took a policy decision to increase the age of retirement from 58 years to 60 years and vide the notification issued on 28th November, 2001, it had increased the age of retirement to 60 years. The notification itself provided that the necessary amendments in the Fundamental Rule 56 (a) shall be done by the Finance Department. Thereafter, the Governor of Uttar Pradesh framed a rule, known as the U. P. Fundamental (Amendment) Rules, 2002, which was notified on 27th June, 2002 in the Gazette. It was made effective from 28th November, 2001. By means of the second proviso, the Governor excluded the applicability of increase of retirement age to such Government servant, who had already attained the age of 58 years, i.e., the previous age of retirement, on or before 1st November, 2001 and had been on extension in service. He submitted that if the notification dated 28th November, 2001 had not been issued by the State Government increasing the age of retirement from 58 years to 60 years then in that event, the petitioner's services would have come to an end on 30th June, 2002, in terms of the Government order dated 21st March, 1984. Thus, the State Government was fully justified in not giving the benefit of the increase in the age of retirement to such Government servant, who had already retired before 1st November, 2001, and were on extension in service. He submitted that the cut off date fixed is to achieve the aforesaid purpose and, therefore, cannot be said to

be arbitrary or discriminatory. He relied upon the following decisions :

(i) Dr. (Mrs.) Sushma Sharma etc. v. State of Rajasthan and Ors., AIR 1985 SC 1367 ;

(ii) State of Bihar v. Ramjee Prasad and Ors., AIR 1990 SC 1300 ;

(iii) Union of India and Ors. v. K.G. Radhakrishana Panickar and Ors., (1998) 5 SCC 111 ; and

(iv) Manju Bala v. Union of India and Anr., 2000 (2) ESC 889 (Del).

13. He also relied upon two unreported decisions of this Court in the case of Shiva Ji Singh and Ors. v. High Court of Judicature at Allahabad and Anr., Civil Misc. Writ Petition No. 52755 of 2002, decided on 8th August, 2003 and in the case of Anand Narain Singh v. U. P. Secondary Education Services and Selection Board, Allahabad and Ors., Special Appeal No. 159 of 2001, decided on 29th September, 2003.

14. According to the learned Additional Advocate General, the decisions cited by Sri Yogesh Agrawal would not be applicable in the present cases inasmuch as in those cases a benefit which was already in existence and was available to the beneficiaries, was only modified and given to the beneficiaries, who had retired on or a particular date. Here, in the present case, a new right is being created, i.e., the increase in age of retirement and, therefore, the principle laid down by the Hon''ble Supreme Court in the case of D.S. Nakara and subsequent decisions would not be applicable.

15. Sri Yogesh Agrawal, the learned counsel for the petitioners, in reply submitted that there cannot be any distinction in extension of service and increase in the age of retirement as in both the cases the Government servant is in actual service with the State Government. He, thus, submitted that the classification is wholly arbitrary. He further submitted that the rights which have accrued to the petitioners vide notification dated 28th November, 2001, cannot be taken away by any Rules framed under Article 309 of the Constitution of India and a right to continue till 60 years, which accrued to the petitioners by virtue of the notification dated 28th November, 2001, and was being taken away by means of the amendment in the Fundamental Rule 56 (a).

16. In the case of Moti Ram Deka (supra), the Hon''ble Supreme Court has held that the rules of superannuation which are prescribed in respect of public service in all modern States are based on consideration of life expectation, mental capacity of the civil servants having regard to the climatic conditions under which they work, and the nature of work they do. The Hon''ble Supreme Court has held as follows :

"In regard to the age of superannuation, it may be said prima facie that rules of superannuation which are prescribed in respect of public service in all modern States are based on consideration of life expectation, mental capacity of the civil

servants having regard to the climatic conditions under which they work, and the nature of work they do. They are not fixed on any ad hoc basis and do not involve the exercise of any discretion. They apply uniformly to all public servants falling under the category in respect of which they are framed."

17. It further observed that a person who substantively holds a permanent post has a right to continue in service subject of course to the rule of superannuation and the rules as to compulsory retirement.

18. In the case of *Air India (supra)*, the Hon''ble Supreme Court has held that in fixing the age of retirement no hard and fast rule can be laid down. The decision on the question would always depend upon an appropriate assessment of the relevant factors and may conceivably vary from case to case. The Hon''ble Supreme Court further held that facts to be considered must be relevant and bear a close nexus to the nature of the organisation and the duties of the employees. Where the authorities concerned take into account the factors or circumstances which are inherently irrational or illogical or tainted, the decision fixing the age of retirement is open to serious scrutiny.

19. In the case of *The Workmen of the Bharat Petroleum Corporation Ltd., Bombay (supra)*, the Hon''ble Supreme Court has held that another factor which appears to be receiving importance in certain circles is the rising rate of unemployment amongst the younger generation. The effect of increasing or decreasing the age of retirement on the date of employment in the younger generation and on the household economics of the older generation is a matter for deep study and investigation. Because of better conditions of living and availability of medical and health facilities, the average span of life was increased and a person between 55 and 60 years of age is alert, active, hale and healthy and may be said to be at the prime of his life. That is also the time when he has to meet several financial commitments and demands. To retire him at that stage may mean virtually to throw him to the wolves. Can the nation afford to have -on its hand several families unable to fully support themselves? Can the nation afford to throw away the knowledge and experience of these people by retiring them when they are still capable of turning out some years of good work? On the other hand, can the nation afford to have an army of unemployed young men, necessarily leading bitter and frustrated lives? Can the nation afford to allow them to fritter away their energies in unhealthy pursuits to which they may be tempted? But then arises the broader question, is the retirement of men of experience at an age when they are still useful to the community the proper solution to the problem of unemployment among the young? is it not an unimaginative solution? is not the solution the creation of greater employment opportunities, by increasing production and its modes? All these are questions which are difficult to answer though everyone has an opinion, often ad hoc. These questions require deep investigation, research and - study. The Hon''ble Supreme Court after considering the service conditions of the Clerical Staff of the Refinery Division and the retirement age and the service conditions of the

Clerical Staff of the Marketing Division of the Bharat Petroleum Corporation Limited, came to the conclusion that since there was no pension scheme in the case of the Clerical Staff of the Refinery Division, while there was such a claim in respect of the Market Division, the retirement age of the Clerical Staff of the Refinery Division should be fixed at 60 years.

20. It appears that the State Government had adopted the recommendations made by the Fifth Pay Commission constituted by the Central Government where it had recommended for increasing the age of retirement of the Government employees from 58 years to 60 years. The Fifth Pay Commission considered all the relevant materials and aspects while recommending the increase in the age of retirement.

21. Under the unamended Fundamental Rule 56 (a) of the Fundamental Rules, the age of retirement of every Government servant has been fixed at 58 years. He was to retire from service on the afternoon of the last day of the month in which he attains the age of 58 years. If he was retained in service, a specific order from the State Government was required. The age of retirement of 58 years did not get extended. It was only retention in service and the period of retention in service was to be counted towards pension, gratuity, increments, seniority etc. in view of the specific orders issued by the State Government under the Civil Service Regulations, adopted in State of U. P. No benefit can be derived from the fact that the period of extension in service is counted for calculation of pension, the increments are given or the seniority is counted. Fundamental Rule 56 (a) of the Fundamental Rules, as it stood, prior to its amendment is reproduced below :

"56. (a) Except as otherwise provided in this Rule, every Government servant other than a Government servant in inferior service shall retire from service on the afternoon of the last day of the month in which he attains the age of fiftyeight years. He may be retained in service after the date of compulsory retirement with the sanction of the Government on public grounds which must be recorded in writing, but he must not be retained after the age of 60 years except in very special circumstances."

22. The aforesaid Rule was amended by the o Uttar Pradesh Fundamental (Amendment) Rules, 2002, and the following was substituted :

"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 sixty years :

Provided that a Government servant, whose date of birth is the first day of a month, shall retire from service on the afternoon of the last day of the preceding month on attaining the age of sixty years :

Provided further that a Government servant, who has attained the age of fifty-eight years on or before the first day of November, 2001, and is on extension in

service, shall retire from service on expiry of his extended period of service :

(a-1) No Government servant shall be granted extension in service beyond the age of retirement of sixty years :

Provided that a Government servant dealing with budget work or working as a full time member of a committee, which is to be wound up within a short period of time may be granted, by the Government, extension of service for a period not exceeding three months in public interest :

Provided further that the Government 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, of one month in the case of a temporary Government servant, or pay and allowances in lieu of such notice."

It was enforced from 28th November, 2001. From a reading of the amended Fundamental Rule 56 (a), it is seen that a proviso has been added according to which a Government servant, who has attained the age of 58 years on or before 1st November, 2001, and is on extension in service, was made to retire from service on expiry of his extended period of service, which means that he would not get the benefit of increase in the age of retirement from 58 years to 60 years. This was necessary as the State Government had issued the notification on 28th November, 2001, increasing the age of retirement from 58 years to 60 years, therefore, the Fundamental Rule 56 (a) has been amended with effect from 28th November, 2001. The retrospective amendment of the Fundamental Rule 56 (a) has not been challenged. Only the validity of the second proviso is under challenge.

23. So far as the question of hostile discrimination is concerned, it may be mentioned here that the persons who had already retired on or before 1st November, 2001, on attaining the age of 58 years in terms of the unamended Fundamental Rule 56 (a) and are on extension in service, constitute a separate class. If they were not on extension of service, they would have retired from the Government service.

24. So far as the question as to whether these persons should also be entitled to the benefit of increase in the age of retirement, it is solely a policy decision to be taken by the State Government. If the State Government decides that those Government servants, who had already retired and are on extension of service, should not be granted the benefit of increase in the age of retirement, it cannot be said that the decision is arbitrary or results in hostile discrimination. It is a policy decision to be taken by the State Government.

25. In the case of State of Rajasthan (supra), the Hon"ble Supreme Court after referring to its earlier decision in the case of D.S. Nakara and Others Vs. Union of India (UOI), found that the compensatory allowance sanctioned by the Government of Rajasthan was on account of extra costs of management and to

establishment and also as an incentive to work on Beas Project. It held that these considerations would apply in the case of all the officers whether they joined the project before 14th September, 1972, or after that date. The order denying the option is, thus, arbitrary and discriminatory treating differently the employee who had joined the Project after 14th September, 1972.

26. In the case of Dhanraj (supra), the Hon"ble Supreme Court has held that there was no justifiable criteria for the State Government to draw a line between those who retired earlier and those who retired after 9th June, 1981, as both set of employees were equally placed in the same Undertaking/Corporation, temporary in character and all having served in the Organisation for more than 20 years. Thus, they were entitled for the pensionary benefits.

27. In the case of Subrata Sen (supra), the Hon"ble Supreme Court was considering the case of revision of pension to the retired employees of the Indian Oil Corporation Limited (Assam Oil Division), who have retired prior to 1st December, 1994, The Hon"ble Supreme Court has held that in the case of the employees governed under the Pension Scheme relations with the employer merely undergo a change and do not get snapped altogether. There is no new scheme (or payment of pension but it is only a revision of the existing Pension Scheme. The Hon"ble Supreme Court directed to give the pensionary benefit to the petitioner therein on the basis of the notification dated 10th March, 1995, by deleting the word "retiring from December, 1994, onwards" from the notification.

28. In the case of Braithwaite Officers Association (supra), the Calcutta High Court has quashed the roll back of the age of superannuation from 60 years to 58 years after it was raised from 58 years to 60 years in the year 1998, on the ground that it did not appear that the Board had applied its independent mind and had taken an independent decision. It had merely followed the decision of the Department of Public Enterprises without having regard to the situation in Braithwaite Company Limited.

29. In the case of D.B. Kauser (supra), this Court in paragraph 7 has held as follows :

"The ratio of the aforesaid judgment is that if the State cannot bear the financial burden to meet a particular requirement, it may be a sufficient cause to fix a particular cut off date and even to make the law with retrospective effect. However, the basis must be shown to have a nexus with the object of classification as well as of legislative exercise. If the choice of fixing a particular date is shown to be wholly arbitrary and introduces discrimination, which violates the mandate of Article 14 of the Constitution, the date can be struck down for the reason that a purpose of choice unrelated to the object sought to be achieved cannot be accepted as valid. However, in a given case, the fixing of a period of experience or from what particular date it will run, or within the legislative competence and wisdom and there is nothing which may warrant a Court to invalidate such an enactment/executive instruction. If the law/Rules/

regulation is based on experience and the Legislature has the freedom to choose the minimum period of experience required and the date from which such experience is to be computed, i.e., fixation of a certain tenure of service for the purpose of grant of advance increment(s)/ absorption/ regularisation/promotion, then fixation of such criteria has rational nexus with the object sought to be achieved. In such matters, the homogenous class of existing employees cannot be divided in two separate classes on arbitrary and irrational basis. If fixing of a cut off date is not devoid of rational consideration and wholly not whimsical and the authorities had not acted mala fide with a view to deprive a particular section of employees of such benefits and the cut off date has been fixed on the recommendations of the Expert Committee/Board or on proper consideration by the authority concerned, it may meet the test of reasonableness and cannot be held arbitrary. While examining the cases like the instant, the Court has to be very conscious because judicial review is not permissible unless the Court is satisfied that the cut off date is "very wide off the reasonable mark or so capricious or whimsical as to permit judicial interference". In all such matters, the Government/authority has to fix a particular date for computing the eligibility and if the date so adopted meets the test of reasonableness, it cannot be invalidated merely on the ground that it may adversely affect some person. In such a case, the rationale behind the policy has to be examined."

30. In the case of Dr. (Mrs.) Sushma Sharma (supra), the Hon"ble Supreme Court has held as follows :

"We must bear in mind that mere errors of Government are not subject to judicial review. What is best is not always discernible. It may be that 25th June, 1975, has some odour to some people. It may be that it revised many attitudes but this is wholly irrelevant. Any other date might have been chosen. A particular period was taken to make a person eligible for being screened for absorption and regularisation and if the beginning date happens to coincide with particular date about which some people have some memories, the law would not become bad. It seems that would be too sensitive a view of human expressions."

The Hon"ble Supreme Court distinguished the case of D.S. Nakara (supra), as follows :

"But as we have mentioned hereinbefore, Nakara"s case AIR 1983 SC 130 (supra), dealt with the problem of benefit to all pensioners. The choice of the date of 1st April, 1979, had no nexus with the purpose and object of the Act. The facts in the instant case are, however, different for the regularisation of teachers, experience was the object to be found out. Certain period of experience was necessary for the basis for making the regularisation. The period of experience would be how much and the date of experience should begin from what time are within the legislative wisdom and there is nothing in this case to indicate that the starting point, i.e., to be in service on or before 25.6.1975 was an arbitrary choice."

31. In the case of State of Bihar (supra), the Hon''ble Supreme Court has held that the choice of a date cannot be dubbed as arbitrary even if no particular reason is forthcoming for the same unless it is shown to be capricious or whimsical or wide off the reasonable mark.

32. In the case of Manju Bala (supra), the Delhi High Court has held that someone or the other is bound not have a grievance when the recruitment is open to a wide spectrum of candidates. Therefore, in such matters, the test cannot be whether the cut off date fixed was reasonable or any other date could have been better. The test can only be as to whether the fixation of the cut off date in question is arbitrary. As a matter of fact the Court can only go into the question of arbitrariness in fixing a cut off date and nothing more.

33. In the case of Shiva Ji Singh (supra), this Court has upheld the cut off date (30th June, 1998) for regularisation of ad hoc employees. This Court had relied upon the decision of the Hon''ble Supreme Court in the case of State of Bihar (supra) and the Full Bench decision of the Hon''ble Delhi High Court in the case of Manju Bala (supra),

34. In the case of Anand Narain Singh (supra), this Court after referring to the decision of the Hon''ble Supreme Court in the case of Union of India v. Parameswaran Match Works, AIR 1974 SC 2349, has upheld the validity of the cut off date, i.e., 6th August, 1993, fixed for regularisation of the services of ad hoc Principals.

35. In the case of Union of India v. Parameswaran Match Works (supra), the Hon''ble Supreme Court has held that "the choice of a date as a basis for classification cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances. It was further pointed out that where a point or line has to be, there is no mathematical or logical way of fixing it precisely, and so, the decision of the Legislature or its delegate must be accepted unless it can be said that it is very wide of any reasonable mark.

36. The Hon''ble Supreme Court in the case of the Union of India and Another Vs. Sudhir Kumar Jaiswal, had held that "when a Court is called upon to decide such a matter, mere errors are not subject to correction in exercise of power of judicial review, it is only its palpable arbitrary exercise which can be declared to be void, as stated in Metropolis Theater Co. v. City of Chicago 57 L. Ed. 30 (1912) : 228 US 61, in which Justice McKenna observed as follows :

"It may seem unjust and oppressive, yet be free from judicial interference. The problems of Government are practical ones and may justify, if they do not require, rough accommodations, illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible ; the wisdom of any choice may be disputed or condemned. Mere errors of Government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void....."

"The aforesaid was noted by this Court in *Sushma Sharma v. State of Rajasthan*, AIR 1985 SC 1367, in which case also reasonability of fixation of a rate for a particular purpose had come up for examination."

37. In the case of *State of West Bengal and Another Vs. West Bengal Government Pensioners Associations and Others*, the Hon''ble Supreme Court has considered the questions as to whether the decision of the Hon''ble Supreme Court in the case of *D. S. Nakara*, obliges the appellant, i.e., State of West Bengal, to pay the pension calculated on the revised scale of pay under the W.B. Services (Revision of Pay and Allowances) Rules, 1990, to all the erstwhile employees of the State Government irrespective of their date of retirement. The 1990 Rules revised the pay scale of the State Government employees with effect from 1.1.1986. It covered those employees who were in service on 1.1.1986 even though such employees may have retired before the 1990 Rules were in fact published. As far these retired employees were concerned, their pay could only be revised notionally and a memorandum was issued on 25th November, 1990, giving them the benefit of revised scales of pay. The notification was challenged by the West Bengal Government Pensioners' Association, the members of which are all pre-1986 retirees. The Hon''ble Supreme Court held that the principles laid down in *D.S. Nakara's* case has been defined in several cases and their limits restated. It referred to the decision in the case of *Krishena Kumar and Others Vs. Union of India and others*, which held that the notification setting a cut off date for exercising an option to either be covered by the Provident Fund Scheme or the Pension Scheme, could not be struck down by applying the ratio of *Nakara's* case. A cut off date for granting service benefit may not necessarily tantamount to violate Article 14 and will be upheld by the Court if there is some explanation in support of that date. The Hon''ble Supreme Court further referred to its earlier decision in the case of *Union of India Vs. P.N. Menon and others*, wherein the challenge to an office memorandum introducing a scheme to treat a portion of dearness allowance as pay in respect of Government servants who retired on or before 30th September, 1977 was negated on the ground that the decision to merge a part of the dearness allowance with pay when the Price Level Index was 272, appears to have been taken on the basis of recommendations of the Third Pay Commission, which date was fixed and it cannot be held that the cut off date has been selected in an arbitrary manner. The Hon''ble Supreme Court has further held that not in matters receiving the pensionary benefit but even in the matter of revision of scales of pay a cut off date has to be fixed for extending the benefit. It also referred to the case of *Commander Head Quarter, Calcutta and others Vs. Capt. Biplabendra Chanda*, wherein the Hon''ble Supreme Court has held that the requirement of equality prescribed by *Nakara (supra)*, did not extend to a new retiral benefit but was limited to by way of revision of a existing benefit and it was held that a person on the date of retirement could not claim grant of pension because of subsequent change in the criteria of eligibility for such grant. The Hon''ble Supreme Court in the case of *State of W. B. (supra)*, held that there is a

distinction between a pension scheme on the one hand and revision of pay scale on the other and, therefore, there is no discrimination or arbitrary fixation of the cut off date.

38. Applying the principles laid down by the Hon''ble Supreme Court and of the High Courts in the aforesaid cases to the facts of the present case, I find that in the present case, the petitioners had retired on attaining the age of 58 years on the last day of the month in which they completed the age of 58 years under the unamended Fundamental Rule 56 (a). They were retained in service. The age of retirement had not been increased at that time when they had retired. The age of retirement was increased only by issuance of the notification on 28th November, 2001. Fundamental Rule 56 (a) had been amended in the light of the notification dated 28th November, 2001. The notification was not to give the benefit of the increase in the age of retirement to those persons, who have already been retired on or before 1st November, 2001, and that is why a proviso was inserted in the Fundamental Rule 56 (a) by way of amendment which came into force with effect from 28th November, 2001 itself. The petitioners, thus, cannot complain that they have been arbitrarily discriminated as they formed a separate class by themselves. They were only retained in service and were continuing on account of the Government Order dated 21st March, 1984. The cut off date fixed by way of amendment cannot be said to be arbitrary or irrational. In this view of the matter, I do not find that the cut off date fixed in Fundamental Rule 56 (a) is arbitrary.

39. So far as the decision of the Hon''ble Supreme Court in the case of Udai Pratap Singh (supra), is concerned, the Hon''ble Supreme Court has held that by an executive order the statutory rules cannot be whittled down nor can any retrospective effect be given to such executive order so as to disturb any such right which has crystallised by an order passed on 1st April, 1975, whereby the State of Bihar decided to merge the Junior and Senior Branch of the Bihar Fire Service. There were specific Rules framed under Article 309 of the Constitution of India, which were holding the field prior to merger of these two branches on 1st April, 1975. In this background, the Hon''ble Supreme Court has held that an executive order cannot operate retrospectively from 1st April, 1975, and disturb the right of seniority acquired by the persons by virtue of their appointment to Senior Branch. The aforesaid decision is of no help to the petitioners as in the present case, I find that the Fundamental Rule 56 (a) has been amended by the Governor of Uttar Pradesh in exercise of his powers under Article 309 of the Constitution of India by framing the Amendment Rules itself. In fact, the petitioners are claiming the benefit of the executive order, i.e., the notification dated 28th November, 2001, which had increased the age of retirement, whereas the Fundamental Rule 56 (a), as amended, does not give any benefit to those persons who are on extension of service.

40. In view of the foregoing discussions, I do not find any merit in these writ petitions. They are, dismissed.