

THE HIGHER PENSION CONTROVERSY | THE SUPREME COURT AND THE EPFO

1. INTRODUCTION

1.1. The Supreme Court (“SC”) on November 4, 2022¹ upheld the validity of the Employees’ Pension (Amendment) Scheme, 2014² (“EPS Amendment”), which had introduced certain far-reaching changes to the Employees’ Pension Scheme, 1995 (“EPS”). In this alert, we examine the key takeaways from this decision and the subsequent relevant circulars of the Employees’ Provident Fund Organisation (“EPFO”).

2. BACKGROUND

2.1. Contributions under the Employees’ Provident Fund Scheme (“EPF Scheme”) and the EPS are undertaken on a monthly basis, in the following manner:

- (i) Employee contributions amounting to 12% of the sum of ‘basic wages’, dearness allowance (DA), and retaining allowance (RA) are remitted to the Employees’ Provident Fund (“EPF”).
- (ii) In the employer’s contribution, 8.33% is contributed towards EPS and the remainder to the EPF.
- (iii) The current wage ceiling is INR 15,000, i.e., employers and employee can choose to contribute on this sum or alternatively choose to contribute on the entire basic wages + DA + RA. However, EPS contributions will still be undertaken on INR 15,000, and the balance will go into the EPF account.

Illustration

Where the sum of [basic wages + DA + RA] is INR 100,000 per month	
EPF Account	EPS Account
Employee contribution @12% of INR 15,000 (<i>wage ceiling</i>) = INR 1800	Employer contribution @8.33% of INR 15,000 = INR 1250
Employer contribution @3.67% of INR 15,000 = INR 550.50	-

2.2. The EPS Amendment introduced the following key changes³ to the EPS with effect from September 1, 2014:

- (i) the monthly wage ceiling was increased from INR 6500 to INR 15,000.
- (ii) only those employees who are EPF members and whose pay is less than or equal to INR 15,000 per month, would be eligible to become members of the EPS (*Para 6(a) of the EPS was amended*).
- (iii) pensionable salary would now be determined on the basis of the average monthly pay drawn during the contributory period of service in the 60 months preceding the date of exit from the EPS.

¹ *Employees Provident Fund Organisation & Ors. v. Sunil Kumar B. & Ors. etc.* AIR 2022 SC 634.

² Notification No. G.S.R. 609 (E) dated 22 August, 2014 available at <https://labour.gov.in/sites/default/files/22.08.2014%20notification%20for%20enhancement%20of%20wage%20ceiling.pdf>.

³ The Amendment modified Paragraphs 3, 6, 11, 12 and 14 of the EPS.

- (iv) the maximum pensionable salary was limited to INR 15,000 per month (*earlier this was INR 6500 per month*). The proviso to Para 11(3), which stated that employers and employees have the option to contribute on higher salary was removed.
- (v) Para 11(4) of the EPS was introduced. The existing members as on September 1, 2014, who had already been contributing on sums in excess of the wage ceiling (*i.e., more than INR 6500 per month*) would have to submit a fresh option within 6 months to continue contributing on pay exceeding INR 15,000 per month (*in order to receive higher pension*). These members who opt for higher pension would also have to make additional monthly contributions at 1.16% of their salary in excess of INR 15,000.
- (vi) if employees did not exercise the above option under Para 11(4) within the specified 6 months' timeframe, it would be deemed that they did not opt for higher pension. Therefore, any contributions made in excess of the wage ceiling would be diverted to their EPF account.

3. THE SC JUDGMENT

3.1. The SC relied on its earlier decision in *R.C. Gupta and Ors. v. RPFC and Ors.*⁴ (“**RC Gupta Judgment**”), wherein it had ruled that the provisions of a beneficial scheme such as the EPS, could not be defeated by a cut-off date. Therefore, as per the RC Gupta Judgment, employees could exercise their joint option to contribute on pay higher than the applicable wage ceiling limit (*i.e., INR 6500*), without the constraint of a cut-off date, in accordance with the proviso to Para 11(3) of the EPS as it stood before the EPS Amendment (*hereinafter referred to as the “Unamended EPS”*).

3.2. In the present case, after examining various arguments, the SC held as follows:

- (i) **Validity of the EPS Amendment:** The EPS Amendment was upheld as legal and valid but certain provisions were read down. The SC upheld the increase in wage ceiling, calculation of pensionable salary and amendments to Para 6 of the EPS as regards membership.
- (ii) **Exempted establishments:** Amendments to the EPS brought about by the EPS Amendment will also apply to employees of exempted establishments.
- (iii) **Eligibility for higher pension:** The following persons will be eligible for higher pension:

Sl. No.	Category of Employees	Comments
1.	Employees who were in service as on September 1, 2014, and had exercised the option to contribute on higher wages under the Unamended EPS.	Such persons will now be guided by Para 11(4) and although the SC judgment did not specifically mention this, the members of this category who retired after September 1, 2014, should be eligible for higher pension.
2.	Employees who were in service as on September 1, 2014, and were contributing to EPF on higher wages, but did not exercise the option under the Unamended EPS.	The right of these persons to higher pension has been crystallised under the RC Gupta Judgment. This category can now exercise their option under Para 11(4) for a period of 4 months from November 4, 2022 (<i>i.e., until March 3, 2023</i>). Although the SC judgment did not specifically mention this, the members of this category who retired after September 1, 2014, should be eligible for higher pension.

⁴ (2018) 14 S.C.C. 809 delivered on 4 October 2016.

3.	Employees who retired before September 1, 2014, after exercising the option under the Unamended EPS.	They will continue to be governed by the Unamended EPS.
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(iv) **Employees not eligible for higher pension:**

- (a) employees who had retired before September 1, 2014, without exercising any option under the Unamended EPS.
- (b) given the current framework of the EPF Scheme and EPS, employees joining the EPS after September 1, 2014 (*i.e., those whose salary is less than or equal to INR 15,000 per month*) will also not be entitled to higher pension.
- (c) it appears that employees who were in service as on September 1, 2014, and had exercised the option under the Unamended EPS but had failed to exercise a fresh option under Para 11(4) of the EPS would also not be entitled to higher pension.
- (v) **Requirement to make additional contribution:** The requirement for employees to make an additional contribution of 1.16% if they opt for higher pension, has been struck down. However, given the operational difficulties, the SC suspended this part of the judgment for 6 months.

4. KEY CIRCULARS ISSUED BY THE EPFO⁵

4.1. To summarise, the following categories of persons can now opt for higher pension:

Sl. No.	Whether employee has exercised option under the Unamended EPS to contribute on higher wages	Whether employee is in service as on September 1, 2014	Eligibility for higher pension
1.	Yes (but this option has been rejected / declined by the EPFO)	Yes	Eligible for higher pension; these employees can exercise the option as prescribed under Circular 1 (<i>explained below</i>). They will be eligible even if they have retired after September 1, 2014.
2.	No	Yes	Eligible for higher pension; these employees can exercise option for higher pension under Para 11(4). They will be eligible even if they have retired after September 1, 2014.
3.	Yes	No	Eligible for higher pension under the Unamended EPS; no fresh option required.
4.	No	No	Not eligible for higher pension.

4.2. **EPFO circular dated December 29, 2022, ("Circular 1"):** Circular 1 covered only one category of eligible employees, (*specified in category 1 in the table above*), *i.e., employees who had:*

- (i) contributed in excess of the prevailing wage ceiling under Para 26(6) of the EPF Scheme; and
- (ii) exercised joint option under the Unamended EPS, which was declined by the EPFO.

⁵ The EPFO Circular dated January 5, 2023, was a corrigendum, therefore this has not been discussed.

- 4.3. **EPFO Circular dated January 25, 2023, (“Circular 2”)**: Circular 2 effectively reiterated the position specified in the SC judgment and stated that employees who retired prior to September 1, 2014, without exercising any option under the Unamended EPS (*i.e., category 4 in the table above*) will not be entitled to higher pension.
- 4.4. **EPFO Circular dated February 20, 2023, (“Circular 3”)**: Circular 3 effectively covers the employees under category 2 of the table above, *i.e., employees who had*:
- (i) contributed in excess of the prevailing wage ceiling under Para 26(6) of the EPF Scheme; and
 - (ii) did not exercise joint option under the Unamended EPS;
- 4.5. **Eligible employees must validate their options at the EPFO portal on or before March 3, 2023.** Each application will be digitally logged and will have to be verified by the employer. Each case will be examined on its facts and the decision will be intimated to the applicant.
5. **INDUSLAW VIEW**
- 5.1. Although the EPFO has provided some clarity on how eligible employees can avail higher pension in light of the SC judgment, several operational issues unfortunately continue to remain. At present, given that the deadline given by the SC is imminent, employers would do well to internally inform eligible employees of these changes and assist / facilitate their applications in the manner prescribed by the EPFO circulars.
- 5.2. It is also important to note that while there *appears* to be no additional financial burden on employers on account of the SC judgment and the EPFO circulars, there could be administrative difficulties for employers (*particularly with respect to former employees*) with respect to implementation of the SC judgment. However, additional EPFO circulars are awaited, especially with respect to allocation of funds between EPF and EPS accounts.

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