

# Decoding “Higher Pension”

## Background of the Dispute

### 1. When was Pension introduced?

As per the provisions of the Employees provident fund and Miscellaneous Provisions act 1952 Sec 6A was introduced for providing pension to employees in the year (16/11/1995) 1995.(replacing family pension which was introduced in 1971)

## Section 6A. Employees’ Pension Scheme.—

- (1) The Central Government may, by notification in the Official Gazette, frame a scheme to be called the Employees’ Pension Scheme for the purpose of providing for—
  - (a) **superannuation pension**, retiring pension or permanent total disablement pension to the employees of any establishment or class of establishments to which this Act applies; and
  - (b) **widow or widower’s pension**, children pension or orphan pension payable to the beneficiaries of such employees.
- (6) The Pension Scheme may provide that all or any of its provisions shall take **effect either prospectively or retrospectively** on such date as may be specified in that behalf in that Scheme.

## Section 7. *Modification of scheme.*—

*(1) The Central Government may, by notification in the Official Gazette, add to [amend or vary, either prospectively or retrospectively, the Scheme, the [Pension] Scheme or the Insurance Scheme, as the case may be].*

## Employee Pension Scheme

### Before 2014 amendment

#### **Para 11. Determination of Pensionable Salary. –**

**Para 11(1)** The pensionable salary shall be the average monthly pay drawn in any manner including on piece rate basis during contributory period of service in the span of **twelve month (before 1/9/2014)** preceding the date of exit from the membership of the Pension Fund.

**Para 11(3)** maximum pensionable salary will be restricted to Rs.6500 PM as on 16/11/1996 subject to the provision if both employer and employee had opted for higher pension by contribution 8.33% on higher salary whichever is later

**Para 6 (a) Membership of the Employees' pension Scheme.** Subject to subparagraph (3) of paragraph 1, the Scheme shall apply to every employee –

(a) who on or after the 16<sup>th</sup> November, 1995, becomes a member of the Employees' Provident Fund Scheme, 1952..... from the date of such membership;

### Origin of the dispute:

RC Gupta case wherein the Himachal Pradesh HC division bench overruled the order of single judge of Himachal Pradesh allowing pension contribution of 8.33 % on actual Salary as against the EPFO restricting the contribution limit maximum to 6500.

The above was challenged by the appellant RC Gupta in Supreme Court by an SLP in 2015:

**After framing of the scheme on 16/11/1995, a provision was added to clause 11(3) w.e.f. 16/03/1996 permitting an option to the employer and employee for contribution on salary exceeding Rs.5000 or Rs.6500 (w.e.f 08/10/2001) per month, 8.33% on full salary, whichever is later.**

### **Plea**

1. Appellant **employee who retired in 2005**, took the plea that the new provision under Clause 11(3) for higher contribution time limit towards pension was not brought out to their knowledge under the circumstance when the employer contributing higher amount ( i.e on actual salary).
2. This was **rejected by the Provident fund authorities** on the grounds that the cutoff date to exercise the option was over.
3. **Cutoff date** was from the date of commencement of the scheme or from the date of contribution exceeding the wage ceiling limit of Rs.5000 or Rs.6000 as the case may be.
4. **Aggrieved** by the order the appellant moved the **HC, the single Judge agreed** with the appellant and passed the order and made it clear it will not be applicable to any other similar cases.
5. The **Division bench of HC reversed** the single judge order by upholding the order of the department.
6. Subsequently **Supreme Court upheld the contention of Employee.**

## Analysis by SC in RC Gupta Case of 2015

### A. Clause 11 (3) of the Pension Scheme is in the following terms :

Paragraph 11. Determination of Pensionable Salary.

(3) The maximum pensionable salary shall be limited to rupees six thousand and five hundred/Rs.6,500/- per month. Provided that if at the option of the employer and employee, contribution paid on salary exceeding rupees six thousand and five hundred/Rs.6,500/- per month from the date of commencement of this Scheme or from the date salary exceeds rupees six thousand and five hundred/Rs.6,500/- **whichever is later**, and 8.33 per cent share of the employers thereof is remitted into the Pension Fund, pensionable salary shall be based on such higher salary.

**Reading the proviso, the court held that the reference to the date of commencement of the Scheme or the date on which the salary exceeds the ceiling limit are dates from which the option exercised are to be reckoned with for calculation of pensionable salary. The said dates are not cut-off dates to determine the eligibility of the employer-employee to indicate their option under the proviso to Clause 11(3) of the Pension Scheme.**

Similar view was taken by SC in the year 2019 in a matter coming from Kerala, as it is a beneficial scheme if not allowed would defeat the purpose of the scheme.

### B. Paragraph 26(6) of Employees Provident Fund Scheme is in the following terms:

26. Classes of employees entitled and required to join the fund .....

(6) Notwithstanding anything contained in this paragraph, an officer not below the rank of an Assistant Provident Fund Commissioner may, **on the joint request in writing**, of any employee of a factory or other establishment to which this Scheme applies and his employer, enroll such employee as a member or allow him to

contribute more than six thousand five hundred rupees of his pay per month if he is already a member of the fund and thereupon such employee shall be entitled to the benefits and shall be subject to the conditions of the fund, provided that the employer gives an undertaking in writing that he shall pay the administrative charges payable and shall comply with all statutory provisions in respect of such employee.

**Provident Fund Commissioner argued that the appellant-employees had already exercised their option under paragraph 26(6) of the Employees' Provident Funds Scheme.**

**Court held that if both the employer and employee are contributing above the wage ceiling limit, the exercise of the option under paragraph 26 (6) is inevitable.**

**Court further held that, when the contribution is already above ceiling limit, how provident fund commissioner could have been aggrieved to file SLP., all that he could have done is to move the requisite contribution require an adjustment between account heads to benefit the employee.**

**The Division Bench of the Kerala High Court examined the impact of the amendment (1<sup>st</sup> September 2014) to the pension scheme in respect of the following classes of pensioners or potential pensioners:-**

- (i) **Employees who had exercised option** under the proviso to para 11 (3) of the 1995 Scheme and continued to be in service as on 1<sup>st</sup> 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 on 1<sup>st</sup> September 2014.*
- (iii) **Employees who had retired prior to 1<sup>st</sup> September 2014 without** exercising an option under paragraph 11(3) of the 1995 Act scheme.*
- (iv) **Employees who had retired prior to 1<sup>st</sup> September 2014 after exercising** of an option under the paragraph 11(3) of the 1995 Scheme.*

## SC November 2022 Judgment:

This case is primarily to deal with Kerala High court Division bench judgment 12<sup>th</sup> October 2018, which was upheld by this court (SC) on 1<sup>st</sup> April 2-19 on a SLP filed by EPFO, **CIVIL Appeal on Kerala High Court Division Bench invalidating the Notification amendment issued on 22<sup>nd</sup> August 2014 effective from 1<sup>st</sup> September 2014**. Review petition was filed by Central government and listed for hearing on 29<sup>th</sup> January 2021

**Basically to deal with certain amendments and modification brought out by Central government in Employees' Pension Scheme 1995**

1. Sec 6A of employees Provident Fund & Miscellaneous Provisions Act 1952
2. Para 6(a), Para 11 of the Employees' Pension Scheme

## Modification of the Scheme from 1<sup>st</sup> September 2014

### Para 6 of EPS Scheme:

Sl No	Before Modification	After Modification
	<p><b><i>(a) Membership of the Employees' pension Scheme. Subject to subparagraph (3) of paragraph 1, the Scheme shall apply to every employee –</i></b></p> <p><i>(a) who on or after the 16<sup>th</sup> November, 1995, becomes a member of the Employees' Provident Fund Scheme, 1952, or of the Provident Funds of the factories and other establishments exempted by the appropriate Government under section 17 of the Act, or in whose case exemption has been granted under paragraph 27 or 27A of the employees'</i></p>	<p><b><i>(a) Membership of the Employees' Pension Scheme. Subject to subparagraph (3) of paragraph 1, the Scheme shall apply to every employee –</i></b></p> <p><i>(a) who on or after the 16<sup>th</sup> November, 1995, becomes a member of the Employees' Provident Fund Scheme, 1952, or of the Provident Funds of the factories and other establishments exempted by the appropriate Government under section 17 of the Act, or in whose case exemption has been granted under paragraph 27 or 27A of the employees' Provident Fund Scheme, 1952 from the</i></p>

	<i>Provident Fund Scheme, 1952 from the date of such membership;</i>	<i>date of such membership and whose pay on such date is less than or equal to fifteen thousand rupees, from the date of such membership;</i>
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### Para 11 of EPS Scheme:

Sl No	Before Modification	After Modification
1	Para 11(1) pensionable Salary shall be Last 12 month Salary just before retirement	Para 11(1) last 60 Month Salary on prorate basis and before 1 <sup>st</sup> Sept 2016 it will be restricted to 6500 PM and there after Rs.15000 PM
2	11(3) maximum pensionable salary will be restricted to Rs.6500 PM as on 16/11/1996 subject to the provision if both employer and employee had opted for higher pension by contribution 8.33% on higher salary whichever is later	11(3) maximum pensionable salary shall be restricted to 15000 PM
3	NA	11(4) The existing members as on 1 <sup>st</sup> Day of Sept 2014 who at the option of both employer and employee, has been contributing on salary exceeding 6500 pm , may on a fresh option (within 6 months form this date of amendment) can opt for higher contribution to pension fund on a salary exceeding 15000 pm , further the member has to pay 1.16% on salary exceeding 15000

***Supreme Court Held (Quoted Below)***

1. The provisions contained in the notification no. G.S.R. 609(E) dated 22<sup>nd</sup> August 2014 are legal and valid.
2. Amendment to the pension scheme brought about by the notification no. G.S.R. 609(E) dated 22<sup>nd</sup> August 2014 shall apply to the employees of the exempted establishments in the same manner as the employees of the regular establishments.
3. The employees who had exercised option under the proviso to paragraph 11(3) of the 1995 scheme and continued to be in service as on 1<sup>st</sup> September 2014, will be guided by the amended provisions of paragraph 11(4) of the pension scheme.
4. The members of the scheme, who did not exercise option, as contemplated in the proviso to paragraph 11(3) of the pension scheme (as it was before the 2014 Amendment) would be entitled to exercise option under paragraph 11(4) of the post amendment scheme. Their right to exercise option before 1<sup>st</sup> September 2014 stands crystallised in the judgment of this Court in the case of **R.C. Gupta** (supra). The scheme as it stood before 1<sup>st</sup> September 2014 did not provide for any cutoff date and thus those members shall be entitled to exercise option in terms of paragraph 11(4) of the scheme, as it stands at present. Their exercise of option shall be in the nature of joint options covering pre-amendment paragraph 11(3) as also the amended paragraph 11(4) of the pension scheme.  
There was uncertainty as regards validity of the post amendment scheme, which was quashed by the aforesaid judgments of the three High Courts. Thus, all the employees who did not exercise option but were entitled to do so but could not due to the interpretation on cutoff date by the authorities, ought to be given a further chance to exercise their option. Time to exercise option under paragraph 11(4) of the scheme, under these circumstances, shall stand extended by a further period of four months. We are giving this direction in exercise of our jurisdiction under Article 142 of the Constitution of India. Rest of the requirements as per the amended provision shall be complied with.
5. The employees who had retired prior to 1<sup>st</sup> 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.





6. The employees who have retired before 1<sup>st</sup> September 2014 upon exercising option under paragraph 11(3) of the 1995 scheme shall be covered by the provisions of the paragraph 11(3) of the pension scheme as it stood prior to the amendment of 2014.
7. The requirement of the members to contribute at the rate of 1.16 per cent of their salary to the extent such salary exceeds Rs.15000/per month as an additional contribution under the amended scheme is held to be ultra vires the provisions of the 1952 Act.
8. We do not find any flaw in altering the basis for computation of pensionable salary.
9. We agree with the view taken by the Division Bench in the case of **R.C. Gupta** (supra) so far as interpretation of the proviso to paragraph 11(3) (pre-amendment) pension scheme is concerned. The fund authorities shall implement the directives contained in the said judgment within a period of eight weeks, subject to our directions contained earlier in this paragraph.

### **Decoding the SC Judgment:**

1. SC Upheld the EPFO amendment made in 2014
  - a. Government has power to amend the scheme prospective or retrospective
  - b. Employee joining the scheme for the first time after 1<sup>st</sup> September 2014 and contributing PF above wage Ceiling of Rs.15000 are not eligible for Pension.
  - c. 1.16 % of employer contribution on account of higher contribution, not valid and struck down the amendment and kept the same in abeyance for the government to come with an appropriate provision
2. If an employee and his employer were already making higher contribution as on 1<sup>st</sup> September 2014 and **has exercised** the higher pension option as per para 11(3) as it stood before amendment and has also **given fresh joint declaration** as per amendment of 1<sup>st</sup> September 2014 under para 11 (4) **shall be eligible for higher pension.**
3. If an employee and his employer were already making higher contribution as on 1<sup>st</sup> September 2014 and **has not exercised** the higher pension option as per para



11(3) as it stood before amendment and has also **not given fresh joint declaration** as per amendment of 1<sup>st</sup> September 2014 under para 11 (4) and in view of RC Guptha Judgment and other High Court Judgment on lack of clarity on date of cutoff given in para 11 (3), **is given time to file Joint declaration within 4 months of this judgment to avail higher pension**

4. Employee Who had **retired before 1<sup>st</sup> September 2014** and was contributing on actual salary which was above the wage ceiling (Rs.5000, 6500) and also **has exercised** the option under para 11(3) as it stood before the amendment, shall be eligible for higher pension provided the employee refund the amount that pertains to Pension fund along with interest to EPFO for availing higher pension.
5. A sample tabulation of the above judgment through various options is given below (Next page) for better understanding

-----**Thank You**-----

# Hon'ble Supreme Court Judgment of November 2022 impact on Higher Pension



Sl No	Description	Option 1	Option 2	Option 3	Option 4	Option 5	Option 6
1	Joined Before 1st September 2014	Yes	Yes	Yes	Yes	Yes	Yes
2	Pension Available	Yes	Yes	Yes	Yes	Yes	Yes
3	<b>Contributing above</b> 8.33 % of Wage ceiling 6500, 15000	No	Yes	Yes	Yes	Yes	Yes
4	<b>Retired before 1st September 2014</b>	No	No	No	No	Yes	Yes
5	Joint option per-amendment 1/9/2014 exercised 11(3)	No	Yes	Yes	No	No	Yes
6	Joint option post amendment 1/9/2014 exercised 11 (4)	NA	Yes	No	No	NA	NA
7	<b>SC time limit extension of 4 Months to avail higher pension</b>	NA	NA	No	Yes	No	Yes
8	Pensionable Salary <b>Before</b> 1st September 2014	6500	Higher	6500	Higher	6500	Higher
9	Pensionable Salary <b>After</b> 1st September 2014	15000	Higher	15000	Higher	15000	Higher

## Note :

- Option 2 & 3:** The employees who had exercised option under the proviso to paragraph 11(3) of the 1995 scheme and continued to be in service as on 1st September 2014, will be guided by the amended provisions of paragraph 11(4) of the pension scheme.
- Option 4:** There was uncertainty as regards validity of the post amendment scheme, which was quashed by the judgments of the three High Courts. All the employees who did not exercise option but were entitled to do so but could not due to the interpretation on cutoff date by the authorities, ought to be given a further chance to exercise their option
- Option 5:** The employees who had retired prior to 1st September 2014 without exercising any option under paragraph 11(3) of the pre-amendment exited from the membership thereof. They would not be entitled to the benefit of this judgment.
- Option 6:** The employees who have retired before 1st September 2014 upon exercising option under paragraph 11(3) of the 1995 scheme shall be covered by the provisions of the paragraph 11(3) of the pension scheme as it stood prior to the amendment of 2014.

- 5 Employee drawing salary above 15000 Joining first time after 1/9/2014, is not eligible for pension as per para 6 of EPS Scheme
- 6 **Employees falling under Option 6**, have to refund the amount received towards provident fund to the extent it belongs to pension fund along with interest to avail the Higher pension

### Sample Calculation based on SC judgment

Date of Joining - Assumed	01-01-1996	01-01-1996	01-01-1996	01-01-1996	01-01-1996	01-01-1996
PF Salary - Say	20000	20000	20000	20000	20000	20000
Contributing More than 8.33 % of Wage ceiling 6500, 15000	No	Yes	Yes	Yes	Yes	Yes
Pension Contribution 8.33% before 01/09/2014 11 (3)	541	1666	1666	1666	1666	1666
Pension Contribution 8.33% after e 01/09/2014 11(4)	1250	1666	1666	1666	1666	1666
Retired before 1/9/2014	No	No	No	No	Yes	Yes
Eligible for Higher Pension as per SC	No	Yes	No	Yes	No	Yes
Pensionable Salary before 1/9/2014	6500	20000	6500	20000	6500	20000
Pensionable Salary after 1/9/2014	15000	20000	15000	20000	15000	20000
Date of Retirement	30-06-2023	30-06-2023	30-06-2023	30-06-2023	31-08-2014	31-08-2014
Years of Service up-to 1/9/2014	19	19	19	19	19	19
Years of Service after 1/9/2014	9	9	9	9	0	0
Total Pensionable service	27	27	27	27	19	19
Bonus Years	2	2	2	2	0	0
Total Pensionable service	29	29	29	29	19	19
Pension Factor	70	70	70	70	70	70
Pro-rata Pension up to 31/8/2014, 6500	1733	5333	1733	5333	1733	5333
Pro-rata Pension after 31/8/2014, 15000	1892	2523	1892	2523	0	0
Total Pension	3626	7856	3626	7856	1733	5333