

Case Law Updates: Understanding the Supreme Court's Ruling Upholding the 2014 EPS Amendment

The Hon'ble Supreme Court of India (“SC”), on November 4, 2022, in a landmark judgement in *The Employees' Provident Fund Organisation v. Sunil Kumar* (“**Judgement**”), examined the provisions of the Employees Pension (Amendment) Scheme, 2014 (“**2014 EPS Amendment**”) and upheld its constitutional validity (with certain riders). The Judgement provides some much awaited clarity in the backdrop of several High Court rulings (such as the Kerala, Rajasthan and Delhi High Courts) which had previously held the 2014 EPS Amendment to be unconstitutional.

What is the 2014 EPS Amendment?

By a notification dated August 22, 2014, the Central Government had made the following key amendments to the Employees' Pension Scheme, 1995 (“**EPS**”) formulated under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (“**EPF Act**”) which were to be effective from September 1, 2014. The primary objective behind these amendments appears to be to ensure larger coverage of low-earning employees and higher contributions by employers and employees to reduce the depletion and outflow of funds from the Government's corpus.

1. Increased the cap on maximum salary on which pension contributions are to be computed (“**Pensionable Salary**”), from INR 6,500 to INR 15,000 per month (this increase in salary threshold applied to provident fund and employees' deposit-linked insurance benefits as well);
2. Changed the conditions for membership to the EPS to only those employees who are members of the Employees' Provident Fund Scheme, 1952 (“**EPF Scheme**”) and whose monthly salary on the date of joining was less than or equal to INR 15,000; and membership for new joinees was restricted to those earning up to INR 15,000;



3. Existing members for whom contributions were being made on a monthly salary above INR 6,500 were to execute a fresh option jointly with their employer, to contribute on the higher salary exceeding INR 15,000, within a period of 6 (six) months from September 1, 2014 (which could be extended by another 6 months for reasonable cause), and pension was then to be determined on the basis of such higher Pensionable Salary. If no option was exercised within this time period, it would be deemed that the member had not exercised the option to contribute over the limit;
4. Members exercising such fresh option were required to contribute additional contributions at 1.16% of the salary exceeding INR 15,000;
5. Determination of pension was modified to be on the basis of the average monthly salary drawn during the contributory period of service in the span of 60 (sixty) months preceding the date of the employee's exit from the membership of the Employees' Pension

Fund (which was previously calculated considering the average monthly salary drawn in the 12 months preceding the date of exit).

What were the previous decisions of the aforementioned High Courts while examining provisions of the 2014 EPS Amendment?

By its judgment dated October 12, 2018, the Kerala High Court in *P. Sasi Kumar & Ors. v. Union of India* (W.P. (C) No. 13120/2015) (“**Kerala HC Case**”) had set aside the 2014 EPS Amendment as arbitrary, ultra vires of the EPF Act and unsustainable, inter alia on the following grounds: (i) maximum Pensionable Salary of INR 15,000 would disentitle persons who have contributed on the basis of their actual salary to benefits based on excess contributions, and is arbitrary; (ii) there is no statutory basis for demanding additional contribution of 1.16% of salary exceeding INR 15,000, which is *ultra vires*; and (iii) altering the manner of computation of pensionable salary would deprive employees of substantial portion of pension they would have been entitled to under original scheme, which is arbitrary.

The decision in the Kerala HC Case was also noted and upheld by the Delhi High Court in *Bhartiya Khadya Nigam Karamchari Sangh and Anr. V. Union of India & Ors.* (W.P. (C) 5678/2018) and the Rajasthan High Court in *Union of India & Ors. v. Jale Singh & Ors.* (D.B.SAW 436/2019), where the latter also clarified that the judgment would be subject to the final decision of the Supreme Court in the then *sub-judice* case of *EPFO v. Sunil Kumar*.

What is the significance and impact of the Judgement?

The SC has on the whole, upheld the validity of the 2014 EPS Amendment but has read down the requirement of member employees to make additional contributions of 1.16% of the salary exceeding INR 15,000 per month. Significantly, the SC has upheld the reasonableness of classification of employees who earn up to INR 15,000 per month, and those earning beyond INR 15,000 per month. Accordingly, there are 2 key takeaways from the Judgment: (i) from September 1, 2014, new membership into the pension scheme is restricted to only those employees earning up to the monthly wage ceiling of INR 15,000, and (ii) members of the EPS with pensionable salary above INR

15,000 per month, and who have made contributions on such higher salary, may exercise the option contemplated under the 2014 EPS Amendment to received enhanced pension benefits, and such option is to be exercised within 4 months from the date of the Judgment.

What is the current status of the amendments, specifically the exercise of the joint option and employees additional contributions under the 2014 EPS Amendment, as per the Judgment?

The SC has provided a time period of 4 months for exercise of the joint option by the employer and employee to contribute towards pension, on salary exceeding INR 15,000, and for pension to be computed on the basis of such actual salary. While the SC has struck down the requirement for member employees to pay an additional 1.16% of salary exceeding INR 15,000, this part of the Judgment is suspended for 6 months to allow the Parliament to bring about necessary amendments to the EPS – for this period, employees contributing at a higher Pensionable Salary are to continue to contribute such additional 1.16% of salary, as a stop gap measure, and thereafter adjustments may possibly be made, based on any modifications made to the EPS.

The amendments relating to increase in the wage ceiling limit to INR 15,000 and the manner of computation of pensionable salary based on the average monthly pay of the period of 60 months preceding the exit of the employee have been upheld and will continue to apply as is, effective from September 1, 2014.

Which categories of employees will benefit from the Judgement?

The following categories of employees stand to benefit from the Judgment:

- 1 Employees who were entitled to exercise the option under the 2014 EPS Amendment, i.e., those employees who were contributing on salary higher than the eligibility limit of INR 6,500 pre-2014, were in service as on September 1, 2014 and on or after such date were earning and contributing on Pensionable Salary of at least INR 15,000 per month (“**Defined Employees**”), but could not exercise their option due

to the confusion regarding the validity of the EPS Amendment/ lack of awareness, missing the deadline or such other reasons.

- ▮ Defined Employees who have retired after September 1, 2014 with or without exercising the option for higher/ uncapped pension under the 2014 EPS Amendment.

These above classes of employees are required to exercise their joint option, with their employers, within 4 months from the date of the Judgement (November 4, 2022), i.e., by March 3, 2023.

Which categories of employees will not benefit from the Judgement?

The following categories of employees will not be entitled to the benefits of the Judgement:

- ▮ Employees who retired prior to September 1, 2014 and have already exited from membership; and
- ▮ New members earning above INR 15,000 from September 1, 2014 will also not be entitled to become members of the Employees' Pension Fund or contribute on a higher salary.

What is unclear from the Judgement however, is how the category of employees who qualify as Defined Employees, who retired after September 1, 2014 and have already withdrawn all provident fund amounts standing to their credit and/or availed their pension benefits under the EPS (either in entirety or partially), will benefit from the Judgement and whether they can exercise their option under Paragraph 11(4) of the amended EPS at present. The peculiar complexity with this category of employees lies in how pension will be computed for them for past and future periods, considering that their provident fund and/or EPS funds have already been utilised/ depleted, or are being utilised.

It also relevant to note a recent notice dated December 7, 2022 issued by an Assistant Provident Fund Commissioner in Andhra Pradesh. Under this notice, the EPFO has recognised the principles promulgated under the Judgment, and notified an employee who retired prior to September 1, 2014 who had not exercised his option prior to his retirement (in 2007) that he would not be entitled to higher pension as he had also not contributed on wages higher than the prescribed limit at the relevant time.



Provide an illustration of how the Judgement will benefit an employee who is a member of the pension fund.

Let us assume that employee 'X' earns INR 14,000 per month, as of September 1, 2014. They had not explicitly opted for higher Pensionable Salary prior to the EPS Amendment but had been contributing on the entire salary of INR 14,000. X's salary increased to INR 18,000 per month in 2016, and while they again did not explicitly opt for higher Pensionable Salary, they continued to make contributions based on the entire salary of INR 18,000. In absence of the Judgment, X would have drawn pension considering contributions made only on INR 15,000, and would not be able to draw pension based on the contributions made considering his entire salary of INR 18,000. In that case, all higher contributions made (over INR 15,000) would be part of the provident fund only and would be paid out as a one-time lump-sum settlement of the provident fund amount. However, in light of the Judgment, X will now have 4 months to exercise their option under Paragraph 11(3), following which X's additional contributions made considering the total Pensionable Salary of INR 14,000/ INR 18,000 will now be transferred to the pension fund, allowing X to draw a higher pension at the time of retirement.

Does the 2014 EPS Amendment, and specifically the ability to exercise a fresh option thereunder, apply to exempted establishments?

Yes, the SC has clarified that the 2014 EPS Amendment will apply to employees of exempted establishments in the same manner as it applies to employees of unexempted

establishments. In this regard, while exercising the joint option, the employer and employee are also required to submit an undertaking to transfer the employers' contributions at the stipulated rates as maintained in the exempted trusts, which must be equal to and not less than the sum that would have been transferable had the fund been maintained by the Employees' Provident Fund Organisation ("EPFO"). This transfer must take place immediately after the exercise of the joint option, within a time period to be stipulated by the EPFO.

What is the process to be followed for implementing the 2014 EPS Amendment in light of the Judgement?

The Judgement requires the legislature to bring about necessary changes to the EPS, and accordingly the exact processes and manner of implementing the actions as clarified under the Judgement, including how to exercise the joint option, any obligations of an employer to reach out to existing/ former employees who are members of the EPS, manner of transfer of funds, cessation and adjustment of the additional 1.16% contributions, are yet to be notified by the Government. It is accordingly expected that the Central Government will issue amendments and the EPFO will issue detailed guidelines/ circular in furtherance of the Judgement with clarity on its implementation.

In this regard, the EPFO has recently issued a circular dated December 29, 2022 ("December Circular") explaining the manner in which an identified category of employees can exercise their option under the 2014 EPS Amendment. This is the category of employees who: (a) have been contributing under the EPF Scheme on their entire salary above the prescribed monthly wage limit of INR 15,000 or INR 6,500 (at the relevant time), (b) exercised their joint option under the EPS prior to the 2014 EPS Amendment to contribute on Pensionable Salary exceeding INR 6,500, and (c) which option was declined or explicitly denied by the provident fund authorities. For these employees, the December Circular prescribes the specific manner of exercising the fresh joint option under the 2014 EPS Amendment, including the supporting documents to be submitted (though the form in which a request is to be made to the Regional Office is to be specified by the Commissioner).

Are there any immediate actions/ steps for employers to take in light of the Judgement?

While there are no immediate obligations or liabilities imposed on employers under the Judgment, there are some recommended actions that employers can consider, as good-faith measures for the benefit of their employees:

- ⌞ As a first step, it would be good for employers to educate their eligible employees and make them aware of the provisions of the 2014 EPS Amendment and the benefits available thereunder – specifically informing them of the time-bound option that they may exercise, jointly with the employer, to contribute towards the EPS on salary exceeding INR 15,000 and the higher maximum pensionable salary they may opt for. This would be particularly relevant for those employees for whom the manner of exercising an option has been specified in the EPFO's December Circular.
- ⌞ It would also be good to inform those eligible employees who are already contributing on a salary exceeding INR 15,000, that the requirement to pay the additional 1.16% contributions will be operative for another 6 months (from November 4, 2022) only, with adjustments possibly being made, based on the legislative changes that are expected to be notified.
- ⌞ The above holds good for employers of exempted establishments operating exempted provident fund trusts as well, and in addition, such employers should gear up and prepare for the transfer of additional contributions, where opted for. In this regard, administrative processes for computing and bifurcating amounts towards provident fund and amounts to be transferred under the EPS should be put in place at the earliest, to enable a smooth and timely transfer of such additional funds to the Employees Pension Fund maintained by the EPFO, at the relevant time.
- ⌞ Finally, employers should remain abreast with legislative developments and any guidelines/ circulars issued by the EPFO in furtherance of the Judgement.

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