

Insights on the Apex Court Verdict on the Higher Pension based on EPS-1995



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PREFACE

- Empowered by Section 6A of the EPF & MP Act, 1952, Govt had framed EPS, 1995 for the purpose of providing:
 - a) superannuation pension, retiring pension or permanent total disablement pension to the employees of establishments governed by the Act; and
 - b) widow/widower's pension, children pension or orphan pension payable to the beneficiaries of such employees.

WHAT IS EMPLOYEES ' PENSION SCHEME-95

- The Employees' Pension Scheme or EPS is a Pension Scheme for the employees of organized sector of private and public sector industrial establishments.
- This Pension Scheme is DEFINED PENSION SCHEME unlike NPS (since NPS gives investment based returns and is market driven Scheme), While EPS gives a guaranteed monthly pension after the retirement.
- Employees' Provident Fund Organization (EPFO) manages the Employees' Pension Account of all those who are contributing to EPF including Exempted PF Trusts.

HOW CORPUS OF THE PENSION FUND IS FORMED - THE FEATURES OF EXISTING PENSION SCHEME:

- Out of the employer's monthly contribution of 12%, an amount @ 8.33% goes into EPS subject to maximum of Rs. 1250/- pm and rest of the amount to EPF.
- Suppose an employee has salary (Basic + DA) of Rs. 1,00,000/- per month and employer contribution is 12% then Rs. 1,250/- (i.e. Rs.15,000/- X 8.33 %) will go to EPS and rest of the amount i.e. Rs. 10,750/- will go to EPF as Employer's contribution.
- Monthly contribution to EPS is restricted to 8.33% of Rs. 6500/- = Rs. 541/- p.m. and from Sep 2014 Rs. 1250/- pm (8.33% of Rs. 15,000/-).

THE AMENDMENT AND THE COURT ORDERS

Vide Notification no. G.S.R. 609(E) dated August 22, 2014; GoI framed the EPS (Amendment) Scheme, 2014 and this amendment acted to then extant pension scheme, and brought forth several noteworthy changes thereto, including:

- a) limiting the maximum pensionable salary to Rs. 15,000/-;
- b) requiring employees within the amended regime to contribute at the rate of 1.16% on the salary exceeding Rs. 15,000/-;
- c) requiring fresh options to be exercised by members within six months from September 1, 2014 (extendable up to six months on sufficient cause shown); and
- d) stipulating that in the event no option is exercised by a member within the period specified, it would be deemed that the member in question has not opted for contribution over the wage ceiling and therefore, the contributions made beyond the wage limit (for such a member) would be diverted to the provident fund account along with interest pursuant to the provident fund scheme.

THE AMENDMENT AND THE COURT ORDERS

The Cases & their Verdicts:-

- The litigation by employees arose because the Union Government amended EPS-1995 effective September 1, 2014, introducing, among other changes, a time limit of six months for the members, jointly with their employers, to opt for higher pension based on their actual salary, and a further six months where reasonable cause for delay existed. **The time limit was, however, not known to the employees as there was no communication to them;** subsequent applications for higher pension were rejected by the EPFO citing the cut-off date, even after it had been set aside by a two-judge bench of the SC in the precedent-setting R.C. Gupta case in 2016; *R.C. Gupta and Others. Vs. Regional Provident Fund Commissioner, EPFO & Othrs. – SC -2018 14 SCC 809.*
- Several writ petitions were filed in different High Courts across the country seeking invalidation of the aforesaid Scheme; and the Scheme was consequently quashed by the Kerala High Court, the Rajasthan High Court, and the Delhi High Court for being unconstitutional in nature.
- Thereafter, the Employees' Provident Fund Organisation ("EPFO") filed appeals before the Supreme Court challenging the judgements of the various High Courts. The Supreme Court, vide its judgement dated November 4, 2022 in EPFO & Anr. v. Sunil Kumar B. & Ors., upheld the validity of the Scheme as well as read down certain provisions thereof.

THE AMENDMENT AND THE COURT ORDERS

The Cases & their Verdicts:-

- In Sunil Kumar order, the Supreme Court of India upheld the constitutional validity of the Employees' Pension (Amendment) Scheme, 2014 (EPS Amendment) that had specified a monthly wage ceiling of INR 15,000 as the eligibility criterion for an employee to become a member of the Employees' Pension Scheme, 1995 (EPS Scheme).
- In the same vein, the court also struck down the part of the EPS Scheme that had stipulated that the employees who were members of the EPS Scheme as on 1 September 2014 could make higher contributions upon making a fresh option within 6 months from 1 September 2014, holding that a cut-off date of this nature went against the beneficial nature of the legislative framework.
- The requirement of making additional contribution of 1.16% of the monthly salary exceeding INR 15,000 has been held to be ultra vires due to 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; and
- 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 option under Paragraph 11(3) of the EPS Scheme shall be covered by the provisions of the EPS Scheme as it stood prior to the amendment of 2014.

IMPACT OF THE VERDICT

In the said verdict, the SC ruled as follows:-

- All employees who did not exercise option for higher pension on 1.9.2014 due to confusion of cut off date can now exercise their option of higher pension within 4 (four) months from the date of the SC Order.
- Employees who retired prior to 1.9.2014 upon exercising option under para 11(3) of the EPS Scheme can be given benefit of higher pension.
- Employees who retired prior to 1.9.2014 without exercising option under para 11(3) and have already exited from the membership of the EPS Scheme can not be given benefit of higher pension.
- EPFO had modified formula for computing monthly pension payable to the members which increased from 12 months to 60 months for computing average pensionable salary. SC refused to interfere in said computation method and hence, the said system of computation of average pensionable salary based on 60 months' average shall continue as it is as against earlier method of computing the same on 12 months' average salary.
- EPFO to implement all above directions given in the judgment within a period of 8 (eight) weeks and should come out with white paper thereon for the benefit of the member-employees.

IMPACT ON EMPLOYEE

- Joint option to be submitted by the employee and by the employer with respective RPFC.
- The option should be given to the EPFO within 4 months i.e. on or before 3rd March 2023.
- A Declaration to be given by the employee/person.
- Explicit consent to be given for transfer of funds from EPF to EPS.
- If required the employee/person should be ready to re-deposit the amount as may be sought by the EPFO
- Supporting records may have to be produced on the contributions made on higher wages and options exercised as and when asked by EPFO in support of Pension Claim.
- For the next 6 (six) months i.e. till 3rd May 2023, employees have to contribute additionally to EPS Corpus @ 1.16% of salary above Rs.15,000/- pm (from 01/09/2014) as additional contribution subject to refund after 6 months in case any other source is notified by Govt. or EPFO through legal means for funding this additional contribution requirement of Pension Fund (one way could be increase in the rate of employers contribution to PF for diversion to Pension Fund).

IMPACT ON EMPLOYER

- Member shall be eligible for Higher Pension benefits; only if Employer and Employee jointly exercise this option in prescribed format and employee allows his/her employer to remit the arrears of/difference of contribution with interest thereon (as stated above) to Employees' Pension Fund;
- Joint option to be collected from the eligible employees and submitted by the employee and by the employer and option of exited employees to be also signed by the ex-employer.
- The option should be given to the EPFO within 4 months i.e. on or before 3rd March 2023 as prescribed by the commissioner.
- Explicit Consent to be taken from employee/person in case of any share adjustment from EPF to EPS and if any Re-deposit to be made.
- Exempted Trust need to submit undertaking of trustee for fund transfer.
- Proof of contributions made on higher wages to be submitted

IMPACT ON EMPLOYER

- Employer has to dig-out records for making arrears calculations. Supporting records may have to be produced as and when asked by EPFO in support of Pension Claim and for Inspection and Audit by the EPFO Authorities, if required.
- As Option/Joint Declaration has to be signed by the Employer also, onus of the calculation of arrears with interest will be on employer.
- EPFO may insist that if rate of interest earned by exempted PF Trust is higher, than statutory rate then interest should be paid at the higher rate.
- For the next 6 (six) months i.e. till 3rd May 2023, employees have to contribute additionally to EPS Corpus @ 1.16% of salary above Rs.15,000/- pm (from 01/09/2014) as additional contribution subject to refund after 6 months in case any other source is notified by Govt. or EPFO through legal means for funding this additional contribution requirement of Pension Fund (one way could be increase in the rate of employers contribution to PF for diversion to Pension Fund).

ELIGIBLE PERSONS TO OPT FOR HIGHER PENSION

THOSE WHO JOINED IN SERVICE BEFORE SEP. 01, 2014 AND CONTINUE IN SERVICE AFTER SEP. 01, 2014 AND WHO JOINED SERVICE ON OR AFTER SEP. 01, 2014 AND CONTINUE IN SERVICE

Employment Services	Employer & Employee Contributions done on higher wages	Option for higher pension Opted or not	Status of EPFO Acceptance	Eligibility for Pension on higher wages
Joined before Sep. 01, 2014 and continue in service	Paid	Never opted	Option can be given within 4 months (Before 04.03.2023)	Eligible
Joined before Sep. 01, 2014 and continue in service	Paid	Exercised option between Sep. 01, 2014 and Nov. 04, 2022	Rejected / not responded by EPFO	Eligible
Joined before Sep. 01, 2014 and continue in service	Not paid	Never opted	NA	Not Eligible
Joined on or after Sep. 01, 2014 on basic wages of Rs. 15,000/- or above.	Not eligible for EPS membership	No option	NA	Not Eligible

ELIGIBLE PERSONS TO OPT FOR HIGHER PENSION

RETIRED PERSONS				
Retirement	Employer & Employee Contributions done on higher wages	Option for higher pension Opted or not	Status of EPFO Acceptance	Eligibility for Pension on higher wages
Before Sep. 01, 2014	Not paid	Never opted	NA	Not Eligible
Before Sep. 01, 2014	Paid	Never opted	NA	Not Eligible
Before Sep. 01, 2014	Paid	Exercised prior to Sep. 01, 2014	Rejected/Not Responded by EPFO	Eligible
Retired between Sep. 01, 2014 to Nov. 04, 2022	Paid	Never opted	Can be Opted on or before Mar. 03, 2023	Eligible
Retired between Sep. 01, 2014 to Nov. 04, 2022	Paid	Exercised option between Sep. 01, 2014 to Nov. 04, 2022	Rejected/ not responded by EPFO	Eligible
Retired between Sep. 01, 2014 to Nov. 04, 2022	Not paid	Never opted	NA	Not Eligible

EPFO 1st CIRCULAR - Procedure to apply

Vide Circular No. Pension/2022/54877/15149 dated 29th Dec. 2022, the EPFO Head Office has issued detailed instructions to their field functionaries with regard to the compliance of the judgment of the Supreme Court in **EPFO Vs. Sunil Kumar B** dated 4th November 2022.

Those employees who would like to avail the benefit of additional pension are required to submit application to the RPFC concerned with the establishment with which the employees concerned had last worked.

The following pensioners may apply digitally /online at www.epfindia.gov.in for validating their options, if any, by the concerned Regional Office:

- a) The pensioners who as employees had contributed under paragraph 26(6) of EPF Scheme on salary exceeding the prevalent wage ceiling of Rs. 5000/- or Rs. 6500/-; and
- b) Exercised joint option under the *proviso* to Para 11(3) of the pre-amendment scheme while being members of EPS, 95; and
- c) Their exercise of such option was declined by PF authorities.

EPFO 1st CIRCULAR – Procedure to apply

The way such pensioners would apply to the concerned Regional Office is as follows:

- (i)** The request will be made in such form and manner, as may be specified by the Commissioner.
- (ii)** The application form for validation will contain the disclaimer as ordered in the aforesaid government notification.
- (iii)** In case of share requiring adjustment from Provident Fund to Pension Fund and if any, re deposit to the fund, the explicit consent of the pensioner will be given in the application form.
- (iv)** In case of transfer of funds from exempted provident fund trust to pension fund of EPFO, an undertaking of the trustee shall be submitted. The undertaking shall be to the effect that due contribution along with interest-up to the date of payment, will be deposited within the specified period.
- (v)** The method of deposit of such funds will follow through subsequent circulars.
- (vi)** Aforesaid application form must contain the following specified documents for evidence and for further processing:
 - a) Proof of joint option under para 26(6) of the EPF Scheme duly verified by the employer; and
 - b) Proof of joint option under the proviso to erstwhile Para 11(3) duly verified by the employer; and
 - c) Proof of remittance in Provident Fund on higher wages exceeding the prevalent wage ceiling of Rs. 5000/6500; and
 - d) Proof of remittance in Pension Fund on higher wages exceeding the prevalent wage ceiling of Rs. 5000/6500, if any; and
 - e) Written refusal of APFC or any other higher authority of EPFO to such requests/remittance.

EPFO 2nd CIRCULAR – Re-Examination of Cases

Vide Circular No. Pension/2022/55893/15785 dated 25th Jan 2023, the EPFO had issued further guidelines in case of pensioners who retired prior to 01.09.2014.

ACC's & RPFC's were advised to ensure that pension on wages exceeding wage ceiling of Rs. 5000/- or Rs 6500/- is sanctioned / continued only in cases which fall within the directions contained in Para 44(ix) read with Para 44 (vi) of Hon'ble Supreme Court judgement dated 04.11.2022.

Accordingly, if in any case, 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, in accordance with directions contained in Para 44 (x) read with Para 44 (V) of Hon'ble Supreme Court judgement dated 04.11.2022.

To act with utmost care should be taken to identify such cases where higher pension was granted on account of judgement of any Court. In such cases a favourable order shall be obtained from the concerned Court citing the order of Hon'ble Supreme Court dated 04.11.2022 before going ahead with stopping/restoration of pension to wages up to ceiling of Rs. 5000 or Rs 6500/-.

EPFO 3rd CIRCULAR – Compliance with the SC orders

Further instructions have been issued on the above subject vide Internal Circular No. Pension/2022/56258/16541 dated 20.02.2023 for compliance with the orders contained in Paras 44(iii) & (iv) read with Para 44(v) of the Hon'ble Supreme Court judgment dated 04.11.2022..

The time limit of four months specified by the Supreme Court for exercising the option for higher pension would expire on 03.03.2023. The time available for the employees to exercise the option in terms of the guidelines issued by EPFO is short.

The Internal Circular dated 20.02.2023 states that the proforma of Joint declaration by the employees and employers will be prescribed by respective Regional Commissioners. Accordingly the Regional provident Fund Commissioners may take sometime to prescribe the Form in which option is to be exercised.

Many Employer Associations and Fraternities have approached the CPFO to extend the time limit for submission of Joint Declaration by another four months after seeking necessary permission from the Hon'ble Supreme Court.

THANK YOU

