

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION NO. 6611 of 2011
With
SPECIAL CIVIL APPLICATION NO. 6652 of 2012
TO
SPECIAL CIVIL APPLICATION NO. 6666 of 2012
With
SPECIAL CIVIL APPLICATION NO. 5956 of 2012

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE C.L. SONI

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
- 2 To be referred to the Reporter or not ?
- 3 Whether their Lordships wish to see the fair copy of the judgment ?
- 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
- 5 Whether it is to be circulated to the civil judge ?

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ONGC RETIRED EMPLOYEES WELFARE ASSOCIATION THROUGH &
88....Petitioner(s)
Versus
ONGC LTD THROUGH CHAIRMAN & MANAGING DIRECTOR &
8....Respondent(s)

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Appearance:

MR K.M. Patel, Senior Advocate with Mr. KRISHNA G PILLAI, ADVOCATE
MR MUKUL SINHA, ADVOCATE for petitioners in respective petitions.
MR RAJNI H MEHTA, ADVOCATE for the Respondent(s) No. 3
RULE SERVED for the Respondent(s) No. 1 - 4

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CORAM: HONOURABLE MR.JUSTICE C.L. SONI**Date : 29/04/2014****CAV JUDGMENT :**

1. Special Civil Application No. 6611 of 2011 and Special Civil Application No.5956 of 2012 filed by the ONGC Retired Employees' Association with its members – retired employees for following common prayers made in para 8(A) to (C).

"8.(A) To declare the Memorandum of Understanding dated 3.2.1998 and impugned Circular No. PRBS/40 at Annexure A are illegal, arbitrary, discriminatory and violative of the scheme and Rules thereof and the same be quashed and set aside.

(B) To declare that the Memorandum of Understanding dated 9.4.2007 is illegal, discriminatory, unconstitutional in so far as it differentiate between the employees retired before and after 31.12.2007 and to that extent, the Circular PRBS-64 at Annexure "C" be quashed and set aside.

(C) To issue a Writ of Mandamus or writ or direction in the nature of mandamus directing the respondent No.1 & 2 to settle the Pension Claim of the petitioners in accordance with the provisions of Post Retirement Scheme 1990 with effect from the date of their superannuation/voluntary retirement with all consequential benefits including payment of arrears and interest."

2. Special Civil Application No. 6652 of 2012 to 6666 of 2012 are one page petitions filed by individual retired employee for grant of prayers made in para 8 of Special Civil Application No.5956 of 2012.

3. Since common questions are raised in this group of petitions, they are decided by this common judgment.

4. The Oil and Natural Gas Commission ("ONGC" for short) introduced the scheme titled as "ONGC Self-Contributory Post Retirement and Death in Service Benefits Scheme, 1991" for post retirement benefits of the officers of the ONGC. The copy of the said

scheme is found placed at Annexure-K with Special Civil Application No. 6611 of 2011. 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.

5. 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 above said 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.

6. 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-A with Special Civil Application No. 6611 of 2011. 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.

7. The amendments/modifications brought in the scheme of 1991 by Circular No. PRBS-40 dated 18th June, 1998 are mainly as regards change in the definition of salary, rates of contribution, membership etc. This Circular was the subject matter of challenge in Special Civil Application No. 8297/99 and allied matters. However, this Court has not accepted the challenge against the said circular and dismissed all the above said petitions with the direction that the amendment in the scheme shall not apply for those retired employees for whom the trust had purchased annuity and released the post retiral benefits before 18th June, 1998, and they shall continue to be governed by the scheme of 1991.

8. It appears that after the above said circular of 1998, one MOU dated 9.4.2007 between the ASTO and ONGC was arrived which is

annexed at Annexure-C with Special Civil Application No. 6611/2011 pursuant to which the ONGC agreed to deposit some amount from the remaining part of the distributable profit of the past and not more than 40% of the distributable profit every year after payment of annual incentive to the funds as per the requirement of the funds liability from time to time. It is also agreed that the pensionary benefits would be calculated depending upon the date of separation from the ONGC on account of superannuation etc. as under:

- (I) For the employees separated from ONGC upto 31.3.2007, pensionary benefits would be calculated under the defined corpus.
- (II) For the employees separating from ONGC on or after 1.4.2007, the pension benefits would be calculated under the defined pension scheme as per the agreed formula.

9. Based on such Understanding, revised scheme vide circular No. PRBS-64 dated 31.12.2007 was introduced and implemented.

10. The case put up by the petitioners is that since the other retired employees challenged the Circular No. PRBS-40 dated 18th June, 1998 and since those petitions were pending, the petitioners did not file petitions earlier. However, since they apprehended that if the petitioners in those petitions succeeded, the respondents might stick to their stand to apply the judgment qua those petitioners only, therefore, by way of abundant precaution, the petitioners have filed the present petitions. The petitioners have averred that not only the circular No. PRBS-40 has taken away their accrued rights but by one more circular No. PRBS-64 dated 31.12.2007, employees who retired between 16.11.1995 and 1.4.2007 have been discriminated and excluded from the benefits of huge funds contributed by the ONGC as a result of agreement between ONGC and ASTO. It is the case of the petitioners that in the modified and revised scheme under circular No. 64, the ONGC has undertaken liability of the funds and agreed to contribute to the PRBS Trust from time to time. However, the petitioners were excluded from the benefit of such reunited funds in as much as such funds were distributed in accordance with the date

of superannuation from the ONGC i.e. to those employees separated from ONGC upto 31.3.2007, pensionary benefits would be given under the defined corpus as done under the earlier scheme and for the employees separated from ONGC on or after 1.4.2007, pension benefits would be calculated under the defined pension scheme as per circular No. PRBS-64. Such scheme has thus bifurcated beneficiaries of the scheme into two classes from the same set of retired employees on the basis of their date of retirement. It is further averred that earlier, no contribution from ONGC was proposed or agreed between the parties. However, in subsequent MOU dated 9.4.2007, huge contribution from the ONGC was proposed and agreed but the employees retired prior to 31.3.2007 are left to get the benefits under the defined corpus while employees retired after 1.4.2007 would receive benefit under the defined pension scheme. Such gross discrimination is violative of the fundamental rights of the petitioners enshrined under Article 14 and 16 of the Constitution of India.

11. The petitions are opposed by affidavit in reply filed on behalf of respondent Corporation mainly on the ground that the circular dated 31.12.2007 is challenged after a period of more than four years and there is no collusion between the ONGC and ASTO to deny the the benefits to the petitioners. It is stated that after the MOU dated 9.4.2007 was signed by the ASTO – recognized union, the circular No. PRBS-64 came into existence. It is stated that the employees who have already retired before 31.3.2007 could not be made entitled to the benefit of new scheme as the effective date was fixed from 1.4.2007 after lot of negotiations and deliberation between the union and the ONGC. It is also stated that the petitioners have got much more from the contributions of existing employees to PRBS Trust and since the contribution of the ONGC has been Rs.100.00 only till 31.3.2007 as approved by the Central Government vide notification dated 18.9.1991, for such employees retired before 31.3.2007, revised pension scheme could not be applied retrospectively. It is

stated that till 31.3.2007, PRBC Scheme has been annuity based self contributory post retirement benefit scheme, and the petitioners have availed such benefits at the time of their retirement before 31.3.2007. The petitioners therefore cannot claim any benefit under the revised scheme as per circular No. PRBS.64.

12. This Court, after considering the arguments advanced by the learned advocates for the parties has not accepted the challenge to the circular No. PRBS/40 dated 18.6.1998 in the group of petitions being Special Civil Application No. 8297/99 and allied matters and rejected the prayer to grant benefits under PRBS Scheme of 1990 (1991) by separate judgment. Accordingly, these petitions for challenge to Circular No. PRBS/40 and prayer to grant benefits as per the PRBS Scheme of 1991 shall stand governed by the said judgment.

13. Learned Senior Advocate Mr.K.M. Patel appearing with learned advocate Mr. Krishna G. Pillai for the petitioners and learned advocate Mr. Rajni H.Mehta appearing for the respondent ONGC are therefore heard as regards challenge made to circular No. PRBS.64 dated 31.12.2007. Learned Senior Advocate Mr. Patel submitted that earlier by PRBS Circular No. 40, accrued rights under the scheme of 1991 were taken away on the ground that the scheme of 1991 was not financially viable. Mr. Patel submitted that now the ONGC has poured huge contribution in the fund for benefits under the scheme, however, the petitioners are discriminated in the matter of getting pension benefits without any rational or logic. Mr. Patel submitted that like other employees who would retire after 1.4.2007, the petitioners were also employees of the ONGC and if for the employees retiring after 1.4.2007 the ONGC could contribute crores of rupees for their retiral benefits, there is no reason not to extend such similar benefits to the employees retired prior to 31.3.2007. Mr. Patel submitted that in fact, there is no change in policy for providing post retiral benefits to the retired employees except that now by way of agreed formula between the Union and ONGC, the funds of ONGC

would be utilized for those employees retiring after 1.4.2007. Mr. Patel submitted that there is no logic for providing cut off date of 31.3.2007 for the purpose of giving benefit of defined pension scheme except that there is agreement between the unions and ONGC. Mr. Patel submitted that the agreement is nothing but conspiracy and collusion between the union and ONGC to deprive the employees retired prior to 31.3.2007 of defined pension scheme under which only the employees retiring after 1.4.2007 would get benefits from the funds of ONGC. Mr. Patel submitted that the right to receive pension is fundamental right enshrined under Article 21 of the Constitution of India and since such benefits are to be made available with other employees whose petitions were pending before this Court, delay should not come in the way of the petitioners in claiming such benefits. Mr. Patel submitted that the ONGC being Statutory Corporation and under the direct control of the Central Government, it cannot divide benefits of the scheme unequally by forming two classes of same set of retired employees on the basis of their date of retirement. Mr. Patel submitted that when the ONGC has decided to contribute huge amount for post retiral benefits to its employees, such benefit of huge contributions made by the ONGC are required to be equally distributed amongst all the employees. Mr. Patel thus urged to declare the circular No. PRBS/64 dated 31.12.2007 as discriminatory, unconstitutional and to direct the respondents to extend the benefits of Circular No. PRBS/64 equally also to the employees retired before 31.3.2007.

14. To counter the above arguments, learned advocate Mr. Rajni H. Mehta appearing for the respondents submitted that till 31.3.2007, the post retiral benefits were released based on self contributory scheme wherein contribution of the ONGC was only of Rs.100.00. Mr. Mehta submitted that it was on account of utilization of funds of existing employees for benefits of retired employees, since huge deficit was created in the funds, the ONGC agreed with the unions to provide funds and such agreement was implemented w.e.f. 1.4.2007

by circular No. PRBS/64 issued on 31.12.2007 and, therefore, benefit under the said circular could be made available only to the employees retired after 1.4.2007. Mr. Mehta submitted that the employees retired before 31.3.2007 since got post retiral benefits on their superannuation before 31.3.2007 on the basis of self contributory scheme in existence prior to circular No. PRBS/64, they ceased to be employees of ONGC and their ties with the funds of the trust for the purpose of benefits under the earlier scheme also come to an end. They are therefore not entitled to the benefit of any improvement made in the scheme for post retiral benefits. Mr. Mehta submitted that the petitions suffered by delay and laches as the petitions are filed after more than four years from the date of issuance of the circular No. PRBS/64 dated 31.12.2007. Mr. Mehta submitted that since large deficit in the funds was required to be met as recommended by the Actuaries M/s. Mercer Human Resource Consulting, the Circular No. PRBS/64 dated 31.12.2007 came into existence as per the understanding-agreement with the unions. Mr. Mehta submitted that since the scheme was to run by utilizing the funds available with the trustees and since the petitioners got more benefits against their contributions on their superannuation, the benefits as per the MOU dated 9.4.2007 and Circular No. PRBS/64 could be made available only to the employees retired after 31.3.2007 and, therefore, there was no question of discrimination against the employees retired prior to 31.3.2007. Mr. Mehta submitted that those employees who got the benefits on reaching the superannuation under the existed scheme cannot claim any higher beneficia on account of subsequent revision in the scheme. Mr. Mehta submitted that those employees who took voluntary retirement prior to 31.3.2007 are also not entitled to ask for any further benefits on account of improvement in the scheme. Mr. Mehta thus urged to dismiss the petitions.

15. Having heard the learned advocates for the parties, it appears

that even after the amendment in the scheme of 1991 by Circular No. PRBS/40 dated 16.6.1998, concern was raised about the sustainability and financial viability of the scheme. Therefore, as stated in the MOU dated 9.4.2007 at Annexure-C, (collectively at page no.39), Actuaries M/s. Mercer Human Resource Consulting were appointed to study the financial strength of the PRBS to recommend necessary changes for long term viability of the scheme. Said Actuaries found that there was large deficit in the funds which needed to be met, made some recommendations to sustain the scheme. As found stated in one of the terms of agreement, the ONGC agreed to increase contribution by 82% from the 1st day of the month of implementation of the revised scheme with annual escalation of 10%. The Circular No. PRBS/64 at Annexure-C dated 31.12.2007 with Special Civil Application No. 6611 of 2011 was then issued. The scheme provides that for the employees separated from ONGC upto 31.3.2007, pension benefits would be calculated under the defined corpus as per the formula existed then. However, for the employees separated from ONGC after 1.4.2007, the pension benefits would be calculated under the defined pension scheme with different formula. Under the above said revised scheme, the benefits to be made available to the employees separated from ONGC on or after 1.4.2007 though by purchasing annuity but on a different formula than the formula adopted for the employees separated from ONGC upto 31.3.2007 whereupon they will not be getting the enhanced benefits. The rational appears to be that they got benefits as per self contributory scheme and as per the recommendation of the Actuaries, if the funds were to be provided by the ONGC to fill large deficit in the funds to sustain the scheme, on availability of the funds, the scheme could run on a new formula. Therefore, to sustain the scheme, if a decision is taken not to apply the revised scheme to the employees retired and got benefits prior to 31.3.2007, the employees separated from ONGC on their superannuation prior to 31.3.2007 could not be said to have been discriminated in the matter of post retiral benefits. It is

pointed out in the affidavit in reply that all the petitioners had got post retiral benefits on reaching their superannuation before 31.3.2007 and now, it is not open to challenge the scheme under Circular No. PRBS/64 dated 31.12.2007 after a period of four years. Such stand taken by the respondents cannot be said to be unreasonable or arbitrary in any manner.

16. In the case of **T.N. Electricity Board versus R. Veerasamy and others**, (1999) 3 SCC 414, while examining the Pension Scheme introduced by Tamil Nadu Electricity Board denying benefits to the employees retired before 1.7.1986 after receiving retiral benefits available to them as per law, Hon'ble Supreme Court held and observed in para 13 and 15 as under:

“13. The retired employees (respondents) while in the service of Government of Tamil Nadu Electricity Department were not governed by pension scheme but governed by the Contributory Provident Fund Scheme. As per the rules in force on the date of the retirement, the employees (respondents) received all retiral benefits. The appellant-Board fixed 1-7-1986 as the date of introducing the pension scheme in view of the Central Government Notification No.-S-35012/21/84-SSIV (SS 11) dated 25-6-86 fixing the date as 1-7-1986, while granting exemption from the application of Family Scheme, 1971 and Employees Deposit Linked Insurance Scheme, 1976. If the date of 1-7-1986 had to be changed it would lead to many other complications such as reopening and revision of past cases from 1957 to 1986 as well as seeking retrospective exemption from Government of India. It is also brought to our notice that by giving retrospective effect to the pension scheme as per the impugned judgment of the Division Bench of the High Court, the financial burden that will have to be borne by the appellant-Board would be in the region of about Rs. 200 crores which is beyond the capacity of the Board.

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15. As noticed earlier, the learned Judges even after noticing that the ratio in the judgment of this Court in Nakara's case (AIR 1983 SC 130) (supra) cannot be pressed into service, erroneously

granted relief on the alleged delay on the part of the appellant-Electricity Board in introducing the pension scheme which certainly cannot be a ground for the Court to give retrospective effect to the pension scheme. Moreover, the appellant-Board had given well-founded reasons for introducing the pension scheme from 1-7-1986 including financial constrains, a valid ground. We are of the view that the retired employees (respondents), who had retired from service before 1-7-1986 and those who were in employment on the said date, cannot be treated alike as they do not belong to one class. The workmen, who had retired after receiving all the benefits available under the Contributory Provident Fund Scheme, cease to be employees of the appellant-Board w.e.f. the date of their retirement. They form a separate class."

17. In the case of **Sasadhar Chakravarty and another, Petitioners v. Union of India and others**, (1996) 11 SCC page 1, the Hon'ble Supreme Court while examining the claim of existing pensioners for the benefit of pension scheme on improvement in non-contributory approved superannuation fund, has held and observed in para 6 to 12 and 18 as under:

"6. Part XIII of the Income-tax Rules, 1962 covering Rules 82 to 97 and dealing with approved Superannuation Funds is framed in exercise of the powers conferred, inter alia, under Clause 11 (cc) of part B of Schedule IV. Under Rule 85 of the Income-tax Rules, 1962 all moneys 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 any scheduled bank or utilised in accordance with Rule 89 for making payments 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 employees shall not exceed twenty-five per cent of his salary for each year as reduced by the employer's contribution, if any, to any provident fund (whether recognised or not) in respect of the same employee for that year. Rule 89 provides as follows:-

Rule 89.

"Scheme of insurance or annuity.

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 Corporation, Act. 1956 (31 of 1956), or

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

Rule 91 is as follows:

"Beneficiary not to have any interest in insurance and employer not have any interest in fund's moneys.

(1) 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.

(2) No money belonging to the fund shall be receivable by the employer under any circumstances nor shall the employer have any lien or charge on the fund".

7. Under the Indian Oxygen Executive Staff Pension Fund which is an approved superannuation fund as per the above provisions, for the purpose of providing annuities to the beneficiaries, the trustees accumulate the contribution in respect of each beneficiary and purchase an annuity from the Life Insurance Corporation of India at the time of retirement or death of each employee or on his becoming incapacitated prior to retirement as per Rule 89 (ii). Therefore, when an employee retires, all accumulated contributions in respect of the concerned employee made by the employer to the pension fund of the trust are utilised for the purpose of purchasing an annuity from the Life Insurance Corporation of India for the benefit of the employee. The right of the employee to receive the annuity and the quantum of this annuity get crystallised at the time of purchase of the annuity under the then existing scheme of the Life Insurance Corporation of India. This annuity is payable for a minimum fixed period and thereafter as long as the recipient is alive. The Life Insurance Corporation of India Ltd. in its affidavit has set out that it is common to provide that the annuity would be payable for a selected number of years irrespective of whether the annuitant is alive or not. At the end of the selected number of years if the annuitant is

alive, the annuity is continued throughout the lifetime of the annuitant.

8. Rules 85 and 89 are meant to safeguard the moneys deposited in the superannuation fund and to secure to the annuitant the annuity amount. Undoubtedly, Rule 89 requires the trustees to purchase an annuity from the Life Insurance Corporation of India to the exclusion of anyone 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 Life Insurance Corporation of India are backed by a government guarantee which is provided by Section 37 of the Life Insurance Corporation Act, 1956. The payment of annuity is thus properly secured.

9. The petitioners contend that any improvements made in the existing pension scheme after the retirement of the employees should also be made available to such retired employees who are the existing pensioners of the Fund. The denial of the benefit of such improvements in the pension schemes to the existing pensioners is ultra vires Articles 14, 19, 21, 31 and 300A of the Constitution of India. This contention is based on a misunderstanding of the nature of the annuity which is purchased in respect of each employee as and when he retires. The right of an employee to receive the annuity and the quantum of this annuity gets determined at the time when the annuity is purchased. Any subsequent improvements in a given Pension Fund Scheme would not be available to those persons whose rights are already crystallised under the annuity scheme by which they are governed because the amounts contributed by the employer in respect of such persons are already withdrawn from the Pension Fund to purchase an annuity. Any subsequent improvement in the Pension Fund will benefit only those whose moneys form a part of the Pension Fund.

10. As regards the improvements made in the Indian Oxygen Limited Executive Staff Pension Fund Scheme in 1985, the trustees of the said fund in their affidavit have explained that an improvement in the pension scheme of an approved superannuation fund is effected on the basis of the fund's financial position as determined by actuarial valuation based on current resources of the fund and future contributions to be received by the fund only in

respect of the existing members in service. An employer cannot make tax deductible contributions to the fund in respect of its past employees. Therefore, there is no scope for augmenting the resources of the fund to meet any obligation that may arise on account of extending the benefit of improvement to the past employees who are existing pensioners. The amounts contributed in regard to such existing pensioners have already been transferred from the corpus of the fund to the Life Insurance Corporation of India for the purpose of purchasing an annuity. Hence there is no accretion coming to the said fund from out of the transferred corpus relating to such existing pensioners. Hence the improvements which are determined by actuarial valuation based on the current resources of the fund and its future expectations cannot be made available to the existing pensioners.

11. In these circumstances the ratio of D.S. Nakara v. Union of India. AIR 1983 SC 130 cannot be applied to extend the benefit of improvement in the pension schemes of such funds to the existing pensioners. By the very nature of this scheme, such benefits are available only to members in service. In the present case, the pension Fund is created out of contributions made by the employer in respect of its employees who are in service in the manner provided under the Income-tax Act and the Rules. The contribution is in the form of a fixed percentage of salary of each of the employees. There is, therefore, no provision for an employer making any additional payment in respect of its past employees who are the existing pensioners. In Nakara's case (AIR 1983 SC 130) (supra) the increase in pension could be met from the general revenue of the Central Government. No such reserve of funds is available to the trustees of an approved superannuation fund. As soon as an employee retires and 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 improvements made subsequently in the pension scheme of a fund. Since the existing pensioners from a distinct class, there is no question of any violation of Article 14 in this connection or of any other Article of the Constitution.

12. The Life Insurance Corporation of India in its affidavit, has pointed out that with effect from 1-4-1985 the Corporation decided to increase the pensions payable under their annuity scheme. They decided to make this increase available not only to new pensioners but also to the annuities which were in the course of payment. Accordingly, the first petitioner's pension under his existing annuity policies was increased with effect from 1-4-1985. This decision of the Life Insurance Corporation to enhance the pension was only with a view to grant relief to the existing pensioners and was not based on any contractual obligation of the Corporation. The Corporation has further pointed out in its affidavit that it has now introduced new annuity scheme. An option has been given to the existing members to switch over to the new scheme. Under the new option available to the pensioners the value of the outstanding installments is determined and the same is applied in the purchase of an annuity. Such annuity would be payable during the life-time of the annuitant and the value of the outstanding installments is returned to the annuitant's nominee on his death. The benefit of changing over to the new scheme is thus made available to the existing pensioners also. There is, therefore, no discrimination in this regard as against the existing pensioners.

18. The petitioners have also raised some objections to the changes made in the Indian Oxygen Limited Executive Staff Pension Fund in 1984 and 1985. The definition of "salary" under the old pension Fund Rules of Indian Oxygen Ltd. did not include commission payable to whole-time Directors. However, by a Deed of Variation dated 9-1-84 the definition of "salary" has been changed. "Salary" has been defined to mean the basic salary of a member and to have the same meaning as defined in Rule 2 (h) of part A of the Fourth Schedule to the Income-Tax Act, 1961. In the case of a whole-time Director, "salary" now also includes the commission on net profits payable to the Director provided that such commission is a part and parcel of the remuneration of the whole-time Director according to the terms of his appointment as approved by the Central Govt. under the Companies Act. The petitioners object to the commission being included in the salary of a whole-time Director as now defined. The change has been made in the light of a decision of this Court in the case of Gestetner Duplicators P Ltd. v.

Commr. Of Income Tax, West Bengal, 117 ITR 1 : (AIR 1979 SC 607) where this Court has held that the commission payable as per the terms of a contract of employment at a fixed percentage of turnover falls within the term "salary" as defined in Rule 2 (h) of Part A of the Fourth Schedule to the Income-Tax Act, 1961. The change in the definition is in accordance with the meaning assigned to "salary" under Rule 2 (h). The question of any discrimination on this score does not arise. In any case, the petitioners who retired prior to 1984 are in no way affected by this change."

18. In view of the above settled principles of law, the petitioners who have already got post retiral benefits on their superannuation from ONGC before 31.3.2007 cannot be made entitled to any benefit on improvement of the scheme by Circular No. PRBS/64 dated 31.12.2007. Those who retired prior to 31.3.2007 and not got benefits, they are to get benefits as per the formula made for them in the revised scheme. In such view of the matter, the prayer to declare the MOU dated 9.4.2007 and Circular No. PRBS/64 dated 31.12.2007 as illegal, arbitrary and unconstitutional cannot be accepted. As stated above, as regards challenge to Circular No. PRBS/40 dated 18th June, 1998, this Court has not accepted the challenge in above referred petition being Special Civil Application No. 8297/99 and allied matters and, therefore, prayer made in these petitions against Circular No. PRBS/40 and to direct the respondents to settle the pension claim of the petitioners in accordance with the PRBS Scheme of 1991 shall stand governed by the decision in the above said petitions.

20. For the reasons stated above, these petitions are dismissed. Rule in each of the petitions is discharged.

(C.L.SONI, J.)

anvyas