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EPS 2014 AMENDMENT CONSTITUTIONAL, BUT CUT-OFF AND HIGHER CONTRIBUTION BY EMPLOYEE NOT PALATABLE: SUPREME COURT

9 November 2022 **Background**

In its much-awaited ruling in the case of Employees' Provident Fund Organisation (EPFO) and Another v Sunil Kumar and Others, the Supreme Court of India (SC) has upheld the constitutional validity of the Employees' Pension (Amendment) Scheme, 2014 (EPS Amendment), with certain caveats as discussed below. The judgment has been rendered against the backdrop of the appeals filed by the EPFO against the judgments of the Kerala High Court, the Rajasthan High Court, and the Delhi High Court (High Courts), each setting aside the EPS Amendment as unconstitutional.

Statutory Framework and the EPS Amendment

The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act), applicable to every establishment employing 20 or more persons, envisages creation of three statutory schemes for extending different kinds of social security benefits to eligible employees viz. Employees' Provident Funds Scheme, 1952 (EPF Scheme), Employees' Pension Scheme 1995 (EPS Scheme), and Employees' Deposit-linked Insurance Scheme, 1976. The EPF Scheme requires the employer to contribute 12% of the monthly pay (i.e., comprising basic salary and ordinarily payable allowances) in respect of a covered employee (and equal contribution is made from the salary of the employee). Of the employer's share of 12% (of the monthly pay), 8.33% goes to the pension fund maintained under the EPS Scheme. In this context, the EPS Amendment made notable amendments to the EPS Scheme *inter alia* relating to the eligibility of the employee to be covered therein. Some of these amendments are broadly noted below:

- **Membership of the EPS Scheme:** Prior to the EPS Amendment, the EPS Scheme was applicable to every employee who on or after the 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 exercise of option under Paragraph 26(6) thereof could become a member of the EPS Scheme. 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; and
- **Determination of pensionable salary:** 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 employees' pension fund. However, the maximum pensionable salary was set at INR 6,500 per month, although 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.

Post the EPS Amendment, 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 employees' pension fund. The maximum pensionable salary was set at INR 15,000 per month. While the EPS Amendment retained the option of contributing 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.

Notably, the EPS Amendment was struck down as unconstitutional by each of the High Courts. While a detailed analysis of the view taken by the High Courts is available [here](#), broadly speaking, the capping of the pensionable salary to INR 15,000 per month was considered to be divorced from the actual wage structures applicable to the workforce (besides the court's observation on failure of the EPFO to demonstrate a depleting fund), and the requirement of additional contribution by employees was found to be devoid of merit in view of lack of provisions in this regard under the EPF Act. As regards imposition of the cut-off date, it was noted that since employees have an option to make contributions in excess of the ceiling limit, no other restriction could be imposed on their right to receive pension.

SC's Analysis and Ruling

- Economic factors around wage ceiling: On the aspect of the wage ceiling brought in by the EPS Amendment, the SC has made observations on the limitations of judicial review, noting that the judiciary cannot direct the executive to design a pension scheme in a specific manner only because the financial stability of a section of retired employees is not well taken care of.
- Additional contribution by employees for higher pensionable salary: As regards the additional contribution requirement (for employees opting to contribute on a salary exceeding INR 15,000 per month), the SC has read down the EPS Amendment, holding that when employees do not otherwise have to make contributions to the EPS Scheme (as the law only requires deposit of the employer's share under the EPF Act to the pension fund while the whole of the employee's share goes to the provident fund), there is no reason why such additional contribution requirement should be imposed on them.
- Application of EPS Amendment to exempted establishments: The SC noted that no arguments were advanced as regards members of the pension scheme of exempted establishments in terms of Paragraph 39 of the EPS Scheme and the same was not being addressed. However, the SC clarified that the EPS Amendment shall also be applicable to the employees of the exempted establishments in the same manner as the employees of the regular / unexempted 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 v 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.

Pursuant to the above observations, the SC ruled as follows:

- 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 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.

Comment

The SC's stand on the limitations of judicial review is understandable, as the appropriateness of a wage ceiling of INR 15,000 per month for the retired workforce should be examined by the executive which has already been given the power to determine the eligibility of the workforce to receive pension benefits, taking into consideration economic and social realities of the present day.

Having said that, certain portions of the judgment have already caused some confusion among the industry and the workforce. For instance, while setting forth the directions for implementation of the judgment, the SC has not made any specific observations on the new members enrolling under the EPS Scheme, although it may be implied that by upholding the EPS Amendment, the SC has indicated towards the ineligibility of the new employees earning a monthly pay in excess of INR 15,000 per month to become a member of the scheme or make higher contributions thereunder. Further, the reason for the SC to suspend a part of its judgment relating to invalidity of the additional contribution requirement on the employees is unclear in the absence of any accepted stance of the EPFO regarding existence of administrative or financial difficulties if such part of the judgment is implemented right away.

As for employees who were members of the EPS Scheme as of 1 September 2014 but could not opt for higher contributions in view of the unclear stance on the EPS Amendment itself, the SC has provided a much-needed relief, and it is hoped that the EPFO works in sync with the judgement to accommodate joint options during the extended period.

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