

**THE EMPLOYEES PROVIDENT FUND ORGANISATION AND ORS. VS. SUNIL  
KUMAR B. AND ORS. AIR 2022 SC 563**

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**Deesha G Ambani\***

**Decided on: 04 November 2022**

**Hon'ble Judges: Justice U.U. Lalit, (C.J.I.), Justice Aniruddha Bose, and Justice Sudhanshu Dhulia.**

**Judgment is authored by Justice Bose.**

### **HISTORICAL BACKGROUND OF THE CASE**

In 1952, the Employees Provident Fund Act was enacted by the parliament. The whole idea behind this was to have social security legislation primarily for the employees. Initially, there was a small amount contributed from the salaries of the employees so that, they can get the contributed money after retirement and make it easy for their survival.

With time it was realised that just the fund would not be helpful and there is a requirement for some kind of pension so the act was amended. Through the amendment in 1995, Section 6A was inserted in the Act, which provided for the family pension. The family pension was given to the employee's family after his death during the tenure of his service.

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Again it was realised that this was not helpful in all aspects and again there was the substitution of 6A by the parliament to bring in its present form, i.e. the pension scheme. It was observed that (i) there was no real pension once the person retires and (ii) there was no disabled pension.

The first family pension scheme was enforced in 1995 and mentioned the requirements and eligibility to avail of such benefits. It was held that the amount that was given by the employees and the employers, would itself generate the pension funds. At this time the ceiling limit was set as 6500/-, if the salary was more than 6500/- then the employees could opt for making higher contributions and there was a time limit of 6 months to get enrolled

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under this. But many of them did not opt for this option on time and the issue came up to the Supreme Court to address whether such an option can be restricted by such a fixed time.

The Supreme Court held in the case of *R.C Gupta* that; to avail such benefits there should not be any limited period of time and had struck down time limitation.

In 2014, the Employees' Pension Amendment Scheme and the ceiling limit were increased to Rs. 15,000/-. But if the employee wants to contribute beyond the ceiling limit then, under Section 11(4) a joint option is given for the employee to make a contribution along with the employer.

There was one more addition that the scheme did not provide, i.e. the additional contribution by the employee at 1.16%, which was given beyond the provident fund. This was in contradiction with section 6A which was added through the amendment with the intention of not burdening the employees, while this condition of 1.16% was burdening the employees. Additionally, it also mentioned the time limit (i.e. the cut-off date) under the scheme.

Due to these changes, the amendment was challenged in Kerala, Delhi, and Rajasthan High Courts.

The authority was of the view that the cut-off date is important for availing such benefits, which was contrary to the judgment of R.C. Gupta's case. The High Courts were of the opinion that the cut-off date is mandatory to contribute for the salary exceeding the ceiling limit.

## **ISSUES IN SUPREME COURT**

The issue in the present case is with regard to the legality of certain amendments and modifications made by the Central Government to the Employees' Pension Scheme, 1995. Such scheme has been made in pursuance of, Section 6A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.

1. Validity of the 2014 amendment and powers of the central government to make such amendments. (It was allowed as per section 7 of the EPS and Schedule III entry 10)

2. Applicability of R.C. Gupta Case. (reasoning is valid and is beneficial legislation, therefore the beneficial legislation cannot be violated, but in the 2014 amendment this cannot be applicable and upheld the principle of R.C Gupta).

3. Methodology of the calculation (from 12 months in the previous laws, the average for 60 months of salary is to be considered for the pension scheme according to the present scheme. It was held that the methodology has been followed and the law is valid).

4. The financial impact on the industries and employees. (the court held that the issue is related to the policy of the govt. and hence court will not touch upon this issue).

5. Classification of employees on the basis of salary (held that the classification of the employees is fair and reasonable as there is an option given for the employees whose salary exceeds 15,000/-).

6. Para 26(6) of EPF Scheme. What happens when the employees are already given a higher salary, are they entitled straight away to the higher salary option even under the EPS scheme, without giving the option. (the court held that: even though the employees become members automatically under the PF and pension scheme, there will be an additional option under the scheme for the contribution when the employees are holding higher salaries), this was mentioned under the unamended section 11(3) of the PF Act.

The main issue was between 11(3) and 11(4) of the Employees' Pension (Amendment) 2014 and when there is the applicability of any one of the clauses then the other options are not applicable.

### **BRIEF OVERVIEW OF THE FACTS**

The changes after the amendment, are sought to be effected in paragraphs 3, 6, 11, 12 and 14 of the 1995 scheme. The Act originally did not provide for any pension scheme and Section 6A was introduced to the said Act by way of an amendment made in 1995.

- The amendment of 1995 contemplated the formulation of a scheme for employees' pensions and the pension fund was to comprise of deposit of 8.33 percent of the employers' contribution made towards provident fund corpus as per the prevailing statute.

- Paragraph 11 of the scheme dealt with the determination of pensionable salary. At that point in time, the maximum pensionable salary was Rs.5000 and this sum had been enhanced subsequently to Rs.6500.
- The pensionable salary was raised to Rs.15000 by a notification dated 22nd August 2014 [numbered G.S.R. 609(E)], which was to be effective from 1st September 2014.
- This notification brought certain other modifications to the scheme mainly restricting its coverage.
- In the appeals before Supreme Court, judgments of the High Courts of Kerala, Rajasthan and Delhi are assailed.
- Clause 1(3) of the pension scheme contemplates the establishments to which the 1952 Act applies. These establishments would include exempted establishments as well. The employees of exempted establishments are integrated into the pension scheme.
- In order to be entitled to the benefits of the pension fund, the employer and the employee, simultaneously with exercising the option in terms of the order of this Court, shall also have to give an undertaking of transferring the employers' contribution at the stipulated rate maintained by the trusts, which shall be equivalent to and not lower than the sum which would have been transferable, had such fund has been maintained by the provident fund authorities.
- The eligibility for enhancement cannot be restricted to those employees only who had exercised the option to remain in the scheme once their salary went beyond the capping of Rs.6500 per month.
- The Supreme Court also referred to the case of *R.C. Gupta and Ors. v. Regional Provident Fund Commissioner, Employees' Provident Fund Organisation and Ors.*, where the court mentioned that; it has been specifically held that there was no cut-off date in the proviso to paragraph 11(3) as it stood before the 2014 amendment. The interpretation given to the proviso to paragraph 11(3) prior to the 2014 amendment does not require any reconsideration.
- The dual option, as is contemplated in paragraph 11(4) of the pension scheme (post-2014 amendment), has to be merged into one. In the event the employer and employee jointly opt for coverage beyond the salary limit of Rs.15000, without giving an earlier option under the un-amended Clause 11(3) of the pension scheme, they would not be automatically excluded from their right to exercise option under paragraph 11(4) of the scheme, post amendment.

## REASON FOR THE CASE IN COURT

Amendments were brought as the Employees' Pension (Amendment) Scheme, 2014 conceived in G.S.R 609 (E).

Aggrieved by this, 54 petitions had been filed by the employees (both members of exempted and un-exempted establishment) themselves or on their behalf under article 32 of the Indian Constitution in different High Courts seeking for the invalidation of the notification dated 22 August 2014.

The High Courts: Kerala, Delhi and Rajasthan decided the case in favour of Employees when the contentions were made regarding the 2014 amendment in EPS.

Kerala High Court in the case of *P. Sasikumar and Ors. v. Union of India (UOI)* set aside the Employees' Pension Amendment (Scheme), 2014 conceived in G.S.R. 609 (E).

## VIEW OF KERALA HIGH COURT

*The Kerala High Court is of the view that; in coming to the finding the amendment was made arbitrarily, based on the reasoning on macroeconomic factors like general increase in salary, addition to the base of the fund and the negative impact on the denial of the pension benefits for a large number of employees. The Court had observed that Rs. 15,000/- monthly income was a very low threshold as a manual labourer will also get at least Rs.500/- as a daily wage. Therefore, it was a concern that the 2014 amendment will deprive several low-scale workers of pensionary benefits.*

- The Delhi High Court in its judgment in the case of *Bhartiya Khadya Nigam Karamchari Sangh and Anr. v. Union of India and Ors.* followed the view expressed by the Kerala High Court and quashed a circular issued by the provident fund authorities on 31st May 2017 precluding exempted establishments from the benefits of higher pension.
- In the case of the *Union of India and Ors. v. Jale Singh and Ors.*, a Division Bench of the Rajasthan High Court also expressed the same opinion.

Later the case was **appealed in the Supreme Court by EPFO** on 1<sup>st</sup> April 2019 and the court decided the case in the favour of the employees and ordered to strike out the new amendment.

This case was sent **for revision to the higher bench of the Supreme Court** on 04 November 2022 which held that:

- The amendments that were made in 2014 are correct.
- The pensionable salary will be 15000/-, which means that the ceiling limit is. (due to which the pensioners were not able to avail the benefit of a higher pension).
- The calculation of the pension will be done by considering the average salary of 60 months, earlier which was done by considering the average of 12 months of salary.
- The employees having a salary exceeding 15000/- can also be members of EPF and for the same they are being given a time of 6 months.
- The employees having a salary of more than 15000/- will not have any deduction of 1.16% from their salary and will have to contribute only 12% towards the EPF.
- The employees who have retired before 01 September 2014 will not be eligible for new rules, and hence they will continue to avail of the benefits according to the rules before the amendment of 2014.

#### **APPROACH OF THE COURT**

The Court divided the employees into Four categories:

- (i) Employees who had exercised the option under the proviso to para 11(3) of the 1995 Scheme and continued to be in service as of 1st September 2014.
- (ii) Employees who had not exercised their option under the proviso to paragraph 11(3) of the 1995 Scheme and were continuing in service as of 1st September 2014.
- (iii) Employees who had retired prior to 1st September 2014 without exercising an option under paragraph 11(3) of the 1995 Act scheme.
- (iv) Employees who had retired prior to 1st September 2014 after exercising an option under paragraph 11(3) of the 1995 Scheme.

Court merged the two options and the employees are able to take dual options so that the benefit of the higher salary can be enjoyed by the employees.

Those employees who have retired before the amendment scheme 2014 and have not taken any option cannot avail of the benefit.

Those employees who have retired before 2014 but availed of any of the options, will continue with the option chosen.

Those employees who were serving and may have taken the first option or not will be effectively merged by exercising Art. 142 of the constitution. And they are given the time of 4 months to take forward the benefits. (*Article 142 of the Indian Constitution empowers the Supreme Court's verdicts and rulings to be enforced. It stipulates that in the performance of its jurisdiction, the top court may issue any verdict or order necessary to provide "complete justice" in just about any case before it.*)

Meanwhile, the employees who were retired and not given any option and the additional contribution of 1.16% as per 11(6) of the scheme was made. Here the court has suspended the law laid down by the judgment, for the period of 6 months after declaring the law to be ultra vires.

Under section 17 of the scheme where the government can exempt the establishments from the applicability of the EPF. Under 17(6) if the employees are working under the exempted establishments, they will not be exempted from the pension scheme.

#### ANALYSIS BY THE SC

- **Economic factors around wage ceiling:** The SC has made observations on the constraints of judicial review with regard to the wage ceiling introduced by the EPS Amendment, noting that the judiciary cannot order the executive to design a pension scheme in a particular way simply because the financial stability of a particular group of retired employees is not adequately taken care of.
- **Additional contribution by employees for higher pensionable salary:** The SC has read down the EPS Amendment with regard to the additional contribution requirement (for employees choosing to contribute on a salary exceeding INR 15,000 per month), holding that there is no reason why such additional contributions should be made to the EPS Scheme when employees are not otherwise required to do so (as the law only mandates deposit of the employer's share under the EPF Act to the pension fund while the entirety of the employee's share goes to the provident fund).
- **Application of EPS Amendment to exempted establishments:** The SC observed that no arguments were raised and the issue was not being addressed about participants in the pension plan of exempted establishments under the terms of

paragraph 39 of the EPS Scheme. However, the SC made it clear that the EPS Amendment would also apply to exempt establishment employees in the same way that it would to employees of regular/non-exempt establishments.

- **Imposition of the cut-off date:** As regards imposition of a cut-off date to deposit contributions on the salary exceeding INR 15,000 per month, the SC has concurred with its division bench ruling in RC Gupta and Others vs. Regional Provident Fund Commissioner and Other [(2018) 14 SCC 809] to hold that the benefits under a beneficial scheme cannot be disallowed by reference to a cut-off date.

### **RULING OF THE SC**

While the EPS Amendment is legal and valid, the cut-off date is not palatable. However, for employees who were members of the EPS Scheme as on 1 September 2014 but could not exercise their option to contribute on a monthly pay higher than INR 15,000 per month (because of interpretational issues emanating from judicial review of the EPS Amendment), the SC has allowed an additional time of 4 months from the date of the order to opt for higher contribution.

The requirement of making an additional contribution of 1.16% of the monthly salary exceeding INR 15,000 has been held to be *ultra vires* due to the absence of any statutory backing as Section 6A of the EPF Act does not contemplate the same, but suitable legislative amendments can be made to generate additional contributions. Accordingly, the SC has suspended the operation of the part of its order that holds the additional contribution requirement to be invalid, for a period of 6 months.

The employees who had retired prior to 1 September 2014 without exercising any option under Paragraph 11(3) of the pre-amendment EPS Scheme and who had already exited from the membership thereof, will not be entitled to the benefit of the judgment. However, those employees who retired before 1 September 2014 upon exercising the option under Paragraph 11(3) of the EPS shall be covered by the provisions of the EPS Scheme as it stood prior to the amendment of 2014.



Sl. No.	Category of the Employees	The decision of The SC in regard to the applicability of the amendment
1.	Existing employees who had not exercised their option for higher/ uncapped pension.	Yes
2.	Existing employees who had exercised their option for higher/ uncapped pension under 11(3), even if they had not exercised the fresh option in 2014 within 6 months.	Yes
3.	Employees who have retired on or after September 1, 2014, with or without exercising their option for higher/ uncapped pension.	Yes
4.	Employees who retired prior to September 1, 2014, after having exercised their option for higher/ uncapped pension under 11(3).	Yes
5.	Employees who retired prior to September 1, 2014, without exercising their option for higher/ uncapped pension under 11(3).	No
6.	Employees who joined on or after September 1, 2014, with a reckonable salary over the statutory threshold of Rs. 15,000 per month.	No

- In the above cases, eligible, existing employees wishing to opt for a higher pension, will have to make higher (differential) contributions to EPS over their past service, by redirecting funds from their PF accumulations.
- EPS members who opted for a higher/ uncapped pension would need to continue contributing 1.16% of reckonable salary for a period of six months.

**DIFFERENCE: BEFORE AND AFTER AMENDMENT**

<b>Changes On</b>	<b>Before Amendment</b>	<b>After Amendment</b>
<p>Membership of the EPS Scheme.</p>	<p>Prior to the EPS Amendment, the EPS Scheme was applicable to every employee who on or after 16 November 1995 became a member of the EPF Scheme. This meant that even such employees whose monthly pay exceeded the applicable wage ceiling (then INR 6,500) and who had become a member of the EPF Scheme by virtue of the exercise of option under Paragraph 26(6) thereof could become a member of the EPS Scheme.</p>	<p>Post the EPS Amendment, the EPS Scheme became applicable to such employees who on or after 16 November 1995 became a member of the EPF Scheme and whose monthly pay on the date of joining was less than or equal to INR 15,000.</p>
<p>Determination of pensionable salary.</p>	<p>Prior to the EPS Amendment, the EPS Scheme provided that the pensionable salary shall be the average monthly pay drawn during the contributory period of service in the span of the 12 months preceding the date of the employee's exit from the membership of the employee's pension fund. However, the maximum pensionable salary was set at INR 6,500 per month, although the</p>	<p>Post the EPS Amendment, the determination of pensionable salary was as per the average monthly salary drawn during the contributory period of service in the span of 60 months preceding the date of the employee's exit from the membership of the employee's pension fund. The maximum pensionable salary was set at INR 15,000 per month. While the EPS Amendment retained the option of contributing</p>

	<p>pensionable salary could be higher if the contribution was made at a higher salary than INR 6,500 per month at the joint option of the employee and the employer.</p>	<p>at the actual salary in case of employees who, being members of the EPS Scheme as on 1 September 2014, had been contributing in this manner in the past, such employees had to make a fresh option within 6 months from 1 September 2014. Further, the employees were required to contribute at the rate of 1.16% of the monthly salary exceeding INR 15,000 towards the pension fund.</p>
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### IMPACT ON EMPLOYEES AND EMPLOYERS AFTER THE JUDGMENT

Impact on Employees	Impact on Employers
<p>This judgment impacts those employees who earn up to Rs. 15,000/- month. As a result of this judgment, the employee's contributions will increase. On the positive side, this also means more savings for the employees.</p>	<p>It remains to be seen whether the proposed legislative change would transfer more burden onto the employer, to make EPS more viable. This measure may include increasing employer contribution by 1.16% of reckonable salary, and/ or any other change to improve the financial viability of EPS.</p>
<p>Employers will also have to shell out more money in the form of employer contributions, as the PF Act requires both the employer and employee to contribute 12% of the employee's basic wages.</p>	<p>From a systems perspective, employers with exempted provident funds would need to gear up for employees opting to contribute more to EPS. Administration systems would need to be enabled to calculate and</p>

	distribute monies owed on account of the Provident Fund and monies owed on account of EPS. Further, such calculations/distributions would have to be communicated/ transferred to the EPFO.
EPS members who opted for a higher/ uncapped pension would need to continue contributing 1.16% of reckonable salary for a period of six months.	----

### ADVANTAGES TO THE EMPLOYEES

- It is beneficial to employees who have not been made members of EPFO.
- The extra contribution of 1.16% which was to be done according to the 2014 amendment will not be applicable.

### DISADVANTAGES TO THE EMPLOYEES

The employees having salaries above 15000/- will not be benefited from this scheme due to the ceiling limit set for 15000/-.

- If there are any changes in the ceiling limits in the future, they cannot avail of the benefits from such changes.

### ROADMAP AHEAD

As per the Supreme Court judgement, it would be up to the administrators to readjust the contribution pattern within the scope of the statute and one possible solution could be to raise the level of the employer's contribution to the scheme. The judgement further refers to an appropriate legislative change being brought about to this effect.

In the near future, a legislative change would be brought about, where there would be an endeavour to remove the burden of 1.16% contribution from employees and prevent it from being shifted to the Central Government. Also, other amendments may be potentially brought

in to provide the option of higher/ uncapped pension to all existing EPS members and to make the EPS more financially viable.

For those employees who exercise the option, employers may have to trace reckonable salary from the date of their joining and apply the appropriate contribution rates on a month-to-month basis. While unexempted employers would merely have to communicate these numbers, the exempted employers would have to transfer the necessary amounts to the EPFO and ensure that the credit is made to the correct employees, at the correct levels. Also, employers would need to align their administration systems to be able to implement such options as and when an employee exercises it.

There is a 4-month window from the passing of the judgement, for employees to opt for higher/ uncapped pension. Employers also need to understand the implications, in order to effectively communicate this to their employees and to facilitate the implementation of the same.

From an employee perspective, opting for EPS may provide better value. However, it may differ based on individual circumstances, assumptions about future events, and preferences for lump sum versus annuity payouts. As a legislative amendment is imminent in the near future, it is difficult to say by how much an employee would stand to gain in the future by selecting such an option.

## **CONCLUSION**

The notification was released by the EPFO containing the clarity on the subject related to the Re-examination of cases of pension on higher wages, of employees who had retired up to 1 September 2014 without exercising any option under Para 11(3) of pre-amended EPS 1995. (This is in regard to the Judgment passed by the Supreme Court, dated 04.11.2022).

The notification issued directed that:

- The employees who had retired prior to 1st September 2014 without exercising any option under paragraph 11(3) of the pre-amendment scheme have already exited from the membership thereof. They would not be entitled to the benefit of this judgment.

- The employees who have retired before 1st September 2014 upon exercising the option under paragraph 11(3) of the 1995 scheme shall be covered by the provisions of paragraph 11(3) of the pension scheme as it stood prior to the amendment of 2014.
- R.C. Gupta's judgement pertains to such employees who had contributed to higher wages under paragraph 26(6) of the EPF Scheme and had further exercised their option under the proviso to erstwhile Para 11 (3) prior to their retirement, and their joint option request under the proviso to paragraph 11(3) was explicitly denied by the concerned office of the RPFC and /or contribution on higher salary was refunded/diverted back to provident fund accounts.
- In order to stop overpayment, if any, in respect of employees who had retired prior to 1st September 2014 without exercising any option under Para 11(3) or the pre-amended scheme, and have been granted a pension on higher wages, their cases need to be re-examined to ensure that they are not given higher pension from the month of January 2023 onwards. Pension in such cases may be immediately restored to pension on wages up to the ceiling of Rs. 5000/- or Rs. 6500/-.
- Pension on wages exceeding the wage ceiling of Rs. 5000/- or Rs 6500/- is sanctioned/ continued only in cases that fall within the directions of the judgment. Accordingly, if in any case, the pension was revised erroneously, such pension may be immediately stopped and restored to pension on wages up to the ceiling of Rs. 5000/- or Rs 6500/- only.