
(2005) 10 SC CK 0001

In the Supreme Court Of India

Case No : Civil Appeal No's. 4267, 7035-36 and 9372 of 2003 and 2327 of 2004

Air India Employees Self Contributory Superannuation
Pension Scheme

APPELLANT

Vs

Kuriakose V. Cherian and Others

RESPONDENT

Date of Decision : 03-10-2005

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 226
Income Tax Act, 1922 — Section 15(1)
Income Tax Act, 1961 — Section 2(6)
Income Tax Rules, 1962 — Rule 82, 83, 84, 85, 86
Insurance Act, 1938 &md

Citation : AIR 2006 SC 3716 : (2005) AIRSCW 6390 : (2006) 108 FLR 519 :
(2006) 1 LLJ 846 : (2005) 8 SCALE 109 : (2005) 8 SCC 404 : (2005) SCC(L&S)
1188 : (2005) 3 SCR 867 Supp : (2006) 1 SLJ 287 : (2005) 6 Supreme 754 :
(2005) 2 UJ 1463

Hon'ble Judges : Y. K. Sabharwal, J; Tarun Chatterjee, J

Bench : Division Bench

Advocate : Mukul Rohtagi, V.B. Joshi and Ravi Kini, in C.A. No. 4267/2003, Pradeep Rajagoopal, Rekha Rajagopal and Bina Madhavan, for Lawyer's Kinit and Co. in C.A. No. 9372/2003, Vishwajit Singh, in C.A. No. 2327/2004, Ashok Shetty, S. Ravi Shankar and Yamunah Nachiar, in C.A. No. 7035/2003, J.P. Cama and Kailash Vasdev, Navin Prakash, Ritu Biswas and Gopal Singh, in C.A. No. 7036/200 A.V. Rangam, A. Ranganadhan and Buddy A. Ranganadhan, for the Appellant;

Final Decision : Dismissed

Judgement

Y.K. Sabharwal, J.

The dispute in these matters basically between the appellant and the serving employees of Air India on one hand and retired employees on the other is about the interpretation of Air India Employees Self-Contributory Superannuation Pension Scheme (hereinafter referred to as 'Scheme').

In or about 1994, Air India proposed creation of a Pension Scheme for its

employees. The Scheme was based on actuarial reports. The employees had to contribute to the fund under the Scheme, Air India contributing a token sum of Rs. 100/- per annum for all the employees put together. Broadly, Scheme was that all full time employees of Air India would become members of the Scheme and contribute a percentage of their salary to be deducted every month and credited to the fund under the Scheme. Each member had to contribute for a minimum period of 15 years and for those who did not have sufficient number of years of service from the date of the commencement of the Scheme upto their superannuation, an amount was calculated based on the total number of years in deficit and the member was required to make payment of the entire sum so calculated either in lump sum or to pay the said amount in monthly installment along with interest on the total sum due. On 12th August, 1996, a deed of trust for incorporating the Scheme was entered into between Air India and the trustees. The deed also contained rules known as 'Air India Employees Self-Contributing Pensionary Scheme Rules' (hereinafter referred to as 'the Rules'). Further, it postulated creation of a pension fund. A deed of variation of the trust was executed on 7th October, 1997 to amend certain provisions of the trust deed. The trust deed, inter alia, stipulates that the retiring employees would get pension equivalent to 40 per cent of the last pay drawn salary, consisting of basic pay, dearness allowances and personal pay, if any.

To give effect to the aforesaid, an agreement was entered into with Life Insurance Corporation of India which issued a master policy stipulating various terms and conditions.

Rules stipulate that a member or his beneficiary shall have no interest in the master policy taken out in respect of the members or any investment otherwise made by the trustees in accordance with the Rules or the Scheme but shall be entitled to receive superannuation benefits in accordance with the Rules and that the trustees shall always administer the Scheme for the benefit of the members and their beneficiaries in accordance with the provisions of the Rules.

A staff notice dated 30th September, 1996 was issued reproducing therein salient features of the Scheme. It stipulated that the Scheme will take effect from 1st April, 1994. The main object of the Scheme is to provide to the members on retirement a fixed amount per month. The amount is to be calculated according to the Scheme on superannuation of an employee and annuity is required to be purchased from Life Insurance Corporation of India (LIC) so as to ensure payment by LIC of a fixed monthly sum to the retired employee and on his demise the payment of the annuity amount to his legal representatives.

Besides the Scheme, the existing employees represented by their respective associations are the appellants before us. According to the appellants, the Scheme was defective inasmuch as large amounts were given to the retiring employees without having regard to the contributions made by them towards the Scheme and resultantly the old employees by making smaller contributions received disproportionately larger amount of benefits. No fund would have been

available with the Scheme for giving pension to the employees retiring after 2005 despite they having contributed large amount to the fund under the Scheme, thus, requiring corrective action. Under these circumstances, the Scheme was amended with effect from 3rd April, 2002. The amendment requires the pensioners to make payment of additional contribution towards annuities purchased from LIC. The amendment provided that the amount of the pension shall be corresponding to the contribution made by the respective retired employees and not on the basis of 40 per cent of the last drawn salary of the employees. Corresponding amendments were also made in the Rules, inter alia, providing that the employees who have retired upto 31st October, 2001 shall contribute the amount so as to make up the difference between cost of annuity purchased for them from the pension fund from LIC and the total contribution made by them till date of retirement. Other consequential amendments were also made providing that the trustees shall notify LIC for retrieval of the shortfall in the contribution from the purchase price of the annuity paid to LIC in respect of such members and for appropriate reduction in the monthly amount payable to such employees. The amount so retrieved is required to be added to and form part of the corpus of the trust fund to be equally distributed amongst the contributing members.

The validity of the aforesaid amendment of the Scheme was challenged by the retired employees in writ petition filed under Article 226 of the Constitution of India before the High Court mainly on the ground that rights in their favour crystallized on purchase of annuities at the time of their superannuation and the same cannot be subjected to any alteration or amendment. The contention urged before the High Court was that the trustees could only effect amendment to the Scheme for future benefits of existing employees and had no right to effect any amendment which adversely affects vested rights of the pensioners in regard to the pension payable to them as per the amended Scheme. The plea was that their pension as per the amended Scheme would be considerably reduced. It was contended that on retirement the ex-employees sever all their relations with the Scheme, which does not envisage making of any additional contribution, by members after superannuation. The LIC having accepted annuity and having made monthly payments to retired employees cannot refund to the trust any amount or reduce monthly payment to the detriment of the pensioners.

These appeals have been filed by the Scheme, Air India, Cabin Crew Association, Ground Staff Association, Officers Association, and Employees Guild Association. Learned counsel for the appellants contend that out of 18,386 employees who were members of the Scheme from the year 1994 till date, 1852 employees retired leaving 16534 employees in service. They pointed out that though retirees were only about 10 per cent of the employees but had taken 60 per cent of the total contribution made by all the employees against their contribution of about 17.98 per cent. If this trend continues the corpus would get fully exhausted and the result would be that the employees who retire after the year 2005 will not get any benefit since by that time no amount will be left in the

fund. It is contended that the annuities continue to remain the property of the scheme and as such trustees have a right to review the situation and amend the scheme. The contention is that the trustees have unrestricted power to amend or alter the Scheme even retrospectively. Further, it is urged that strictly speaking the amendment is not retrospective inasmuch as the revision of the pension is prospective. The amount of the pension would be reduced on non-fulfillment of the conditions by the retiring employees after the date of the amendment.

The High Court by the impugned judgment held that the impugned amendment to the Trust Deed to the extent it applies in future is legal and valid but the amendment cannot apply to the employees who have retired before the date of amendment and such employees shall continue to receive pensionary benefits as before, namely, the benefits which existed at the time of amendment.

For the aforesaid conclusion, the main ground which prevailed with the High Court is that the right to annuity in favour of retired employees crystallized on the date of superannuation and the same cannot be changed by amendment.

The High Court held that annuitant has no connection with the quantum of the remaining trust fund; whether it increases or decreases and that on retirement of the employee, the quantum of corpus, which yields the annuity, is paid over to the LIC and physically leaves the trust fund. The retiree gets a life long annuity and on his demise his heirs get the designated corpus. Thus the designated corpus which leaves the trust on date of superannuation never returns. The trust is created because of the requirement of Income Tax Act and for the purpose of administrative convenience. Annuitants are in no way concerned with the financial health of the trust fund which originally purchased the annuities. They are not entitled to look to original trust for any assistance in case the interest rate of LIC falls and they cannot claim any additional benefit even if trust decides to increase the benefits for such existing employees.

Challenging the impugned judgment, learned counsel for the appellants contend that the beneficiaries, namely, retired employees cannot have any interest in the insurance policy entered by the trustees; the entire fund is within the control of the trustees; legal obligation is cast on the trustees that none of the member is deprived of pension. The trustees have not only right but an obligation to correct the mistake and amend the Scheme so that the employees retiring after 2005 also get pension and are not deprived of it despite having contributed to the fund from their salary. Amendment became necessary on finding out that the funds are likely to be depleted as a result of the bona fide mistake. It is because of such mistake disproportionate amounts have been paid to the retirees without regard to the contributions made by them.

The crucial question is whether the benefits, which the retired employees are getting, can be curtailed because of reduction of the fund amount.

In support of these appeals, three contentions have been urged: (1) depletion of the fund amount if not checked would result in the retirees after the year 2005

not getting any pension. Therefore, there was the requirement to make the impugned amendments; (2) the trustees in terms of Deed and the Rules have unrestricted power to amend the Scheme so as to apply amendment to also those who stand retired; and (3) the Scheme is not amenable to the writ jurisdiction. The appellants are neither an instrumentality or agency of the State nor other authority contemplated by Article 12 of the Constitution.

Taking the last contention first, the High Court rejected it observing that the creation of pension fund flows from the socio economic obligations of the States and that the pension is not a charge or bounty nor is it a gratuitous payment depending on the whims of the employer. The High Court is of the view that writ is maintainable as it was mainly directed against LIC. It is, however, contended on behalf of the appellants that the nature of the Scheme under consideration is different. Despite use of the term 'pension', the benefit under the Scheme is not 'pension' as understood in service jurisprudence. The observations made in the impugned judgment relying upon various earlier precedents dealing with pension and holding that it is not a bounty may not strictly apply to the benefits stipulated for the retiring employees under the Scheme in question. Further, it is possible to contend that LIC is only a proforma party to the litigation and that it cannot be said that writ is directed mainly against LIC, the main question being the power of the trustees to amend the Scheme with retrospective effect. We need not, however, examine, in the present case, the aforesaid question and the correctness of the view of the High Court on the aspect of maintainability of the writ petition since learned counsel challenging the correctness of the impugned judgment, have adopted a pragmatic and fair approach that this Court having heard the matter in detail, it would not serve either the interest of the retired employees or the employees in service or the Scheme, if the parties are relegated to litigation before other forums on this court reversing view of the High court on the question of maintainability of the writ petition. Under these circumstances, we leave open the question of maintainability of the writ to be decided in an appropriate case.

Now, we will examine other two contentions. The object of introducing the Scheme was to enable the employees to obtain monetary benefit on their superannuation and/or payment to the beneficiaries in the event of death of the employee. How it was sought to be achieved shall have to be considered in the light of the Scheme, the stand of the appellants and also the provisions of the Income Tax Act and the Rules. Air-India Employees' Superannuation Pension Trust (for short 'Trust') was established to administer the pension scheme also in fulfillment of the requirement under the Income Tax Act, 1961. The pension scheme was approved by the Commissioner of Income Tax.

Under Section 2(6) of the Income Tax Act, 'approved superannuation fund' has been defined to mean superannuation fund or any part of the superannuation fund which has been and continues to be approved by the Chief Commissioner or Commissioner in accordance with the Rules contained in Part B of the Fourth

Schedule.

Part B of Schedule IV of the Income Tax Act, 1961 deals with approved superannuation funds. Under clause 3 thereof, in order that the superannuation fund may receive and retain approval, it shall satisfy the conditions set out in the said clause and any other conditions which the Board may, by Rules, prescribe. One of the conditions is their fund shall be a fund established under an irrevocable trust. Another condition is that fund shall have for its sole purpose the provision of annuities for employees in the trade or undertaking on their retirement at or after a specified age or on their becoming incapacitated prior to such retirement, or for the widows, children or dependents of persons who are or have been such employees on the death of those persons.

Part XIII of Income Tax Rules, 1962 covering Rules 82 to 97 dealing with approved superannuation funds is framed in exercise of the powers conferred, inter alia, under clause 11 (1)(cc) of Part B of Schedule IV. Under Rule 85, it is, inter alia, stipulated that all monies contributed to the approved superannuation fund are required to be invested in a post office savings bank account in India or in a current account or in a savings account with scheduled bank or utilized in accordance with Rule 89 for making payment under a scheme of insurance or for purchase of annuities referred to in that rule. Under Rule 87, the ordinary annual contribution by the employer to a fund in respect of any particular employee shall not exceed 25% of his salary for each year as reduced by the employer's contribution, if any, to any provident fund (whether recognized or not) in respect of the same employee for that year.

Rule 89, inter alia, provides that for the purpose of providing the annuities for the beneficiaries, the trustees shall enter into a scheme of insurance with LIC and accumulate the contributions in respect of each beneficiary and purchase an annuity from the said LIC at the time of the retirement or death of each employee or on his becoming incapacitated prior to retirement.

Clause 3 of the trust deed, inter alia, provides that pension fund is to be established under irrevocable trust and the fund shall have for its sole purpose the provision of annuities for employees.

Clause 14 provides that power of appointing the Trustee shall be vested in the employer. The Board of Trustees shall consist of three representatives of the employer and eight members who are employees. The employer shall appoint, its representatives, the representatives of the members, who shall be the employees. The employer shall exercise power of filling up any vacancies and removing any Trustee and the employer shall nominate one of its representative Trustees as Chairman of the Trust.

Clause 19 provides that the employer shall have the power to appoint any officer to act as Secretary of Fund who will be invested with such powers of management of the Trust as the Trustees may from time to time in their discretion determine. With the consent of the employer the trustees shall have

power to employ any person or persons to do any legal, accountancy or other work.

The Trust deed shows that the trustee agreed to act as such of the pension fund at the behest of the employer. It further shows that the employer has considerable control over the functions as well as the administration of the Scheme.

Clause 5 of the trust deed deals with power to amend. It reads as under:

"The Trustees may at any time with the previous concurrence and/or approval in writing of the employer alter, vary or amend any of the trusts or provisions of this Deed and the Rules.

Provided that no such alteration or variation shall be inconsistent with the main objects of the trusts hereby created.

Provided further that no such alteration or variation shall be made without the prior approval of the Commissioner of income tax having jurisdiction over the Fund."

Clause 8 provides that members to have no legal right. It reads thus:

"Except as provided for in this Deed or in the Rules, no Member, Beneficiary or other person claiming right from such Member shall have any legal claim, right or interest in the Fund."

We may also reproduce clauses 24, 26, 27, 32 and 33 which read as under:

"24.Trust Fund-The Fund shall consist of the contributions as specified in this Deed and the Rules governing the Fund and contributions received by the Trustees from the Company and of the accumulations thereof and of the securities and the annuities purchased therewith and interest thereon and of any capital gains arising from the sale of the capital assets of the Fund. The Trustees shall hold the Fund upon such trust and with and subject to such powers and provisions as are or shall be contained in this Deed and the Rules for the time being in force to the intent that the said Fund shall be established for the benefit of the Members and/or their Beneficiaries. The Fund shall be vested in the Trustees. The Trustees shall have the entire custody, management and control of the Fund. No monies belonging to the Fund shall be recoverable by the Employer under any circumstances nor shall the Employer have any lien or charge over the Fund, except or any loans that may be lent by the Employer to the Fund for meeting its immediate liabilities.

26.Provisioins of Benefit-The trustees may enter into any Scheme of insurance or contracts with the Life Insurance Corporation of India to provide for all or any part of the benefits which shall be or may become payable under these presents and may pay out of the Fund all payments to be made by it under such Scheme or contracts.

27. Investment of Funds- (a) All monies from time to time in the hands of the Trustees and not immediately required for the purpose of the Trust shall be deposited/invested by the Trustees within 15 days from the date of receipt or accrual, as the case may be, in accordance with Rule 85 of the income tax Rules, 1962 or any modification or re-enactment or reframing or renumbering thereof.

(b) The Trustees shall have power at any time and from time to time to vary, transpose or sell such investments and reinvest the Funds in other investments of the nature hereby authorised, within the guidelines, notifications or Rules issued by the Government from time to time.

32. Review of Funds- The Trustee shall review the availability of Funds of the Scheme annually or at such intervals as may be deemed fit by the Trustees and to decide any revision in the maximum benefit or rate of the member's contribution under the Scheme.

33. Review of Benefits-Notwithstanding anything to the contrary contained in these presents or in the rules the Trustees shall have and shall always be deemed to have the right to review any limit the benefits payable to the Beneficiaries including the right to reduce the benefits payable in accordance with the rules in the event of any or all the members ceasing or reducing to make contribution to the Fund in accordance with these presents and the Rules.

Rule 14 provides that members or his beneficiary shall have no interest in the master policy. It reads as under:

"A member or his beneficiary shall have no interest in the Master Policy taken out in respect of the members or any investment otherwise made by the Trustees in accordance with the Rules of the Scheme but shall be entitled to receive superannuation benefits in accordance with the Rules. Provided always that the Trustees shall administer the Scheme for the benefit of the members and their beneficiaries in accordance with the provisions of these Rules."

Dealing now with the first contention as to the depletion of the fund amounts, case of the appellants is that the scheme was based upon actuarial valuation carried out in the year 1993/1994 on assumptions as under:

- (1) Basic pay and DA were taken as pre-revised scales.
- (2) Assumption that the contribution will start flowing on monthly basis from April, 1994. (3) Rate of interest was assumed at 12 per cent.
- (4) Contribution of Rs. 350 per month was supposed to increase by 10% per annum.
- (5) Total number of members of the Scheme at any given time would remain constant i.e. retirees are replaced by recruits.

It is urged that when the Scheme was launched in 1996 none of the above assumptions were found to be in existence as evidenced from the following:-

(1) With the wage agreement in 1996, the salary scales were substantially revised.

(2) Monthly deductions of contribution started only from September, 1996 and arrears of contributions for the period April, 1994 to August, 1996 were received by the Trust from March 2000 only.

(3) Rate of interest has been progressively declining.

(4) The contribution of Rs. 350 p.m. has not been escalated by 10% per annum.

(5) Number of employees contributing to the Scheme has progressively declined in view of non-recruitment since 1995.

Further, according to the appellants, there was shortfall of Rs. 155 crores which is as under:

"Rs. in Crores (a) Increase in annuity cost on account of 65 revision of grades and pay scales (b) Non-escalation of additional contributions 60 since 1995 @ 10% (c) Loss of interest on contribution from April 30 1994 to April 1996
_____ Rs. 155" _____

It is contended that the aforesaid deficit of Rs. 155 crores, as assessed by the actuaries, only represents the gap between the present value of all future pension liability of the Trust as per the original defined benefit scheme and the present value of all future contributions to be collected by the trust, as originally determined. The actuaries had assessed the increase in annuity cost on account of revision of pay scale at Rs. 65 crores. This is sought to be illustrated by the appellants by giving figures of pre-revised Basic + DA and pension calculated at the rate of 40% and cost of annuity and contribution of retiring employee and also giving figures of revised scales and resultant increase of cost of annuity without proportionate increase at employee's contribution.

The break up of 60 crores on account of non-increase in the additional contribution of Rs. 350 has also been given. The break up of deficit of Rs. 30 crores has also been given. As per the Scheme, the contribution of the members was in two parts (a) 1% to 5% contribution of Basic and D.A. and (b) additional contribution of Rs. 350 per month. Further, all members who retired in the period from April, 1994 to August, 1996 did not make the additional contribution of Rs. 350 p.m. in their 15 years lump sum contribution. The impact of non-escalation of additional contribution of Rs. 350 has been assessed at Rs. 60 crores. It has been pointed out that the Scheme was applicable to all employees who retired from 1st April, 1994 but actual deductions of contributions from monthly salary commenced from September, 1996. It is stated that various unions representing the members were not agreeable for their members making a lump sum contribution and requested Air India Management to appropriate and pay the Trust such arrears of contribution for the period April, 1994 to August, 1996 from the wage agreement arrears as and when these were paid. Air India was facing a severe financial crunch at that point of time and the Management had signed

agreement with the Unions to the effect that though revised pay scales were implemented immediately, arrears would be paid only when the company's liquidity position permitted the same. It was understood that the Management was not to pay any interest on such deferred payment of arrears. The payment of arrears of pension contribution to the Trust, therefore, was also deferred until the settlement of wage arrears i.e. till March 2000. This resulted in loss of interest on such arrears.

The aforesaid financial position has been disputed and retirees have sought to explain that the facts and figures given and conclusions drawn by the Scheme are entirely incorrect and misleading. It was pointed out that in addition to the simple computation mistakes, the projection has not taken into account the interest accrual. According to retirees, as per the correct position the shortfall if at all will be minimal and in any case it was to be borne in mind that the Scheme as originally formulated was rolling scheme and benefits were not confined to the extent of contributions made.

The retirees have also given facts and figures giving calculations based on pre-revised Basic and DA with accrued interest (without escalation) as also calculations based on revised Basic and DA without escalation and the calculations based on with escalation.

Further, according to the retirees, the trustees took no steps to either approach Air India to recover the monies which is stated to be due from Air India nor they approached the Income Tax Officer for permission to invest amounts in short term deposits nor have they taken steps to revise contributions. According to them, the trustees to save their own skin attempted to recover the amounts from the retirees under the guise of acting fairly to balance out the difference without explaining as to what prevented them from taking requisite steps while the retirees were still in employment. They have also highlighted the factor of failure of trustees to take steps for making the recoveries from Air India which kept amount after deducting the same from the salaries of the employees.

It is not necessary to go into detail calculations. It does appear that there is shortfall in the Fund though a lot can be said in respect of calculation submitted by both sides. No doubt, the amount which went out of the fund for purchase of annuity for retiring employee was considerably more than what was contributed by the outgoing employee but it is also true, at the same time, that the huge amounts did not come to the fund from Air India and some of assumptions on which Scheme was formulated did not hold good on commencement of the Scheme. The reason for the position of the fund which necessitated the amendment cannot be attributed entirely on account of the gap between the amount contributed by the retiring employee and the amount used for purchase of annuity. It may also be noted that the appellant's own case is that there was basic fallacy in the Scheme from its inception. The Scheme, as originally conceived was flawed, is the stand of the appellants in CA No. 4267 of 2003. It is further their own stand that concept of granting annuities on a defined benefit

basis in a self-contributory fund is inherently fallacious as in the self-contributory scheme the only consideration is the contributions made by the members and hence the benefit has to necessarily flow from their contributions and the interest accrued thereon. As against this, the present is a case of defined benefit Scheme. This basic fallacy in the Scheme was never rectified from inception. It is the own case of the appellants that in addition to this inherent fallacy in the formation of the Scheme, the situation was aggravated by various factors noticed above.

We would assume that there were several contributory factors as a result of which the fund position became quite bad. The factors included the non-receipt of huge funds in time from Air India, lack of proper investment by the trust resulting in loss of interest in addition to the fallacy in the scheme being gap between the contribution and the amount required for purchase of annuity to ensure return of specified amount to the retirees.

It may be that the last of the aforesaid factor contributed most in the depleted financial position of the fund requiring the trustees to make the amendments in the scheme on 3rd April, 2002, but it has to be borne in mind that the original scheme was a 'Benefit Defined Scheme' as opposed to a 'Contribution Defined Scheme'. It has now been conceded on behalf of the appellants that there was no fraud in formulation or implementation of the scheme. Besides aforesaid factor, there were other factors, such as, considerable delay in Air India remitting arrears of pension contribution amounting to Rs. 23 crores to the trust, non-payment of interest by Air India on late payments etc.

The retirees received what was receivable by them according to the existing scheme on the date of retirement. The pension scheme, as originally conceived and formulated, was a rolling scheme postulating outgoing employees on retirement and their place being taken by induction of new employees whose contributions would add to the fund.

According to the figures given above, the shortfall in the fund was in the sum of Rs. 41.83 crores which was sought to be made up from 1852 retirees. According to the retirees, if they are asked to make good that amount, on average each pensioner will have to repay a sum of Rs. 2,25,863/-. At the same time, if the amount is contributed by the existing over 16,500 employees to make good the aforesaid differential amount of Rs. 41.83 crore, they would be required to pay about Rs. 25,000/- each which can be split into convenient installments.

On distinction between 'Defined Benefit Plan and 'Defined Contribution Plan' Mr. Arun S. Murlidhar in 'Innovations in Pension Fund Management' states :

"Defined Benefit Plans

In the DB pension plan, participants and/or sponsors make contributions, and these contributions could change over time. The scheme then provides a defined benefit-a prescribed annuity in either absolute currency or as a fraction of a

measure of salary (e.g., 50 per cent of final salary or the average the last five years of salary. The guaranteed pension benefit could be in either real or nominal terms. The ratio of annuity or benefit to a measure of salary is known as the replacement rate.

Defined Contribution Plans

Under the DC scheme, participants and/or sponsors make pre-specified contributions. These contributions could be specified in either absolute currency or as a fraction of a measure of salary (e.g. 5 per cent of annual pretax salary). The participants invest the contributions in assets. However, the pension depends entirely on the asset performance of accumulated contributions. As a result, two individuals with identical contributions could receive very different pensions. Bader (1995), Bodie, Marcus, and Merton (1988), and Blake (2000) provide more detailed descriptions of DB and DC plans."

(Emphasis supplied by us)

According to learned author, there are several ways in which the aforesaid plans can be funded. In general, country's social security systems are pay-as-you-go (PAYG), Defined Benefit schemes which tax current participants to pay retiree benefits. However, corporate or occupational defined benefit or defined contribution schemes tend to be funded both partially and fully. Funding requires allocating funds prior to retirement in order to service future liabilities.

The scheme envisages a Defined Benefit Plans and not a Defined Contribution Plans. It also envisages allocating funds at the time of retirement of employees, i.e. the amount for which the annuity is purchased. None has questioned the power of the trustees to amend the scheme prospectively from the date of amendment. We would also assume that there is a corpus deficiency which, to a considerable extent, has taken place as a result of gap between contribution and amount of annuity purchased. All the same, the basic question is whether by the amendment of the scheme, this gap can be bridged by making recoveries from those who have already retired and are getting benefit from LIC as a result of purchase of annuity and/or from their heirs who would otherwise receive annuity amount after the demise of the retiree. This necessarily takes us to the second question as to the power to amend the scheme retrospectively.

At the outset, it may be noted that there is no merit in the contention, half-heartedly canvassed, that the amendment is not retrospective on the ground that the rights of the retirees only after the amendment of the scheme are being effected as the amount already paid to them under the unamended scheme is not being asked to be returned. There is fallacy in the argument. It is evident that the retirees, as a result of amendment, are being asked to pay to make good the gap between the amount of annuity and the contributions made by them and, if not, either their monthly pension would be reduced or their heirs would not get the annuity amount at the relevant stage. The amounts already taken by the retirees have also been taken into consideration while working out

the figures. Therefore, it cannot be said that the amendment is not retrospective. Various clauses on the basis whereof learned counsel for the appellants contend that it is permissible to amend the scheme with retrospective effect have already been noted hereinbefore. To consider the effect thereof and to appreciate contentions urged by learned counsel for the appellants, first let us examine the true meaning of expression 'Annuity'.

The expression 'Annuity' has no statutory definition. However, according to Black's Law Dictionary, it means an obligation to pay a stated sum usually monthly or annually to a stated recipient.

An annuity is a right to receive de anno in annum a certain sum; that may be given for life, or for a series of years; it may be given during any particular period, or in perpetuity; and there is also this singularity about annuities, that, although payable out of the personal assets, they are capable of being, even, for the purpose of devolution, as real estate; they may be given to a man and his heirs, and may go to the heir as real estate (see : Advanced Law Lexicon by P Ramanatha Aiyar, 3rd Edition 2005)

In Commissioner of Wealth-tax Vs. P.K. Banerjee (dec'd., by legal representatives), , this court held that in order to constitute an annuity, the payment to be made periodically should be a fixed or pre-determined one, and it should not be liable to any variation depending upon or on any ground relating to the general income of the fund or estate which is charged for such payment. The court cited with approval the observations of observations of Jenkins L. J in In-re Duke of Norfolk Public Trustee v. Inland Revenue Commr. [(1950) 1 Ch 487] which reads thus:

"An annuity charged on property is not, nor is it in any way equivalent to an interest in a proportion of the capital of the property charged sufficient to produce its yearly amount. It is nothing more or less than a right to receive the stipulated yearly sum out of the income of the whole of the property charged (and in many cases out of the capital in the event of a deficiency of income). It confers no interest in any particular part of the property charged, but simply a security extending over the whole. The annuitant is entitled to receive no less and no more than the stipulated sum. He neither gains by a rise nor loses by a fall in the amount of income produced by the property, except in so far as there may be a deficiency of income in a case in which recourse to capital is excluded."

Learned counsel for the appellants have, however, placed strong reliance on the Trust Deed and the Rules to contend that the Trustees have full right to amend the Scheme with retrospective effect and that the members or beneficiaries have no right, title or interest in the fund or even in the annuities purchased from the fund on the retirement of beneficiary. In this respect, reliance is placed upon Clause 5 of the Trust Deed above reproduced stating that the Trustee may at any time with previous concurrence or approval in writing of the employer alter, vary or amend any of the provisions of the Trust Deed and the Rules. The first proviso

to the aforesaid clause, however stipulates that no such alteration or variation shall be inconsistent with the main objects of the Trust thereby created. Reliance has also been placed to Clause 8 of the Trust Deed stipulating that except as provided for in this Deed or Rules, no member, beneficiary or other person claiming right from such member shall have any legal claim, right or interest in the Fund. But, the proviso to the said clause enjoins upon the Trust Deed to administer the Fund for the benefit of the members and/or their beneficiaries in accordance with the provisions of the Deed and the Rules. Reliance on Clause 24 has been strongly placed submitting, inter alia, that the members' Fund shall consist of contributions as specified in the Trust Deed and the Rules governing the Fund and contributions received by the Trustees from the Air India and of the accumulations thereof and of the securities and annuities purchased therewith and interest thereon and that the said Fund shall be established for the benefit of the members and/or their beneficiaries and shall be vested in the Trustees. Further, Clause 26 is relied upon which stipulates that the trustees may enter into any scheme of insurance or contracts with the LIC to provide for all or any part of the benefits which shall be or may become payable under this deed and may pay out of the Fund all payments to be made by it under such scheme or contracts.

Besides the aforesaid clauses, learned counsel for the appellant have placed strong reliance on Clause 32 and Clause 33 of the Trust Deed. Clause 32 provides the power of the Trustee to review the availability of Funds of the Scheme annually or at such intervals as may be deemed fit by the Trustees and to decide any revision as to the rate of the member's contribution under the Scheme. Clause 33 i.e. power of review of benefits stipulates the Trustees right to review any limit the benefits payable to the beneficiaries including the right to reduce the benefits payable in accordance with the rules in the event of any or all the members ceasing or reducing to make contribution to the Fund.

None of the aforesaid clauses render any assistance to the appellants. The relied upon clauses deal with the members who continue to contribute to the Fund. The liability of the retiring member to make any such contribution ceases on retirement. It is nobody's case that after the retirement any contribution is made or required to be made by retired employees. The aforesaid clauses only show the right and power to review the Fund and the benefits payable to the continuing members/employees. Likewise, reliance on Rule 14 which stipulates that the member or his beneficiary shall not have any interest in the master policy taken out in respect of the members in accordance with the Rules of the Scheme but shall be entitled to superannuation benefits in accordance with the Rules, has no applicability. The retired employees are not claiming any interest in the master policy but are claiming right flowing from the annuity purchased on their retirement.

The rights of the employees to receive the annuity and quantum of the annuity get crystallized at the time of purchase of the annuity.

In *Sasadhar Chakravarty and Another Vs. Union of India and Others*,¹ the question arose as to when the right of employee to receive annuity and the quantum thereof gets crystallized. In that case, the employer had set up a non-contributory superannuation fund under the provisions of Income Tax Act, 1961. On retirement, under the rules of the fund, the retired employee was receiving an annuity under the policy purchased by the members of the fund from LIC. A writ petition was filed by retired employee contending that certain improvements have been effected in the executive staff fund to which the pensioners who had already retired were entitled and denial thereof was arbitrary and violative of Article 14 of the Constitution. The retired employee claimed right to the larger benefits which though not available at the time of his retirement but were being given to the employees who retired after the improvements to the fund have been made. This Court held that the right of the employee to receive an annuity and the quantum thereof get crystallized at the time of purchase of the annuity under the then existing scheme of the LIC and any subsequent improvements in a given pension fund scheme would not be available to those persons whose rights are already crystallized under the scheme by which they are governed because the amounts contributed by the employer in respect of such persons are already withdrawn from pension fund to purchase the annuity. With reference to Rules 85 and 89 of Income Tax Rules, this Court held that the same are meant to safeguard the monies deposited in the superannuation and to secure the annuitant annuity amount. Undoubtedly, Rule 89 requires the Trustee to purchase an annuity from the LIC to the exclusion of any one else but this provision must be judged in the context of the fact that the contracts of life insurance which are entered into by the LIC are backed by a government guarantee which is provided by Section 37 of the Life Insurance Act, 1956. The Court observed right of an employee to receive the annuity and the quantum gets determined at the time when the annuity is purchased. Any subsequent improvement in a given pension fund will benefit only those whose moneys form part of the pension fund. As soon as an employee retires, an annuity is purchased for his benefit under Rule 89, there remains no scope for any fresh contribution on his account so as to entitle him to an increased pension prospectively on the basis of the improvements made subsequently in the pension scheme of a fund since the existing pensioners form a distinct class.

The decision was sought to be distinguished on the ground that in the said case, this Court was concerned with the scheme financed by the employer unlike the present scheme where employer's contribution was almost nil and that it was self-contributing scheme. We are, however, unable to accept this contention. The ratio decidendi of the case is that the moment annuity is purchased, the fund leaves the corpus and the relations between the two are snapped. The corpus to the extent required for purchase of annuity leaves the trust fund and all connections between trust fund and retirees are severed. Thus, once the annuity is purchased, there remained no connection with the quantum of the fund. Therefore, annuitants are in no way concerned with the financial position of the

fund for which annuity was purchased. They cannot be asked to further contribute. That is the basic question in the present case. It matters little that the present case is of reverse position inasmuch as in the case of Sasadhar Chakravarty this Court was considering the case of a retired employee who was seeking right in the improvement whereas in the present case the question is about reducing the benefits or rights of the retired employees. The question is about applicability of the principle. Applying the principle in Sasadhar Chakravarty's case to the present case, we have no doubt that after retirement retirees are not liable for any deficit in the fund which is sought to be made good by recovery from them which is the effect of retrospective amendment. Further, as already noted it was a benefit and rolling scheme as opposed to a contributory scheme. Neither clauses 32 and 33 or the Trust Deed nor Rule 14 has any applicability on question of retrospective operation of amendment to the retired employees. It has been admitted that the form of insurance annuity policy with LIC was adopted as a result of mandate of the statute. Having done that, the appellants are bound by the consequences flowing from purchase of annuity. In view of what we have said above there is neither any substance in the contention that contract was between LIC and the trustees nor is it of any consequence in view of our conclusion that the amount, on retirement of employees, leaves the fund for purchase of annuity and the rights of the retirees are crystallized on their retirement by purchase of annuity and thus no amount can be claimed from them by making applicable amendment dated 3rd April, 2002 with retrospective effect. Therefore, we find no substance in the second contention.

The contention that there is no privity of contract between LIC and the retired employees as contract for purchase of annuities is between trust and LIC, has also no substance. In Chandulal Harjivandas, Jamnagar Vs. Commissioner of Income Tax, Gujarat, insurance policy was purchased by the father of the assessee and the life assured was that of the assessee. The claim of assessee for rebate of insurance premium u/s 15(1) of the Income Tax Act, 1922 was rejected. On reference, the High Court upheld this view of the Revenue holding that contract of insurance with LIC was entered into by the father of the assessee and that the contracting parties were the father of the assessee and the LIC. This court reversing decision of the High Court held that the contract of insurance must be read as a whole; in substance it is a contract of life insurance with regard to the life of the assessee and that the main intention of the contract was the insurance on the life of the assessee and other clauses are merely ancillary or subordinate to the main purpose, u/s 2(11) of the Insurance Act, the purchase of annuity amounts to purchase of an insurance policy. It would make no difference, in the present case, as to who made the payment.

The LIC having accepted the annuity and having effected monthly payments can neither reduce the annuity amount nor refund it to the trust to the detriment of the retirees since the annuity has already crystallized and no change can be made in such annuity as stipulated by the impugned amendments. LIC has obligation to fulfill the promise given by it to the retirees, who are assured under

the annuity scheme.

In *Commissioner of Wealth Tax, Punjab, J and K, Chandigarh, Patiala Vs. Yuvraj Amrinder Singh and Others*, , it was held that annuities dependent on human life constitute a species of contract of life insurance. In *Life Insurance Corporation of India and Others Vs. Smt. Asha Goel and Another*, , interpreting scope of Section 45 of the Insurance Act, 1938, this Court laid down the parameters within which powers u/s 45 could be exercised to repudiate the claim under a contract of insurance.

In our opinion, the view of the High Court is unassailable. In the result, all appeals are dismissed.