

**Mr. Kuriakose V. Cherian, retired employee of Air India Limited, Mrs. Vidyut Vijay Kadam, employee of Air India Limited, Vasant B(sic)imrao Mahajan, retired employee of Air India Limited, Mr. Pramod Biharilal Kumar, retired employee of Air India Limited, Mrs. Saroj Alhawat, retired employee of Air India Limited and Air India Pensioners Welfare Association Vs Air India Employees Self Contributory Superannuation Pension Scheme Finance Dept. and Others**

**Court:** Bombay High Court

**Date of Decision:** April 4, 2003

**Acts Referred:** Air India Employees Self Contributory Pension Scheme Rules " Rule 5

Constitution of India, 1950 " Article 12, 14, 19, 21, 226

Income Tax Act, 1922 " Section 15(1)

Income Tax Act, 1961 " Section 2(6), 36(1), 7(1)

Income Tax Rules, 1962 " Rule 85, 89, 89(2), 91

Life Insurance Corporation Act, 1956 " Section 2(11), 37, 45

**Citation:** (2003) 6 BomCR 219

**Hon'ble Judges:** Ranjana Desai, J; A.P. Shah, J

**Bench:** Division Bench

**Advocate:** J.P. Cama and N.S. Nappinai, instructed by Satish Maneshinde, for the Appellant; C.U. Singh and J.S. Saluja, instructed by M.V. Kini and Co. for respondent Nos. 1 and 6 to 17, S.K. Talsania, instructed by M.V. Kini, for respondent No. 2, V.Y. Sanglikar, for respondent No. 3, Ashok D. Shetty and A.V. Bukhari, for the Respondent

## **Judgement**

A.P. Shah, J.

This petition under Article 226 is for the issue of appropriate writ, direction or order directing the Respondents to rescind

and revoke the amendment effected to the Air India Employees Self Contributory Superannuation Pension Scheme as per the Deed of Variation

dated 3.4.2002 and the letters dated 2.4.2002 and 3.4.2002 issued pursuant to the amended scheme requiring the pensioners to make payment of

additional contribution towards annuities purchased for Respondent No. 3 Life Insurance Corporation of India and, to continue such annuities

without any alteration to its terms and quantum and without any payment of additional contribution from the pensioners. The Petitioner Nos. 1 to 5

are the retired employees of the Respondent No. 2-Air India Limited. The Petitioner No. 6 is a registered association representing the retired

pensioners of the Respondent No. 2. The first Respondent is the Air India Employees Self Contributory Superannuation Pension Scheme

constituted by the Respondent No. 2 Air India for the benefit of its full time employees for providing pension to superannuated members thereof

and Respondent Nos. 6 to 17 are its trustees. The second Respondent - Air India, is a Government Company, incorporated under the India

Companies Act, 1913. The third Respondent is the life Insurance Corporation of India constituted under the Life Insurance Corporation Act,

1956. Respondent Nos. 4 and 5 are the Unions representing employees of the Respondent No. 2. The facts and circumstances leading upto this

petition are stated hereinafter.

2. In or about 1994 the Respondent No. 2 proposed creation of a Pension Scheme for its employees. The Pension Scheme proposed by the

Respondent No. 2 was designated as a self contributory pension scheme, which was formulated based on actuarial reports. The proposed scheme

was sent to the Government of India, Ministry of Civil Aviation and Tourism (Department of Civil Aviation) and approval was given in March

1995, subject to certain revisions proposed by the department being effected and on further condition that the Air India would not be permitted to

contribute anything in excess of Rs. 100 per annum for all employees put together. The Respondent No. 2 entered into Memorandum of

Understanding (MoU) with various unions for implementation of the Pension Scheme dated 18.5.1995. As per the MoU there was to be a single

pension scheme for all employees of the Respondent No. 2 and no union was to create separate pension scheme. Further it was mandatory for all

full time employees of the Respondent No. 2, represented by the respective unions to become members of the Pension Scheme. Further the

contribution from the Respondent No. 2 was restricted to Rs. 100 per annum totally for all employees taken together. The members contribution

was twofold i.e., a percentage of their salary to be deducted every month and credited to the account of the Respondent No. 1 and a lump sum

monthly payment as fixed by the actuaries. Each member had to contribute for a minimum period of 15 years of service. For those who did not

have sufficient number of years of service from the commencement of the scheme to superannuation, an amount was calculated based on the total

number of years in deficit and the members were required to effect payment of either the entire sum so calculated as a lump sum payment or to pay

the said amount in monthly installments alongwith interest on the total sum due. The Deed of Trust for incorporating the Scheme was entered into

on 12.8.1996 and the Rules for the Scheme were framed thereunder known as Air India Employees Self Contributory Pension Scheme Rules

("Rules" for short). A deed of variation of the trust was effected on 7.10.1997 to amend certain provisions of the Trust Deed. As per the terms of

the Trust Deed, the retiring employee shall get pension equivalent to 40% of the last drawn salary, which consists of Basic Pay, Dearness

Allowance, and Personal Pay if any (Basic + D.A. + P P), and for that purpose, the Respondent No. 1 had approached the Life Insurance

Corporation of India, Pension and Group Schemes Department. Divisional Office, to have a Superannuation Pension Scheme. Accordingly an

agreement was entered into between the Life Insurance Corporation of India (LIC for short) and Respondent No. 1 whereby the LIC had issued a

Master Policy bearing No. GA/12717 stipulating various terms and conditions. After the commencement of the Scheme all the employees were

given option for making contribution and a certain fixed sum was mentioned as payable as pension under each option. This amount was consequent

on the contribution made under each option. As per the first option 40% of the last drawn salary was payable as pension to the members on

superannuation and the second option was payment of a sum of pension under the first option less the commuted amount which was one third of

the annuity amount payable under the first option.

3. The Petitioner Nos. 1 to 5, since their respective dates of superannuation, have been receiving monthly pension as per the Scheme. The genesis

of the dispute is the said amendment effected to the Trust Deed by the trustees of Respondent NO. 1 in consultation with Respondent No. 2. It is

the case of the Respondent Nos. 1 and 2 that the Scheme as originally framed was defective as a result large amount of benefits were given

irrespective of the contributions actually made by the retiring employees towards the Scheme. As a result older employees who made smaller

contribution would receive disproportionately large amount of benefits and consequently no funds will be available with the Respondent No. 1 and

none of the employees who retire after 2005 will get any benefit whatsoever even though they have paid huge amounts of contribution. Therefore

the trustees proposed amendment to convert the Scheme from ""benefit defined"" to ""contribution defined"". This amendment was approved in the

meeting of the trustees held on 2.4.2002 and the Deed of Amendment was executed on 3.4.2002 whereby it is provided that pension shall be

corresponding to the contribution by the respective retired employees and not on the basis of 40% of the last drawn salary of the employees.

Corresponding amendments were also effected in the Rules. Under the amended Rules it is provided that the employees who have retired upto

31.10.2001 shall contribute a lumpsum amount equal to the difference between the cost of annuity purchased for them by the Pension Fund from

the LIC, and the total of contribution made by each such employee to the Pension Fund till the date of his retirement within such time as may be

proposed by the trustees. Rule 6 was amended to provide that with regard to employees who have retired upto 31.10.2001 and who do not make

the additional contribution as stipulated under Sub-clause (c) of Rule 5, the trustees shall notify LIC for retrieval of the shortfall in the contribution

from the purchase price of the annuity paid to LIC in respect of such members and for a proportionate reduction in the monthly pension amounts

payable to such employees. The amount of shortfall in the contribution so retrieved shall be added to and form part of the corpus of the trust fund

and shall be distributed equally amongst the continuing members who are in service. Pursuant to the said amendment letters were issued to the

pensioners requiring them to pay differential sum between the contribution made by them and the amount of annuity taken on their behalf from the

LIC since the Scheme has been amended from being benefit defined to contribution defined. The pensioners were called upon to pay differential

amount before 30.4.2002 failing which it has been stated that annuity value in respect of each pensioner will be reduced, to the extent of the

contribution by each pensioner and consequent reduction in the pension payable would also be effected. This amendment to the Scheme has been

purportedly effected on the basis of the provisions of Clause 5 of the Trust Deed and as a result of this amendment pension payable to the

petitioners stood substantially reduced and this is demonstrated by the following chart:

Petitioner Pension payable as per old Pension payable as per

Scheme amended Scheme

Petr No. 1 Rs 5012/- Rs 2048/-

Petr No. 2 Rs 3223/- Rs 496/-

Petr No. 3 Rs 2962/- Rs 701/-

Petr No. 4 Rs 5063/- Rs 660/-

Petr No. 5 Rs 3932/- Rs 468/-

4. The petitioners contend that their annuities crystallized at the time of superannuation and were not subject to any alteration or amendment even if

subsequent increase in benefits were effected by the trustees for its employees. Conversely the right of the trustees to effect amendments or

alterations to the Scheme can only be effected for future benefits and not to those already vested in the pensioners. The amendment to the Scheme

is thus wholly illegal and arbitrary and irreparably affect the livelihood of the pensioners. It is further contended that no provision of the Deed of

Trust entitles the Respondent Nos. 1 and 2 to alter or amend the benefits payable retrospectively and all amendments or alterations ought to be

effected only prospectively. The proposed amendment to the Scheme is thus ultra vires and contrary to the provisions of the Deed of Trust. It is

pointed out that the scheme does not envisage any additional contribution from its members after superannuation and no such right is given to the

trustees in this regard. The LIC having accepted the annuity and having effected monthly pension payment thereof cannot refund or reduce the

annuity amount to the detriment of the pensioners since the annuity has already crystallized and no change ought to be effected in such annuity

amount as proposed by the trustees.

5. On behalf of the Respondent No. 1 counter affidavit was filed by its Secretary raising a preliminary objection that the petition under Article 226

is not maintainable as against Respondent No. 1 trust, which is not a State or other Authority within the meaning of Article 12 of the Constitution. It

is contended that the Pension Fund which is established and controlled entirely by the employees themselves does not perform any public duties

nor does it discharge any functions which could even remotely be considered to be essential functions of the State. It is further contended that this

being purely contractual right and obligation, a writ would not lie for enforcement of such rights. It is pointed out that out of about 18,386

employees who are the members of the Respondent No. 1 for Pension Scheme from the year 1994 till date, 1852 employees have retired leaving

behind 16534 employees in service. It is contended that the retirees who form only 10% of the employees have taken 60% of the total contribution

by all the employees, whereas, their own contribution of Rs. 18.20 crores is only 17.98% of total contribution. Therefore as the days go by, the

corpus will get steadily depleted, and persons who retire later will keep getting steadily decreasing amounts of benefits. Consequently, the

employees who retire after the year 2005 will get no benefit whatsoever, as the entire fund will be bankrupted by the earlier retirees and no moneys

will remain in the fund. Therefore it was absolutely necessary to alter the benefits and bring back the excess funds which are deposited in the name

of the retired employees by way of annuity. It is maintained that the annuities continue to be the property of the Respondent No. 1, and as such it

has right to review the same in accordance with the amended rules and guidelines. Therefore the trustees have unrestricted power to amend or later

the Scheme even retrospectively. However, the current amendment cannot be termed as retrospective as the revision in the pension is only

prospective i.e. from the date of amendment. The Air India has filed a separate counter affidavit supporting the stand taken by the Respondent No.

6. Mr. Cama, learned counsel for the Petitioners, Mr. C.U. Singh, learned counsel for the Respondent Nos 1 and 6 to 17, Mr. Talsania, learned

counsel for the Respondent No. 2. Mr. Sanglikar, learned counsel for the Respondent No. 3 and Mr. Shetty, learned counsel appearing for the

Respondent Nos. 4 and 5 Unions have made elaborate submissions before us. Oral submissions have been supplemented by written submissions.

7. Before adverting to the submissions made at the Bar, it would be necessary to refer to the salient features of the Pension Scheme. The scheme is

an annuity scheme based on fixed percentage of the retiral wages of the employees and the sole purpose of the scheme is to provide annuity as

seen from Clause 3(b) of the Trust which reads as under:

3(b) the fund shall have for its sole purpose the provision of annuities for employees in the trade or undertaking on their retirement at or after a

specified age or on their becoming incapacitated prior to such retirement or for the widows, children or dependents or persons who are or have

been such employees on the death of those persons.

Clause 5 provides that the trustees may at any time with previous concurrence and/or approval in writing of the employer can alter, vary or amend

any of the Trusts or provisions of the Deed and the Rules, provided that no such alteration or variation shall be inconsistent with the main objects of

the Trust. Clause 8 provides that except as provided for in the Deed or in the Rules, no member, beneficiary or other person claiming right from

such member shall have any legal claim, right or interest in the Fund, provided always that the trustees shall administer the fund for the benefit of the

members and/or their beneficiaries in accordance with the provisions of the Deed and the Rules. Clause 13 then provides that the Fund shall at all

material times be vested in the trustees who shall not be less than three in number and not more than eleven provided that the trustees shall not be

appointed without the approval of Commissioner of Income Tax. The trustees controlling and administering the Fund shall act strictly in conformity

with the Deed and the Rules.

8. Clause 24 defines ""Trust Fund"" as follows:

The Fund shall consist of the contribution as specified in this Deed and the Rules governing the Fund and contributions received by the Trustees

from the Company and of the accumulations thereof and of the securities and the annuities purchased therewith and interest thereon and of any

capital gains arising from the sale of the capital assets of the Fund. The Trustees shall hold the Fund upon such terms and with and subject to such

powers and provisions as are or shall be contained in this Deed and the Rules for the time being in force to the intent that the said Fund shall be

established for the benefit of the members and/or their beneficiaries. The Fund shall be vested in the Trustees. The Trustees shall have the entire

custody, management and control of the Fund. No monies belonging to the fund shall be recoverable by the employer under any circumstances nor

shall the employer have any lien or charge over the fund except on any loans that may be lent by the employer to the fund for meeting its immediate

liabilities

9. Clause 26 requires the trustees to enter into in any scheme of insurance or contracts with Life Insurance Corporation of India to provide for all

or any part of the benefits which shall or may become payable under the scheme and make out of the fund all payments to be made by them under

such schemes or contracts. Clause 32 under the caption ""Review of Fund"" reads as follows:

The Trustees shall review the availability of funds of the scheme annually or at such intervals as may be deemed fir by the Trustees and to decide

any revision in the maximum benefit or rate of the member"s contribution under the scheme

Clause 33 empowers the trustees to review of benefits in the following terms:

Notwithstanding anything to the contrary contained in these presents or in the rules the Trustees shall have and shall always be deemed to have the

right to review any limit the benefits payable or the beneficiaries including the right to reduce the benefits payable in accordance with the rules in the

event of any or all the members ceasing or reducing to make contribution to the fund in accordance with these presents and the Rules.

10. Clause 34 deals with the termination of the Trust on the happening of certain events and reads as follows:

34. Termination of Trust:

a) The Trust hereof shall be determined at the earliest to occur on the following events:

i) On the winding up of the employer unless such winding up for the purpose of amalgamation, reconstitution or reconstruction or

ii) Upon the Trustees unanimously deciding to wind up the Trust Fund:

b) If the Trusts hereof are determined, the benefits which have accrued prior to the date of determination shall be non forfeitable to the extent

funded.

c) Upon determination of the Trust, the annuities then held by the Trustees shall be assigned in favour of the respective member or beneficiary, in

respect of whom such annuities had been purchased. The assets, which remain in the fund after all liabilities have been satisfied or fully provided

for, shall, subject to the prior approval of the Commissioner, be allocated for the purpose of distribution among every member in the proportion

that member"s accrued benefit bears to the to total accrued benefits of all members of the fund at the date the fund is terminated. Members of the

fund shall, upon allocation of the said assets, become entitled to exercise any of the options to the members leaving the service of the employer.

d) Notwithstanding anything whatsoever stated in Sub-clause (c) of this Clause, upon determination of the Trust and after the Trustee shall have

ascertained the wishes of the members and the beneficiaries, the Trustees may in their absolute and uncontrolled discretion make such

arrangements or enter into such agreements as they may deem fit and shall in the opinion of the Trustees serve as far as may be the wishes of the

members or the beneficiaries.

Provided always that any such arrangement or agreement shall be made only after obtaining the prior approval of the Commissioner.

11. The principal submission of Mr. Cama is that the scheme as framed is an annuity scheme based on fixed percentage of retiral wages of the

employees. The right of the retirees to receive the annuity at the fixed rate under the said scheme crystallises on the date of the retirement of the

employee from the service. Once the annuity is purchased the trustees have no further obligation to retirees after they began to receive the benefits

under the Scheme. The provisions of the scheme do not enable the trustees to affect the pension payable to the pensioners on the basis of the

annuity purchased. Therefore the trustees cannot take away such benefit by carrying out amendment to the Trust. Mr. Cama urged that irrespective

of what trustees can or may do and irrespective of the directions the trustees may issue to the LIC, the LIC has independent statutory obligation to

fulfill the promise given by it to the petitioners, who are assured under the annuity scheme. He submitted that the 1st respondent cannot issue such

directions to the LIC and if issued must be liable to be ignored.

12. In order to appreciate Mr. Cama submission it is necessary to consider the nature of the annuity Scheme. There is no statutory definition of the

word "annuity". According to the Black's Law Dictionary (7th Edn) annuity means an obligation to pay a stated sum usually monthly or annually to

a stated recipient. In one of the earliest legal compilations of the English law, the term "annuity" has been explained as yearly payment of a certain

sum of money granted to another in fee or for life or for a term of years either payable under a personal obligation of the grantor or charged upon

his pure personality, although it may be made a charge upon his free hold or lease hold land in which latter case it is commonly called as rent

charged. In Commissioner of Wealth-tax Vs. P.K. Banerjee (dec'd., by legal representatives), the Supreme Court held that in order to constitute

an annuity, the payment to be made periodically should be a fixed or pre-determined one, and it should not be liable to any variation depending



upon or on any ground relating to the general income of the fund or estate which is charged for such payment. The Court cited with approval the

observations of Jenkins L. J in *In-re Duke of Norfolk Public Trustee v. Inland Revenue Commr*, (1950) 1 Ch 487 which read thus:

An annuity charged on property is not, nor is it in any way equivalent to an interest in a proportion of the capital of the property charged

sufficient to produce its yearly amount. It is nothing more or less than a right to receive the stipulated yearly sum out of the income of the whole of

the property charged (sic 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.

Evershed M. R. who delivered a separate judgment agreed with the above observation and stated thus:

In the case of one who has enjoyed for his life (say) one fourth of the income of an estate, it seems to be in accordance with common sense and a

natural use of language to say that he enjoyed for his life, that he was life tenant of a fourth part of the (corpus of the) estate: and accordingly that

upon his death a fourth part of the estate passed to the next successor. But to such language can in my judgment appropriately be used in the case

of an annuitant. He is in no way concerned with changes in the yield of the estate, his right to his annuity will continue whatever income the estate

may produce or (unless he has a right to look to income only) though the estate produce no income at all".

13. In *Late Nawab Sir Mir Osman Ali Khan Vs. Commissioner of Wealth Tax, Hyderabad*, the Supreme Court noted in para 40 as under:

The term "annuity" is not defined in the Act. According to the Oxford Dictionary, "annuity" means sums payable in respect of a particular year:

yearly grant. As annuity is a certain sum of money payable yearly either as a personal obligation of the grantor or out of property. The hallmark of

an annuity, according to *Jarman on Wills* (page 1113) is (i) it is a money, (2) paid annually, (3) in fixed sum, and (4) usually it is a charge personally

on the grantor".

In para 42 of the said judgment the court observed that the word "annuity" must be given the signification which it has assumed as legal term owing

to judicial interpretation and not its popular and dictionary meaning.

14. In *Commissioner of Income Tax, Kerala and Coimbatore Vs. L.W. Russel*, , the question before the Court was whether the contribution paid

by the employer to the assessee under the terms of the trust deed in respect of a contract for a deferred annuity on the life of the assessee is a

perquisite as contemplated by Section 7(1) of the Indian Income Tax Act. In that case the object of the superannuation scheme was to provide for

pensions by means of deferred annuities for the members upon retirement from employment on attaining certain age under the conditions mentioned

therein. The Court while construing the scheme observed:

We have given the relevant part of the Scheme and the Rules. The gist of the scheme may be stated thus: The object of the Scheme is to provide

for pension to its employees. It is achieved by creating a trust. The trustees appointed thereunder are the agents of the employer as well as of the

employees and hold the money received from the employer, the employee and the insurer in trust for and on behalf of the person or persons

entitled thereto under the rules of the scheme. The trustees are enjoined to take out policies of insurance securing a deferred annuity upon the life of

each member, and funds as provided by contributions from the employer as well as from the employees. The Trustees realise the annuities and pay

the pensions to the employees. Under certain contingencies mentioned above, an employee would be entitled to the pension only after

superannuation. If the employee leaves the service or dies in the service of the society, he will be entitled to only to get back the total amount of the

pension of the premium paid by him though the trustees in their discretion under certain circumstances may give him a proportion of the premiums

paid by the society. The entire amount representing the contributions made by the society or part thereof as the case may be will then have to be

paid by the trustees to the society. Under the scheme the employee has not acquired any vested right in the contributions made by the society.

Such a right vests in him only when he attains the age of superannuations. Till that date that amount vests in the trustees to be administered in

accordance with the rules, that is to say in case the employee ceases to be a member of the society by death or otherwise, the amounts contributed

by the employer with interest thereon subject to the discretionary power exercisable by the trustees becomes payable to the society. If he reaches

the age of superannuation the said contributions irrevocably become fixed as part of the funds yielding the pension. To put it in other words, till a

member attains the age of superannuation the employer's share of the contributions towards the premiums does not vest in the employee. At best

he has a contingent right herein. In one contingency the said amount becomes payable to the employer and in another contingency to the

employee".

15. In *Sasadhar Chakravarty and Another Vs. Union of India and Others*, a writ petition was filed by a retired employee of the M/s. Indian

Oxygen Limited. The Indian Oxygen Limited had set up a non contributory superannuation fund known as the Indian Oxygen Lt. Staff Pension

Fund. It was a non-contributory approved superannuation fund set up under the provisions of the Income tax Act, 1961. On retirement, under the

rules of the fund, the petitioner was receiving an annuity under a policy purchased by the trustees of the Fund from the Life Insurance Corporation

of India. It was the case of the petitioner that certain improvements which have been effected in the executive staff pension fund of the company in

1985 should be made available to the existing pensioners of the company and that denial of the benefits of such improvement to the existing

pensioners of the said fund is arbitrary and violative of Article 14 of the Constitution. The petitioner has also challenged Clause II(cc) of Part 8 of

Schedule IV of the Income Tax Act, 1961 as conferring an unguided power to the Board to frame rules. He had also challenged Rules 89 and 91

of the Income Tax Rules 1962 as arbitrary and violative of Article 14. Negating these contentions the Court held as under:

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 crystallized 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 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 life time 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 any one else.

But this provision must be judged in the context of the fact that the contract 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.

16. The Court expressly rejected the argument that any improvement in the existing pension scheme after retirement of the employee should also

be made available to such retired employees who are the existing pensioners of the Fund and that denial of such benefit is ultra vires Articles 14,

19, 21, 31 and 300A of the Constitution. The court observed:

9..... 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 improvement in a given pension fund scheme would not be available to those person whose rights are already crystallized under the

annuity scheme by which they are governed because the amount 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..... 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..... 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 contributions 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 D.S. Nakara and Others Vs. Union

of India (UOI), the increase in pension could be met from the general revenue of the 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 form a distinct class, there is no question of any violation of Article 14 in this connection or

of any other Article of the Constitution.

17. The challenge to the constitutional validity of Clause 11(cc) of Part B of Schedule IV of the Income Tax Act and the Rules 89 and 90 was also

rejected by the Court observing that:

13... Now, the entire scheme of approved superannuation funds is framed as to ensure safety of the fund so that the beneficiaries are assured of

an annuity for the requisite period. Hence under Part B of Schedule IV of the Income Tax Act the approved superannuation funds require the

approval of the Chief Commissioner or the Commissioner of Income Tax. The purpose of such approval is clearly to ensure that the fund is

established under an irrevocable trust for the benefit of the employees of any establishment or undertaking and to ensure that the fund shall have for

its sole purpose provision of annuities for the employees on their retirement or on their becoming incapacitated or in the event of their death for the

benefit of the dependents. It is necessary that the funds should be invested in a manner which secures them over a period of time for this purpose.

Clause 11(1)(ii) gives to the Board the power to make rules for the purpose of regulating the investment or deposit of moneys of an approved

superannuation fund. This cannot be called as an arbitrary conferment of powers on the Board. By the very nature of the scheme as framed, the

purpose of regulating investment of the trust funds is to ensure their safety.

14..... It is, however, pointed out by the Life Insurance Corporation that the security which is provided by purchasing an annuity from the Life

Insurance Corporation of India is not comparable to other kinds of investments because all contracts of insurance entered into by the Life

Insurance Corporation are backed by a government guarantee which is provided by Section 37 of the Life Insurance Corporation Act, 1956.

Therefore, from the point of view of safety and security of the moneys of the superannuation fund an investment in an annuity through the Life

Insurance Corporation of India provides valuable security to a beneficiary. By ensuring that the investment is made in a manner which ensures the

safety of the fund and the payment of an annuity the Board has ensured that the fund is not misutilised or the pensioner is not deprived of his

annuity. Of course, it is possible to envisage other types of schemes and other types of investments which may have varying safety and different

returns. But that does not mean that Rule 89 is arbitrary or unreasonable. The entire scheme is framed on the basis of relevant considerations and

cannot be called unreasonable or arbitrary.

18. It is thus apparent that the annuity is different from the normal pension. It is a sum ascertained, the right to which crystallizes on the date of

superannuation. On the superannuation of the employee both the quantum of annuity as also the corpus to which it is charged get crystallized and

cannot be affected by subsequent actions of the trustees. The annuitant has no connection with the quantum of the remaining trust fund or whether it

increases or decreases. Upon retirement of the employee the quantum of the corpus which yields the annuity is paid over to the LIC and physically

leaves the trust fund. The retiree gets a lifelong annuity and on his demise his heirs get the designated corpus. Thus the designated corpus which

leave the trust on date of superannuation never returns. The trust is created by the Air India because it is so required by the Income Tax Act and

for the purpose of administrative convenience. The trustees as held in I T Commissioner v. I.S. Russel are merely acting as an agent of the

employer and the employees. The annuitants are no way connected with the financial health of the trust fund, which originally purchased the

annuities. The annuitants are not entitled to look to original trust for any assistance in case the interest rate of the LIC falls. They cannot claim any

additional benefit for example instead of minimum 40% which they have been receiving, the trust decides to increase the benefit to the maximum of

50% as provided in the trust deed. The petitioners can have no claim upon the trust fund in case of loss or reduced value of their annuities arising

due to reduction in interest or otherwise. Similarly the trust also can have no claim upon the petitioners vested annuity because their own funds are

inadequate.

19. The learned counsel for the respondents tried to distinguish the judgment of the Supreme Court in the case of Sasadhar Chakravarty on the

ground that in that case the Supreme Court was dealing with the company contributory scheme. The submission is without any merit inasmuch as

the provisions of the Income Tax Act and the Rules apply equally to annuity purchased by a self contributory Fund. The contribution may be either

by the employees themselves or by the employer. In either case, an annuity is created. In both cases the obligations under the Income Tax Act and

Rules will have to be fulfilled. In both cases Rule 89 requires that the trustees should invest the contributions in an annuity with the LIC. The source

of the money is therefore irrelevant. This is amply clarified in a subsequent judgment of the Supreme Court in Subrata Sen and Others Vs. Union of

India and Others, . In that case the petitioners were getting pension from the Assam Oil Staff Pension Fund Scheme on the following basis:

A sum equal to 40 per cent of the average annual basic salary for the last five years of service immediately preceding the date of retirement.

The Government of India had issued notification dated 10.3.1995 providing for revision of pension formula in respect of Indian Oil Corporation

(AOD) officers covered by AOD Staff Pension Scheme for the officers retiring from December 1995 onwards. The petitioners contended that the

cut off date is discriminatory and there cannot be any classification of retirees who have retired prior to December 1994 and who are to retire from

December 1994 onwards and therefore they are entitled to have pension on the basis of revised formula. Before a two Judge Bench of the

Supreme Court the respondents sought to rely upon Sasadar Chakraverty's case in support of their plea that the retirees would not be entitled to

revised benefits. The Supreme court rejected the plea pointing out the distinction between the rights and obligations which flow from the annuity

based scheme which are different from the rights flowing from family pension scheme. The following observations of the Court are pertinent:

17. In our view, the ratio of the aforesaid judgment is not applicable in the present case. In the said case, Indian Oxygen Ltd. had set up a "non

contributory superannuation fund" known as the Indian Oxygen Ltd. Executive Staff pension Fund. As per the Rules, an employee was entitled to

receive an annuity under a policy purchased by the trustee of the Fund from Life Insurance Corporation of India. The petitioners in that case

contended that the scheme of such non contributory approved superannuation fund should be modified so as to provide for disbursement of

pension by the Fund themselves or in the alternative by a statutory body to be newly constituted under a new scheme. Further, the Fund was

constituted for the purpose of providing an annuity to the beneficiaries and the trustees were required to accumulate the contribution in respect of

each beneficiary and purchase the 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(2) of the Income Tax Rules, 1962. Therefore, when an employee retired, all

accumulated contribution in respect of the employee concerned made by the employer to the Pension Fund of the trust was crystallized for the

benefit of the employee. In that set of circumstances, the court observed that the right of the employee to receive the annuity under the ten existing

scheme of Life Insurance Corporation of India. The court also observed that the contention was based on misunderstanding of the nature of the

annuity which is purchased in the interest of each employee as and when he retires. The position in the present case is altogether different. Right to

get pension is obviously different from getting annuity on the basis of accumulated contribution. The Rules for grant of pension provide that an

employee mentioned in a specified category shall automatically become member of the pension fund and is entitled to get pension on the date of his

retirement. Amount of pension is to be determined as per the Rules. The Rule is modified and the petitioners seek relief on the basis of the

amended Rule on the ground that there cannot be any discrimination between the employees who retired prior to or after a particular date, as held

in Nakara"s case which is followed by this court in various decisions including Kasturi. Further there is no question of the pensioners (retired

employees dividing the pension fund and/or payment of pension to be made only from the pension fund. The liability to pay pension arises because

of provision made in the Rules. In this view of the matter, the decision in Sasadhar Chakravarty would have no bearing.

20. It is significant that in both the decisions of Sasadhar Chakravarty and Subrata Sen the companies were contributing, yet the Court has come

to different conclusions. The difference thus lies not in whether the fund is contributory or non contributory, the difference lies in whether the rights

and obligations are crystallized on the date when claim for pension arises. If it is an annuity scheme, the employee has no further connection with

the parent fund and employer. If the rights/ obligations are not crystallized, it is normal pension and the linkage continues. Thus the present case is

clearly governed by the ratio in Sasadhar Chakravarty"s case.

21. It is strenuously contended by the counsel for the respondents that from the trust deed and all other related documents it is abundantly clear

that the members of beneficiaries shall not have any right, title or interest in the fund or even in the annuities, title or interest in the fund or even in the

annuities purchased from the fund in respect of any retired member or beneficiary. Reference was made to Clause 8 of the trust deed which

provides that member, beneficiaries or any other person claiming thereunder shall not have any legal claim, right, or interest in the fund. Reference

was also made to Clause 24 to show that the annuity purchased by the trustees also form part of the fund. Further it is pointed out that Clauses 32

and 33 confer power on the trustees to review and limit the benefits payable to the beneficiaries including the right to reduce the benefits payable in

accordance with the Rules. The submission is that Clause 33 fully empower the trust to alter or limit or reduce the benefits at any time even without



effecting any amendment in the trust deed. The actions of the respondent No. 1 are therefore fully authorized and lawful under Clause 33. The

argument fails to impress us. A plain reading of Clause 33 shows that this power has to be exercised in a situation where a member has ceased or

refused to make contribution to the fund in accordance with the rules. The provision makes it clear that this power to review is limited to the

existing employees who are required to contribute refuse or cease to contribute. All retirees have already completed their contributions. Thus

Clause 33 will have no application. Then so far as Clause 32 is concerned the same deals with the power of the trust to review the available fund

of the scheme annually or at such intervals as may be deemed fair by the trustees and to decide any revision in maximum benefit or rate of

member's contribution under the scheme. This is obviously inapplicable in respect of superannuated employees in whose favour the annuities were

purchased and whose rights were crystallized on the date of superannuation. The fact that the definition of fund includes annuity does not make any

change in this position inasmuch as annuities are held by the grantee upon the trust. IN this connection Clause 34 of the trust deed is also

significant. This clause deals with termination of the trust. Sub-clause (b) of Clause 34 provides that if a trust is determined the benefits which have

accrued prior to the date of determination shall be no forfeitable to the extent funded. Sub-clause (c) provides that upon determination of the trust,

the annuity then held by the trustees shall be assigned in favour of the respective members or beneficiaries, in respect of whom such annuities had

been purchased and the balance fund is distributed among the balance members proportionately. Thus the benefit which has already accrued to the

retirees are not to be touched by the trustees and the annuities which have been purchased but not assigned to the concerned employees shall be

so assigned to them. Therefore there is no power in the trustees to unilaterally request the LIC to limit, reduce or refuse the benefit. Once the

annuity and benefit is purchased there is no power or jurisdiction vested in the trust or in the LIC to reduce, cancel or review the benefit or any

part thereof. As a matter of fact u/s 37 of the LIC Act Government of India has guaranteed the sum assured on the policy issued by the LIC> In

our considered view any other construction would lead to highly unjust and inequitable situation if trustees of welfare funds were allowed to reduce

the pension of retired employees merely by intimating the LIC according to their whims. Such a construction would be opposed to all well settled

principles of law.

22. The matter can also be viewed from a different angle. u/s 2(11) of the Insurance Act, the purchase of an annuity amounts to purchase of an

insurance policy. Section 45 of the Insurance Act specifies only certain stipulated circumstances in which the insurer is entitled to repudiate an

insurance contract. It is nobody's case that Section 45 was attracted in the present case. In *Sasadhar Chakravarty* the Supreme Court has clearly

held that annuity is not comparable to other kinds of investments because contracts of insurance entered into by the Life Insurance Corporation are

backed by the Government guarantee which is provided by Section 37 of the LIC Act, 1956. By providing that the investment is made in a manner

which ensures the safety of the fund and the payment of an annuity the rules ensure that the fund not misutilised or the pensioner is not deprived of

his annuity. Therefore any deviation from the quantum assured under such a contract would be opposed to the statutory mandate of the Insurance

Act and the LIC Act. This is for the obvious reason that the contract of insurance enures to the benefit of the assured though technically he is not a

party to the contract. This is supported by the Supreme Court decision in *Chandulal Harjivandas, Jamnagar Vs. Commissioner of Income Tax,*

*Gujarat*, . In that case the policy was purchased by the father of the assessee and the life assured was that of the assessee. In the course or

assessment the assessee claimed rebate of insurance premium under the provisions of Section 15(1) of the Income Tax Act, 1922. On a reference

the Gujarat High Court held that the contract of insurance with the Life Insurance Corporation was entered into by the father of the assessee and

under the terms thereof the contract was to become the assessee's contract only by his adopting it on attaining majority. The High Court further

held that on the true interpretation of the terms of the contract, even if the minor were to be alive on the deferred date it was the assessee's father

who was entitled to receive the cash option unless the assessee adopted the contract as his own. The High Court accordingly held that the real

contracting parties were the father of the assessee and the Life Insurance Corporation and it was only under certain contingency on the happening

of which the contract was to become the contract of the assessee. Reversing the said decision the Supreme Court held:

We are, however, of the opinion that the contract of insurance between Corporation must be read as a whole and in spite of the clauses referred

to by Mr. Desai we consider that the contract is in substance a contract of life insurance with regard to the life of the assessee. The important point

to notice is that if the assessee adopts the policy upon attaining majority the Corporation becomes liable to pay the sum assured. viz. Rs. 50,000 to

the assessee on the stipulated date of maturity i.e. March 11, 1982 if the assessee was alive. The Life Insurance Corporation will also be liable to

pay the amount assured if the assessee were to die before the stipulated date of maturity but on or after the deferred date i.e. March 11, 1965.

The our opinion, the insurance on the life of the assessee was the main intention of the contract and the of clauses upon which Mr. S.T. Desai relied

are merely ancillary or subordinate to that main purpose. Life insurance in a broader sense comprises any contract in which one party agrees to

pay a given sum upon happening of a particular event contingent upon the duration of human life, in consideration of the immediate payment of a

smaller sum or certain equivalent periodical payments by another party (Halsbury's Laws of England 3rd Edn Vol 22, p. 273)...

Life insurance business"" means the business of effecting contracts of insurance upon human life, including any contract whereby the payment of

money is assured on death (except death by accident only) or the happening of any contingency dependent on human life, and any contract which

is subject to payment of premiums for a term dependent on human life.

It should be remembered in this connection that the object of enacting Section 15(1) of the Act is the encouragement of thrift and the section

should hence be interpreted in such a manner as not to nullify that object. Having examined all the clauses of the contract of insurance, in this case,

we are satisfied that it is in substance a contract of insurance on the life of the assessee and therefore rebate u/s 15(1) of the Act is admissible on

the premium payable as per the annexure A of the statement of the case during the minority of the assessee.

23. Another point that was urged by the counsel for the respondents with some vehemence was that the fund in question is a self contributory fund

and it is implicit therein that the benefit must be equal to the contribution. This argument completely ignores different types of pension funds.

Broadly there are two kinds of pension funds i.e. benefit defined fund and contribution defined fund. In fact this distinction is also recognized by the

trustees while affecting amendment whereby the original scheme which was benefit defined has been converted into contribution defined. In

Innovation in Pension Fund by Shri Arun S. Muralidhar the distinction between aforesaid two funds is demonstrated as follows:

**Defined Benefit Plans:-**

IN the DB Pension plan, participants and/or sponsors make contributions, and these contributions could change over time. The scheme then

provides a defined benefit a persecuted annuity in either absolute currency or as a fraction of a measure of salary (e.g. 5- percent of final salary or

the average of 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 persecuted contributions. These contributions could be specified in either absolute

currency or as a fraction of a measure of salary (e.g. 5 percent 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), Bodies, Marcus, and Merton (1988), and Blake (2000) provide more detailed

descriptions of DB and DC plans.

24. The learned counsel for the respondents, however, urged that Rule 89 of the Income Tax Rules restricts the benefit to the actual contribution

made by the employees and provides that such benefit shall be strictly commensurate to actual contribution by the employees. In other words Rule

89 restricts annuity amount to the extent of the contribution actually made. The submission is fallacious and based on complete misconception of

the provisions of the Income Tax Act and the Rules. u/s 2(6) of the Income Tax Act, the approved superannuation fund has been defined to mean

superannuation fund or any part of the superannuation fund which has been and continues to be approved by the Commissioner in accordance with

the Rules contained in Part B of the IV Schedule. u/s 36(1) of the Income Tax Act deductions as provided in that sub-section shall be allowed in

respect of matters dealt with therein computing income of the assessee. Part B of Schedule IV of the Income Tax Act deals with approved

superannuation fund. Under Clause 3 of Part B, in order that superannuation fund may receive and retain approval it shall satisfy conditions set out

in the said Clause as well as any other conditions, which the Board may, by Rules prescribe. There are other conditions laid down in Clause 3,

with which we are not concerned. The trustees of the superannuation fund are required to make an application to the assessing officer for approval

of the found under Clause IV of Part B. Clause 11 deals with the rule making power of the Board. Clause 11(cc) empower the Board to make

rules for regulating the investment or deposit of moneys of an approved superannuation fund. Rules 85 and 89 are meant for safeguarding the

moneys deposited under the superannuation fund and to secure to the annuitant the annuity amount. Rule 89 requires the trustees to purchase the

annuity from the LIC to the exclusion of anyone else. As observed in Sasadhar Chakravarty's case this provision must be judged in the context of

the fact that the contracts of life insurance, which are entered into by LIC are backed by the government guarantee, which is provided by Section

37 of the Life Insurance Corporation Act. The payment of security is thus properly secured. There is nothing in the language of Rule 89 which in

any manner restricts annuity amount to the contribution actually made. The expression "contribution" applies equally to cases where the

contribution is made by the employer or by the employee as also equally to contributions made to a benefit defined fund and a contribution define

fund. In both cases the amounts are contributed to the superannuation fund. Rule 89 merely requires the trustees to purchase the annuity from the

LIC to the exclusion of anyone else. The provision is aimed at providing security of the funds. The Income Tax Rules are not intended to expand or

restrict the quantum of benefits which are payable under any particular policy of insurance and that is not its purpose. The purpose of the Income

Tax Rules is to protect and/or provide guidelines for protection of the superannuation funds. Reliance placed on Rule 89 is thus clearly unfounded.

25. In view of the foregoing discussion, we hold that the benefit under the annuity scheme was crystallized on the date of superannuation of the

employees and the Trust has no power to in any manner interfere with the benefit which is receivable by the annuitants under the annuities

purchased from the LIC.

26. The next question is whether a writ or order could be issued under Article 226 of the Constitution against the Pension Fund. It is seen that the

petition is mainly directed against the LIC which is a statutory Corporation and, there cannot be any dispute that such a petition would be

maintainable. The LIC has a statutory obligation to ensure payment of fixed amount of annuity fund and neither the LIC nor the Trust can reduce

the amount assured. If the LIC, for any reasons fails, or is incapable of making the stipulated payment the guarantee by the Government of India

u/s 37 of the LIC Act can be enforced. It is further seen that the creation of the pension fund flows from the socio-economic obligation of the State

and its instrumentalities under the Constitution. The concept of pension is now well known and has been clarified by the Supreme Court time and

again. It is not a charity or bounty nor is it gratuitous payment solely dependent on the whim or sweet will of the employer. It is earned for rendered

long service and is often described as deferred portion of compensation for past service. In All India Reserve Bank Retired Officers Association

and others Vs. Union of India and others, the Court observed that it is in fact in the nature of a social security plan to provide for the December of

life of a superannuated employee. Such social security plans are consistent with the socio-economic requirements of the Constitution when the

employer is a State within the meaning of Article 12 of the Constitution. The trustees of the pension fund merely act as agent of the employees and

employer. Therefore the conduct and action of the 1st respondent trust are subject to judicial review by this court. The fact that instead of carrying

out the socio-economic activity by itself, the respondent company has done so through the modality of a trust created by it makes no difference.

Indeed in Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations

Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, the Supreme Court has observed:

If the state had chosen to carry on these business through the medium of government departments, there would have been no question that actions

of these departments would be stated actions". Why then should actions of these corporations be not state actions?

27. In Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others, ,

the Court while considering the maintainability of the writ petition for mandamus as against the management of the college observed:

14. If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public

duty mandamus will not lie. These are two exceptions to Mandamus. But once these are absent and when the party has no other equally

convenient remedy, mandamus cannot be denied. It has to be appreciated that the appellant-trust was managing the affiliated college to which

public money is paid as Government aid. Public money paid as Government aid plays a major role in the control, maintenance and working of

educational institutions..... When the University takes a decision regarding their pay scales, it will be binding on the management. The service

conditions of the academic staff are, therefore, not purely of a private character. It has super-added protection by University decisions creating a

legal right-duty relationship between the staff and the management. When there is existence of this relationship, mandamus cannot be refused to the

aggrieved party"".

28. The Court noted that Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is a striking

departure from the English law. The Court, after referring to the observations by Subha Rao, J., in Dwarka Nath Vs. Income Tax Officer, Special

Circle D-ward, Kanpur and Another, , observed:

The arm "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for

the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement on

the fundamental rights. The word Any person or authority used in Article 226 are, therefore, not to be confined only to statutory authorities and

instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much

relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the

person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied.

21. Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute.

Commenting on the development of this law, professor De Smith states: ""To be enforceable by mandamus a public duty to have been imposed by

character, common law, custom or even contract"". (Judicial Review of Administrative Act 4th Ed P 540). We share this view. The judicial control

over the fast expanding maze of bodies affecting the rights of the people should not be put into water tight compartment. It should remain flexible to

meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available to each injustice wherever it is

found. Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the

appellants on the maintainability of the writ petition"".

29. In the light of the above settled legal position we have no hesitation to hold that this writ petition under Article 226 is maintainable.

30. In the result, we hold that the impugned amendment to the Trust Deed to the extent it applies in future is legal and valid. as far as the past

retirees are concerned i.e. the retirees upto the date of amendment, the said amendment cannot apply and such retirees shall be entitled to continue

to receive pensionary benefits as they exited at the time of the amendment.

Rule is made absolute accordingly. No order as to costs.