

(2014) 04 GUJ CK 0065

In the Gujarat High Court

Case No : Special Civil Application Nos. 8297 of 1999, 3262 of 2000, 4026 and 12262 of 2001, 16739 of 2010 and 5815 and 13697 of 2012

N.M. Tai

APPELLANT

Vs

ONGC Ltd.

RESPONDENT

Date of Decision : 29-04-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226
Income Tax Act, 1922 — Section 15(1)
Income Tax Act, 1961 — Section 2
Life Insurance Corporation Act, 1956 — Section 2(11), 37

Citation : (2014) 3 GLH 450

Hon'ble Judges : C.L. Soni, J

Bench : Single Bench

Advocate : K.M. Patel, Senior Advocate, Krishna G. Pillai and Mukul Sinha, Advocate for the Appellant; Rajni H. Mehta, Advocate for the Respondent

Judgement

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C.L. Soni, J.—In all these petitions, since common questions of law are involved, they are decided by this common judgment. First four petitions and Special Civil Application No. 13697 of 2012 are filed by the retired employees-officers of the Oil and Natural Gas Commission Limited ("ONGC" for short) - respondent No. 1 in each of the petitions. The rest two petitions are filed by the ONGC Retired Employees' Association with retired employees.

2. The petitioners have claimed benefits in connection with the scheme titled as "O.N.G.C. Self Contributory Post Retirement and Death in Service Benefits Scheme, 1991" for post retirement benefits of the officers of ONGC.

3. The copy of the said scheme is found placed at Annexure-A with Special Civil Application No. 12262 of 2001. It is self-financing scheme. Its Eligibility Clause 1(b) provides that the member of the scheme should have served ONGC for a continuous minimum period of ten years except in case of death/permanent total

disablement and should have contributed as per Clause-2 of the Scheme. Clause 1(c) (i) provides for membership that all regular executives of O.N.G.C. in the service of the Commission on or after the effective date of the Scheme shall be eligible to become members of the scheme, subject to the condition that the employee who retired between 1.4.1990 and 1.4.1991 will be excluded from the scheme. Clause 1(c)(ii) provides that the scheme shall be optional to the existing executives in regular service on the effective date of the Scheme i.e. 1.4.1990. However, it is compulsory for the executives joining regular service in the Commission as new entrants on or after the effective date of the Scheme. Clause-2 provides for contribution to be made by the members to be calculated on the basis of their salary and according to the rate fixed in various age group provided in the said clause. Clause 2.2 provides that the employees superannuating within ten years from the effective date of the scheme shall be required to contribute minimum for a period of 10 years. Clause 2.3 provides that apart from the above contribution, additional cash contribution will be made by the member employee to make up the requirements relating to funding the scheme as determined by the actuaries/trustees from time to time. Clause 3 provides for reckonable service. Clause 3. A provides for counting of services, for determining eligibility for pension, rendered only in ONGC. Clause 4(c)(i) provides for refund of cash contribution with interest on member employee leaving within ten years of joining the ONGC. Clause 4(c)(ii) provides that the members leaving the service after cash contribution of 10 years or more will be entitled at their option either to have deferred pension from their notional age of superannuation, based on their reckonable service and salary at the time of leaving the organization. Clause 4 provides for calculation of benefits to be given to the member. Clause 4(d) provides that the benefit under the scheme will be paid by purchasing annuity from the LIC at the time of superannuation or leaving the Organization as per clause 4(c). It further provides that such benefit will be calculated on the basis of LIC Annuity for life pension with guaranteed payment for 15 years. The members are also given option to choose from the various types of annuities available with LIC. Clause 4(e) provides that the members shall have option to commute one third of the pensionary benefits as per LIC Annuity for Life Pension with guaranteed payment for 15 years. Clause 5 provides for managing the scheme as per which the scheme shall be run by the trust consisting of trustees to be nominated by the Chairman, ONGC and representatives as may be nominated on the Board by Central Working Committee ("CWC" for short) of Association of Scientific and Technical Officers of ONGC ("ASTO" for short). It further provides that the trust would make investment plan of the fund as per the pattern of rule 67(2) of the Income Tax Rules, 1961 and would purchase annuity from LIC for the beneficiaries under the Scheme. Clause 6 provides that the scheme is based on voluntary contribution by the member employees. It provides that no contribution will be made by ONGC towards this scheme except the contribution of Rs. 100.00 per annum and no other financial liability on account of this scheme will devolve on ONGC or the Government of India. Clause 7 provides that the trustees may review the

availability of funds annually or at such other intervals as may be fixed by the Trustees to decide whether any revision in the maximum entitlement and/or the rate of employees' contribution under the scheme is warranted.

4. It appears that after the Central Government accorded approval to the above said scheme, it was agreed between the officers of the ONGC and the ONGC to constitute a trust to run the scheme and, therefore, the trust deed dated 23rd October, 1991 was executed between the trustees and the ONGC. The trust deed provides for constitution of the Board of Trustees, for management of the funds, for providing the superannuation benefits under the scheme to the eligible members and making of the rules for operating the scheme. Copy of the trust deed and the rules for governing the scheme are found annexed with the affidavit in reply filed in Special Civil Application No. 3262 of 1999.

5. The scheme was then amended and modified vide circular No. PRBS/40 dated 18th June, 1998. Copy of this circular is found placed at Annexure-C with Special Civil Application No. 8297 of 1999. It is stated in this circular that in August, 1996, a writ petition No. 1718 of 1996 was filed by some member-officers of MRBC, Mumbai against ONGC and others before the Hon'ble High Court of Bombay challenging the financial viability of the scheme, and in compliance with the directions of the Hon'ble High Court, negotiations were held amongst the concerned parties and review of the scheme was carried out in consultation with the Actuaries. As a result, Memorandum of Understanding ("MOU" for short) was signed on 03.02.1998 by the concerned parties and finally the matter was disposed of by Hon'ble High Court of Bombay as withdrawn on 29.4.1998 on the basis of the MOU.

6. The amendments/modifications brought in the scheme of 1991 by circular dated 18th June, 1998 are mainly as regards change in definition of salary, rates of contribution, membership etc. Having felt affected and aggrieved by such amendments, the petitioners have challenged the Circular No. PRBS/40. They have prayed for the benefits as per the scheme existed prior to the said circular.

7. I have heard the learned Advocates for the parties. Learned Senior Advocate Mr. K.M. Patel appearing with learned Advocate Mr. K.G. Pillai, learned Advocate Mr. A.K. Clerk, appearing for the respective petitioners in this group of petitions submitted that once the scheme of 1991 was approved by the Central Government based on which the retired employees made contributions as provided in the scheme, no change affecting the rights of retired employees could have been brought in without approval of the Central Government. Learned Advocates for the petitioners submitted that under the scheme of 1991, rights in favour of the retired employees were crystallized and such rights could not have been altered to the detriment of the retired employees without their consent. Learned Advocates for the petitioners submitted that the MOU for making change in the existing scheme was entered into between the ONGC and the Unions behind back of the retired employees and therefore no amendment based on such MOU in the existing scheme could have been made affecting rights of the

retired employees. Learned Advocates for the petitioners submitted that amendment in definition of salary and the rates of contribution etc., resulted in curtailments of the post retirement benefits available to the retired employees which was not permissible as their relationship with the ONGC came to end and they stood governed by the scheme. Learned Advocates for the petitioners submitted that the amendments-modifications made by the impugned Circular No. PRBS 40 in 1998 could not be applied retrospectively to the employees retired before introduction of the said circular No. 40. Learned Advocates for the petitioners submitted that the impugned circular is to apply prospectively for the employees retired after introduction of the circular and, therefore, said circular in so far as it has taken away accrued rights of retired employees, is bad in law and is required to be quashed. Learned Advocates for the petitioners submitted that the trust managing funds is not private trust but is extended hand and in full control of the ONGC and, therefore, it cannot act arbitrarily and it has to stand test of Article 14 of the Constitution of India. Learned Advocates for the petitioners submitted that simply because the provision is made in the scheme of 1991 for reviewing and making change in the scheme, is no ground to take away the accrued rights of the retired employees under the scheme. Learned Advocates for the petitioners submitted that such review or amendment in the scheme available to the trustees and ONGC would apply only to the employees retired after the impugned Circular came into force or to the existing employees. Learned Advocates for the petitioners submitted that the retired employees since were senior drawing higher pay, their contributions were higher than the junior employees and, therefore, it is not correct to say that they took higher benefits against contributions than the junior employees who would contribute more. Learned Advocate for the petitioners submitted that once the retired employees became entitled for benefits under the scheme of 1991, it will be for the trustees to manage the funds by calling for required contribution from the members to whom the amended scheme would apply and in no way the accrued rights of the retired employee could be taken away.

8. Learned Advocate Mr. Rajni H. Mehta appearing for the respondents submitted that the petitioners are not entitled to invoke the writ jurisdiction of this Court under Article 226 of the Constitution of India as the ONGC is a Company and not the State. Mr. Mehta submitted that the petitioners are otherwise also not entitled to invoke the writ jurisdiction against the ONGC as the scheme is not run by the ONGC but managed by the trust wherein ONGC only contributes Rs. 100.00 per annum. Mr. Mehta submitted that the scheme of 1991 was since not financially viable, it was challenged before the Hon''ble High Court of Bombay and as a matter of fact, the Hon''ble High Court of Bombay found that the scheme was not financially viable and it was required to be reviewed by the trustees in consultation with the unions of the employees, pursuant to which an MOU was entered into between the trustees and the unions and based on such MOU, amendments/modifications were required to be brought in the scheme. Mr. Mehta submitted that the MOU was taken note of by the Hon''ble High Court of

Bombay and then the petitions were disposed of as withdrawn and thereafter the impugned Circular No. PRBS-40 was issued whereby the scheme of 1991 stood amended and modified and the petitioners with other eligible employees stood governed by the said amended scheme. Mr. Mehta submitted that the benefits under the scheme were released after June, 1998 and therefore there is no question of release of benefits as per scheme of 1991. Mr. Mehta submitted that not only under the trust deed but also under the scheme of 1991, the trustees were authorized to review availability of funds and to ask for additional cash contribution from the member employee to make up their requirements relating to the funding of the scheme and, therefore, it was open to the trustees to make amendments/modifications in the scheme. Mr. Mehta submitted that since the MOU was made in consultation with the unions as found necessitated pending the petitions before the Hon'ble High Court of Bombay, the petitioners cannot claim as a matter of right to get the benefits under the scheme of 1991. Mr. Mehta submitted that there is no question of affecting or taking away any rights allegedly accrued to the retired employees by effecting the amendment in the scheme of 1991 as the scheme of 1991 since not found financially viable, was not approved. Mr. Mehta submitted that the scheme though called as pension scheme, in fact, it is not a pension scheme but it is a self-contributory and self financing scheme of the employees of the ONGC for giving them benefits from the annuities purchased from the LIC from the funds of the trust. Mr. Mehta submitted that the amendment in the scheme was necessary as the funds with the trustees were likely to be depleted by release of benefits to retired employees which could have been much more contribution. Mr. Mehta submitted that in fact, the contribution of trust is about 200% more than the contribution of retired employees and, therefore, they are bound by the amended scheme. Mr. Mehta submitted that if the scheme was not amended, it would have been totally scrapped and nobody would have been entitled to any benefits on reaching the age of superannuation. Mr. Mehta submitted that the funds under the scheme are totally managed by the trustees and the scheme is entirely operated by the trustees wherein contribution of the ONGC is only Rs. 100.00 per annum and since there is specific provision in the scheme that the ONGC shall not be financially liable in connection with the scheme, the petitioners cannot maintain their petitions against the ONGC and are not entitled to claim any relief against the ONGC. Mr. Mehta submitted that in fact, this Court has got no jurisdiction to entertain the petitions as the Trust managing the fund for the purpose of operating the scheme is not within the jurisdiction of this Court and the ONGC being only nominal contributory to the fund and not responsible for operating the scheme of post retiral benefits to the member of the scheme, the petitioners cannot invoke jurisdiction of this Court. Mr. Mehta thus urged to dismiss the petitions.

9. Having heard learned Advocates for the parties, it appears that though the scheme is self contributory, the grievances made are that the employees who retired between 1992 to 1995 have been paid pension on the basis of the pre-

revised basic pay though the pay revision was implemented with effect from 1.1.1992, the employees retired between November, 1995 to June, 1998 have been paid pension at reduced rate as per the circular dated 18.6.1998, which was implemented with retrospective effect from November, 1995 and for the employees retired after June, 1998, the impugned circular of June, 1998 has reduced the benefit of pension by denying the benefit of revision with effect from 1.1.1992 as their salary was taken on 16.11.1995 with notional escalation.

10. For sake of convenience, the affidavit-in-reply filed on behalf of ONGC in Special Civil Application No. 3262 of 2000 is referred. It is stated in the affidavit that the post-retiral benefit scheme is based on voluntary contribution by member employees. No contribution, except token contribution of Rs. 100/- per annum, is made by ONGC. No other financial liability on account of the scheme devolves either on the ONGC or the Government of India. Since the ASTO, a registered body under the Societies Act, 1860, being representative body of all officers of ONGC spread throughout the country requested the management of ONGC to formulate the scheme to achieve the objective to take care of the post-retiral and death in service benefits, the scheme was envisaged and brought into effect as self contributory scheme with approval of the Central Government. It is stated that to run such scheme, the Trust Deed is made on 23.10.1991 and the Board of Trustees as per the Trust Deed is to manage the scheme. For giving the benefits to the members, annuities are purchased by the Trust from LIC in terms of Rule 89 of the Income Tax Rules, 1961 and periodical payment from annuity is then made by LIC to the eligible members. It is stated that since the pay scales of the executives were revised with effect from 1.1.1992, for which orders were issued on 10.1.1996, financial viability of the scheme got affected because of unexpected rise in the salary, and therefore the scheme was challenged by Writ Petition No. 1718 of 1996 before the Hon"ble Bombay High Court, wherein following order was passed on 5.11.1996:-

"This petition under article 226 is filed by some of the employees of Oil and Natural Gas Commission (ONGC) challenging the validity of ONGC Self Contributions Post Retirement and Death in Service Benefits Scheme ("Scheme" for short). The main grievance of the Petitioners is that the scheme is not financially viable and the entire corpus of the scheme is likely to be wiped out soon leaving the junior employees in service completely high and dry. The petitioners have therefore, prayed for quashing and setting aside the Scheme. In the alternative, they have prayed for a direction against the ONGC not to implement the scheme.

It seems that the scheme was introduced sometime in May, 1990 for the officers working in ONGC, although, some 3000 officers did not join the scheme, large majority comprising of nearly 18000 officers have opted for the scheme. So far around 2000 cases of those who have retired/expired have been settled. Nearly 293 cases of death and/or total/permanent disability while in service the pending for retirement.

In their affidavit in reply, the ONGC has vehemently denied the petitioners' case that the Scheme is not financially viable.

However, during hearing, Mr. Dada, learned Additional Solicitor General, appearing for ONGC fairly stated that the Corporation has received actuarial report from M/s. K.A. Pandit that the scheme is not viable. Mr. Dada also produced a copy of the report for the perusal of the Court. The report shows that the scheme is not viable on account of unexpected rise in the salary and change in the formula of D.A. M/s. K.A. Pandit have recommended that to make the scheme viable, it is necessary to raise fund from the sources available. The fund position should be reviewed especially when there is a change on account of wage negotiation or the long term recruitment policy. It is recommended that in order to take care of the fund additional contribution should be raised from the year in which exorbitant salary rise has been given i.e. 1992 and difference with 12% interest to be paid to the fund. It is also recommended that any difference of annuity cost because of the above salary rise and interest payable to LIC from 1992 to date of payment of annuity should be raised in such a way that it does not post undue problems to the existing members.

On a careful scrutiny of the report, it is clear that the Scheme is not viable unless additional funds are raised from different sources. Otherwise, the Scheme is liable to be scrapped altogether. The question relating to generation of Additional funds will have to be considered by negotiations between the officers' Association and the Corporation. The Bombay Association has appeared through the President, ASTO (MRBC), ONGC and has agreed for holding negotiations with the Corporation. However, the All India Association i.e. ASTO (CWC) ONGC has not appeared although served. The Central association is hereby directed to hold similar negotiations with the Corporation for the purpose of finding out solution for saving the Scheme. In the meanwhile, it is necessary to issue ad-interim relief in order to ensure that the fund is not further depleted.

The ONGC is hereby restrained from paying out from the funds of the scheme except in the cases of death or total/permanent disability while in service, the Corporation is permitted to release the funds to the extent of 50% in such cases."

11. It is further stated in affidavit that Hon'ble Bombay High Court then vide order dated 20.6.1997 amended the order dated 5.11.1996 and allowed the trust to refund the contributions of those employees whose contributions were inadvertently collected, as they were not eligible to become members of the scheme. Thereafter, pending the petitions, discussions-negotiations by including the representatives of the employees as well as the representatives of the union (ASTO) to review the scheme took place and after extensive negotiation, amicable understanding was reached with the help of the actuaries M/s. K.A. Pandit of Mumbai and it was decided that the Trust may review availability of the funds annually or at such intervals as may be fixed by the trustees to decide whether in revision of maximum entitlement and/or rate of employees' contribution under the scheme is warranted. In view of the above development,

MOU was arrived at on 3.2.1998 amongst all the concerned parties and based on such MOU, the Hon'ble Bombay High Court permitted the petitioners and the employees who had challenged the financial viability of the scheme of 1991 to withdraw the petitions. The MOU dated 3.2.1998 was considered by the trust in the meeting dated 4.2.1998 and was adopted vide resolution of even date as per rule 32 of the scheme rules and the approval of the Chairman of the ONGC was obtained on 2.3.1998 for the: amendments/modifications in the scheme. It is further stated that with additional availability of funds on account of amendments in the scheme as per MOU, the scheme became financially viable as confirmed by the actuaries M/s. K.A. Pandit vide their letter dated 13.4.1998 and thereafter, amendments in the scheme by impugned circular No. 40 dated 18.6.1998 were made and the benefits are being calculated in accordance with the amended provisions of the scheme. It is stated that the financial viability of the scheme is of paramount importance and if the scheme had not become financially viable, the scheme would have been scrapped and the petitioners would not have got any benefit under the scheme altogether. Since the scheme become financially viable by virtue of the MOU, the petitioners received benefits under the scheme. The affidavit has also dealt with the other contentions raised by and on behalf of the petitioners.

12. Conjoint reading of the scheme of 1991, the trust deed, impugned circular No. PRBS-40 and the stand taken by the ONGC in its affidavit would go to show that though the scheme is referred as pension scheme but in fact, it is self-contributory fund raising scheme for giving post retiral benefits to retired employees and death in service benefits to the heirs of retired employees from the annuities to be purchased from LIC by the Trust from the accumulated funds. Such post retiral benefits and death in service benefits are to be made available only to the members of the scheme unlike the pension scheme of the employer whereunder pension benefits are available to all the employees subject to their complying with the conditions of such scheme. There is no dispute about the fact that the ONGC has not introduced any pension scheme for giving benefits of pension to its employees. For the present scheme, ONGC is just contributing Rs. 100.00 per annum.

13. From the trust deed, it appears that though there is direct control of the Chairman on appointment of trustees and in fact out of seven members of the board of trustees, four members are to be nominated by the Chairman of the ONGC and their tenure is also at the pleasure of the Chairman of the ONGC, still the scheme managed by the board of trustees remains as self contributory scheme for post retiral benefits and death in service benefits only to the members of the scheme. However, since the ONGC through its Chairman has been exercising control over the trust, the Court can examine the grievances of retired employees of the ONGC in the petitions filed under Article 226 of the Constitution of India.

Learned Senior Advocate Mr. K.M. Patel relied on the decision in the case of A.

Manoharan and Others Vs. Union of India (UOI) and Others, ; Union of India (UOI) and Others Vs. Tushar Ranjan Mohanty and Others, and Ex-Major N.C. Singhal Vs. Director General Armed Forces Medical Services, New Delhi and Another, to press his point that as held by Hon"ble the Supreme Court in the above decisions, the Government or the legislative body or any State Authority has no power to amend, alter or modify any regulation, rule or scheme so as to take accrued rights of an employee.

14. The rules made by the trustees are to operate the scheme for benefits to the members on their retirement including voluntary retirement. However, the benefits under the scheme to the members are available only on their reaching the superannuation and from the annuities purchased from the accumulated funds of the trust. Therefore, for any retired employee, if the annuity is purchased by the trustees from the corpus accumulated, such member would start getting periodical benefits from such annuity and his ties with the ONGC and with the funds of the trust for the purpose of benefits under the scheme comes to an end. Such member then could not be bound by any subsequent liability on account of amendment in the scheme and for him, amendment cannot be applied retrospectively nor can be made entitled to any benefit of improvement in the scheme.

15. The Dictionary meaning of "annuity" is a fixed amount of money paid each year, usually for the rest of the life of payee, a type of insurance that pays a fixed amount of money each year. There are different kinds of annuities but it could be described as right to receive certain sum that may be given for life or for series of years. At this stage, it will be beneficial to refer rule 85 and 89 of the Income Tax Rules, 1962. They read thus:-

"85. All moneys contributed to the funds after 31st day of October, 1974, or received or accruing after that date by way of interest or otherwise to the fund may be deposited in a Post Office Savings Bank Account in India or in a current account or in a savings account with any scheduled Bank or utilized in accordance with rule 89 for making payments under a scheme of insurance or for purchase of annuities referred to in that rule; and to the extent such moneys as are not so deposited or utilised shall be invested in the manner specified in sub-rule (2) of rule 67, and for this purpose, the expression "invisible moneys" in that sub-rule shall mean the moneys of the fund as are not deposited or utilised as aforesaid.

....

89. For the purpose of providing the annuities for the beneficiaries, the trustees shall-

(i) enter into a scheme of insurance with the Life Insurance Corporation established under the Life Insurance Corporations Act, 1956 (31 of 1956) or any other insurer as defined in clause (28BB) of Section 2 of the Income-tax Act, 1961, or

(ii) accumulate the contributions in respect of each beneficiaries and purchase an annuity from the said Life Insurance Corporation of India or any other insurer at the time of retirement or death of each employee or on his becoming incapacitated prior to retirement.

Provided that nothing in this rule shall apply to a fund established or constituted, under an irrevocable trust which has its sole purpose to make payments of pension or family pension, in accordance with the rules or regulations made under the following Central Acts, namely:-

(i) the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970); or

(ii) the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 (40 of 1980); or

(iii) the State Bank of India Act, 1955 (23 of 1955); or

(iv) the State Bank of India (Subsidiary Banks) Act, 1959 (38 of 1959); or

(v) the Industrial Development Bank of India Act, 1964 (18 of 1964); or

(vi) the National Bank for Agriculture and Rural Development Act, 1981 (61 of 1981); or

(vii) the Export-Import Bank of India Act, 1981 (28 of 1981); or

(viii) the Industrial Reconstruction Bank of India Act, 1984 (62 of 1984); or

(ix) the Small Industries Development Bank of India Act, 1989 (39 of 1989); or

(x) the National Housing Bank Act, 1987 (53 of 1987)."

16. Above rules fall under the heading of "Approved Superannuation Funds" of the Income-tax Rules, 1962 ["I.T. Rules, 1962" for short]. Rule 85 provides that All moneys contributed to the funds after 31st day of October, 1974, or received or accruing after that date by way of interest or otherwise to the fund may be deposited in a Post Office Savings Bank Account in India or in a current account or in a savings account with any scheduled Bank or utilized in accordance with rule 89 for making payments under a scheme of insurance or for purchase of annuities referred in that rule; and to the extent such moneys as are not so deposited or utilised shall be invested in the manner specified in sub-rule (2) of rule 67. Rule 89 provides that for the purpose of providing the annuities for the beneficiaries, the trustees shall enter into a scheme of insurance with the Life Insurance Corporation or accumulate the contributions in respect of each beneficiaries and purchase an annuity from the Life Insurance Corporation of India or any other insurer at the time of retirement or death of each employee or on his becoming incapacitated prior to retirement. However, exception is carved out by proviso that nothing in this rule shall apply to a fund established or constituted under an irrevocable trust which has its sole purpose to make payment of pension or family pension, in accordance with the rules or regulations

made under the Central Acts named therein.

17. In the scheme of 1991, it is specifically provided that from the accumulated "corpus" against each beneficiary, annuity from the LIC shall be purchased by the trustees at the time of retirement or death of member-employee. Thus, as required by rule 85 and 89 of I.T. Rules, the scheme of 1991 secured benefits for its members from the funds accumulated from the contributions of the members. As provided in rule 91 of I.T. Rules, no beneficiary shall have any interest in any insurance policy taken out by the trustees under the rules of a fund and he shall be entitled only to an annuity from the fund. As per the proviso to rule 89 of I.T. Rules, scheme for insurance or annuity shall not apply to the funds established or constituted for making payment of pension or family pension in accordance with the rules or regulations made under the Central Acts named therein. Therefore, it appears that the scheme of 1991 was intended to run for the benefits of its members from the funds accumulated from their contributions only and, therefore, it cannot be said to be pension scheme of the employer.

17.1 In Special Civil Application No. 16739/10, 5815/12 and 13697/12, the trust is joined as party and in affidavit in reply filed on behalf of the trust, it is stated that the scheme is managed and handled by the trust with the token contribution of Rs. 100.00 per annum from the ONGC and the scheme being self-contributory-self-financing scheme, same is not pension scheme and, therefore, the petitioners are not entitled to invoke the writ jurisdiction under Article 226 of the Constitution of India. The petitions are also opposed on the ground of delay.

18. As stated by the petitioners themselves in their petitions, the scheme for their post retiral benefits is self-contributory and self-financing scheme and the trustees are required to determine corpus in respect of each of the members of the scheme and to purchase annuity from the LIC for retiring employee-member of the scheme.

19. As stated in the affidavit in reply, to make the corpus for each of the retiring employee-member, the trust contributed much more than the contribution of such retiring employee and for such purpose, the contribution made by the young employees were being used. It is in such circumstances the scheme was not financially viable and ultimately amendments in the scheme were warranted. Under the scheme of 1991, the trustees were very much authorized to review the funds to make suitable changes in the scheme. In such view of the matter, to make the original scheme financially viable for the benefits of the members of the scheme, if the trustees in due deliberation and consultation with the unions brought amendment in the scheme, it cannot be said that the rights of the petitioners are adversely affected. When the trustees are responsible to manage the funds for the purpose of ultimate benefits to be given to the members of the scheme and when they are authorized to review such funds and call for necessary further contribution, they cannot be said to have acted arbitrarily, unreasonably and their such action cannot be said to be in any way violative of Article 14 and 16 of the Constitution of India. So long as the funds were not

utilized for purchasing annuities from the LIC for the individual member, such individual members would stand governed by the amended scheme. However, for any member-retired employee, if the trustees had purchased annuity from the funds before the amendment in the scheme was brought in on 18th June, 1998, such member would cease to have any tie with the funds and his case cannot be permitted to be reviewed by the trustees. He cannot be asked to make any further contribution or to receive reduced benefits under the new scheme.

20. From the very nature of the scheme, it appears that the rights of the members of the scheme to get the post retiral benefits are depending upon the availability of the funds with the trustees. Such availability of the funds with the trustees is only from the contributions of the members-employees. It is not a case where the employees are not required to contribute any amount for getting the pension and the ONGC is responsible to allocate entire fund and create trust for paying pension to the retiring employees. If such was the case, right to get pension would get crystallized as per the Rules of the ONGC. But when there is no pension scheme from the ONGC, members of the scheme are to abide by amendment brought in by the trustees on review of the scheme unless they are paid benefits under the scheme on their retirement by purchasing annuities for them before the amendment.

21. At this stage, the decision in the case of Air India Employees Self Contributory Superannuation Pension Scheme Vs. Kuriakose V. Cherian and Others, needs to be referred. Hon"ble the Supreme Court has held and observed in paragraph No. 34 to 52 as under:-

"34. 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.

35. 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.

36. 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.

37. 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.

38. 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.

39. 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 prescribed annuity in either absolute currency or as a fraction of a measure of salary (e.g., 50 percent 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.

40. 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.

41. 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 herein before. 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".

42. 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.

43. 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)

44. In *CWT v. P.K. Benerjee*, this Court held that in order to constitute an annuity, the payment to be made periodically should be a fixed or predetermined 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. IRC* which reads thus:- (All ER p.675 H)

"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."

45. 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.

46. 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.

47. 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.

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

49. In *Sasadhar Chakravarty & Anr. v. Union of India & Ors.*, 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 could 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.

50. 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.

51. 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 v. CIT* 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 under Section 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, under Section 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.

52. 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.

22. Learned Senior Advocate Mr. Patel however submitted that in view of the judgment of the Kerala High Court in Writ Appeal (WA) No. 1882/2005, the petitioners shall be entitled to the benefits as per the unamended scheme. The judgment relied in the said Writ Appeal was passed relying on the judgment in WA No. 21/2004 and as observed in the said judgment, the Court held that the judgment will not be binding to all the cases in future. The judgment in WA No. 1882/2005 was challenged before Hon'ble the Supreme Court and Hon'ble the Supreme Court dismissed the Special leave Petition No. 336/09 leaving the

question open. In such view of the matter, no relief based on the judgment of Kerala High Court can be granted especially when this Court has independently decided the issues raised in the present group of petitions.

22.1 Learned Senior Advocate Mr. Patel, then relied on the decision in the case of O.N.G.C. Ltd. Vs. G.S. Chugani and Another, to point out that the scheme of 1991 was approved by the Central Government and based on such scheme of 1991, Hon'ble the Supreme Court has affirmed the order made by the learned Single Judge holding that the retired employee therein - respondent was governed by the scheme approved by the Central Government. Mr. Patel submitted that the amendment by the impugned circular was not approved by the Central Government and, therefore, same benefit which was made available in the case of G.S. Chugani (supra) can be made available to the petitioners and impugned circular cannot be applied to the case of the petitioners.

As discussed above, in the scheme approved by the Central Government, there is provision for review of the availability of funds by the trustees. Therefore, fresh approval was not required for amendment in the scheme especially when the scheme was found not financially viable. In any view of the matter, when this Court has arrived at the conclusion that the amendment by the impugned circular cannot be applied in the case of retired employees for whom the annuities were purchased and the benefits were released prior to 18th June, 1998, such employees would remain entitled for the benefits under the scheme of 1991. Therefore, the above said judgment will be of no help to the case of the petitioners.

23. Mr. Mehta however raised the question about maintainability of the petitions. However, as stated above, since from the trust deed, it appears that the ONGC has full control on the constitution of the board of trustees to manage the funds of the scheme and since trust is constituted for the benefit of the employees of ONGC, the petitions cannot be dismissed simply on the ground that the self contributory scheme is not amenable to the writ jurisdiction. However, the question would still remain whether the petitioners can challenge the impugned circular amending the original scheme. For this purpose, rights of the petitioners to challenge the amendment are to be considered in the context of the original scheme of 1991. Original scheme when clearly provides for reviewing the funds and necessary amendment or alteration in the scheme by the trustees, members of the scheme including the petitioners would have no right to challenge the powers of the trustees to review the scheme except on the ground that the impugned circular cannot apply retrospectively to the retired employees for whom the annuities were purchased and benefits were released to them prior to introduction of the impugned circular.

24. Under such circumstances, those petitioners - retired employees for whom the annuities were not purchased before the scheme was amended as per impugned circular of 1998 and who did not get post retiral benefits, they would not be entitled to challenge the impugned circular and shall stand governed by

the impugned circular. For such petitioners, no relief can be granted and their petitions would stand dismissed.

25. However, those petitioners-retired employees for whom annuities were already purchased and post retiral benefits or the death in service benefits were given prior to 18.6.1998, they shall continue to be governed by the old scheme of 1991 and the amendment made in the scheme by the impugned circular cannot be applied to them.

26. Though rest three petitions i.e. Special Civil Application No. 16739/10, 5815/12 and 13697/12 are filed after much delay, however, since the Court differentiated between two set of retired employees, one for whom annuities were not purchased and the benefits were not released prior to 18.6.1998 and the others for whom annuities were purchased before amendment, objection of delay not required to be considered.

27. However, since no clear details are available about the retired employees for whom the annuities were purchased before 18.6.1998, it is required to be directed that those petitioners-retired employees for whom annuities were already purchased and post retiral benefits and death in service benefits were released prior to impugned circular No. PRBS/40 dated 18th June, 1998, the amendment in the scheme by impugned circular shall not be made applicable to them and they shall continue to be governed by the scheme of 1991. For the reasons stated above, the petitions are dismissed. However, the respondents are directed not to apply the impugned circular No. PRBS/40 dated 18th June, 1998 to the retired employees for whom the annuities were purchased from the LIC and benefits under the scheme of 1991 were released prior to 18th June, 1998, i.e. the date of impugned circular No. PRBS/40. Such retired employees, the members of the scheme, shall stand governed by the scheme of 1991. For such retired employees, if the respondents have implemented the impugned circular, the respondents shall restore the benefits to such retired employees as per the scheme of 1991 by recalculating the benefits for them as per the scheme of 1991. Such exercise shall be completed within the period of three months from the date of receipt of this order. Rule is discharged in each of the petitions.