

INDIAN SOCIAL SECURITY - SUPREME COURT STRIKES DOWN AMENDMENTS LIMITING PENSION CONTRIBUTIONS AND PAYMENTS

By -
Atul Gupta, Trilegal
atul.gupta@trilegal.com

The Supreme court has upheld the setting aside of Employee's Pension (Amendment) Scheme, 2014 that capped maximum pensionable salary to INR 15,000/month, and substantially reduced the receivable pension.

Background

On 1 April 2019, the Supreme Court in *The Employees' Provident Fund Organization and Anr. v Sunil Kumar B & Ors.* (**SC Ruling**) upheld the 2018 Kerala High Court decision in *P. Sasikumar and Ors. v Union of India and Ors.* (**Kerala HC Ruling**) which had set aside the Employee's Pension (Amendment) Scheme, 2014 (**2014 Amendment**).

In accordance with the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (**EPF Act**) and the Employees' Pension Scheme, 1995 (**Pension Scheme**), the employer and employee are required to contribute 12% each (can be capped at 12% of INR 15,000 for domestic employees) from the employee's salary. While the employee's contribution of 12% is entirely allocated towards the employee's provident fund (**EPF**) account, the employer's contribution is split 8.33% into the employee's pension account and 3.67% into the EPF account. Often organizations and employees pay uncapped contributions and do not limit the same to the INR 15,000 threshold for domestic staff. For e.g. an individual earning INR 100,000 per month would receive INR 12,000 as employer's contribution (split 8.33% into the EPS account and 3.67% into the EPF account) and the employee would also contribute INR 12,000 into the EPF account.

However, the 2014 Amendment, *inter alia*, capped the maximum pensionable salary to INR 15,000 per month, excluding all *new* members who earned above this sum from pension (i.e. the aforementioned 8.33% employer contribution would also go into the EPF account for such members) and giving only a short window of 6 months to *existing* members to choose whether or not they wished to make uncapped pension contributions. Consequently, the pension payable to employees was substantially reduced leading to petitions being filed against this amendment. In the above example, the employee earning INR 100,000 per month would be entirely excluded from pension if he/she was a new PF member. For someone who was an existing member, their pension contribution would be limited to INR 1250 per month (i.e. 8.33% of INR 15,000), unless they opted within the 6-month window to continue making uncapped contributions.

2014 Amendment - Key Provisions

Key elements of the 2014 Amendment are outlined as follows:

- (i) salary ceiling was increased from INR 6,500 to INR 15,000 per month;
- (ii) new members (joining on or after 1 September 2014) drawing salary exceeding INR 15,000 per month were not eligible to contribute to the Pension Scheme at all;
- (iii) existing members as on 1 September 2014 (whose contribution towards the Pension Scheme had been on salary exceeding INR 6,500 per month) had an option to make contributions on a higher salary (i.e. exceeding the new ceiling of INR 15,000 per month) by expressly opting for

the same within a 6-month window. This was further subject to the condition that such member would have to contribute an additional 1.16% (on the salary exceeding INR 15,000 per month) from his/ her share of contribution;

- (iv) the pensionable salary was to be calculated on the average monthly pay for the last 60 months preceding the date of exit from the membership of the Pension Scheme. This was 12 months earlier.

The Kerala HC Ruling

Several writ petitions were filed before the Kerala High Court, challenging the validity of the 2014 Amendment. After hearing the petitions, the Kerala High Court (*in P.Sasikumar vs Union Of India*) rule on 12 October 2018 that the 2014 Amendment had resulted in creating different classes of pensioners who received different pension benefits on the basis of a date (i.e. 1 September 2014). It further noted that owing to this amendment, the following classes of pensioners were created -

(a) employees who were contributing to the Pension Scheme at salary exceeding INR 6500, and were continuing in service as on 1 September 2014; (b) employees who were contributing to the Pension Scheme at salary capped at INR 6500, and were continuing in service as on 1 September 2014; (c) employees who have retired prior to 1 September 2014 without exercising an option to contribute at higher salary (exceeding INR 6500) towards the Pension Scheme; (d) employees who have retired prior to 1 September 2014 after exercising the option to contribute at higher salary (INR 6500) to the Pension Scheme.

Given the differentiation created, the High Court observed that the EPF Act does not distinguish between members of a covered establishment and rather treats employees as a homogenous class. Accordingly, the benefits flowing from the EPF Act and the schemes (including Pension Scheme) should apply to the said class of employees uniformly. Consequently, the High Court held that such differentiation has no rational or statutory basis and capping the maximum pensionable salary at INR 15,000 per month would deprive most employees of a decent pension in their old age.

Also, the High Court struck down the requirement to contribute an additional 1.16% for employees contributing towards the Pension Scheme at salary exceeding INR 15,000. It also held that computation of pension based on average monthly pay of 60 months instead of 12 months will reduce pension significantly, and therefore struck this down as well. In this respect, the Employees' Provident Fund Organization (EPFO) argued that the 12-month timeframe would lead to depletion of the pension fund. However, the court rejected this argument owing to lack of any supporting evidence from the EPFO.

SC Ruling - Analysis and Impact

The SC reaffirmed the Kerala HC ruling (on the 2014 Amendment being struck down) whereby, employees covered under the EPF Act will now be eligible for a higher pension. The pension will increase since employees can now contribute towards their pension fund at their uncapped salary and the basis for calculation of pensionable salary will be the salary received over the last 12 months instead of 60 months preceding the date of exit from the Pension Scheme. Also, since the 2014 Amendment has been struck down in its entirety, it appears that the salary ceiling for pension shall revert to INR 6,500.

However, this judgement leaves certain questions unanswered. It is unclear if this will apply retrospectively, thereby allowing employees who were completely excluded from the Pension Scheme by the 2014 Amendment, as well as those who didn't opt for higher pension payments within the 6-month opt-in window, to seek retrospective coverage (and accordingly a diversion of contributions previously made into their EPF account, into their Pension account). Going by the R.C. Gupta ruling, one can surmise this would apply retrospectively. In *R.C. Gupta and Ors. v Regional Provident Fund Commissioner, Employees' Provident Fund Organisation and Ors.* (decided on 4 October 2016), the

Supreme Court struck down the 6-month opt-in window from 1 September 2014 (for employees to continue making uncapped pension contributions) and directed the EPFO to adjust the funds from the EPF account to the pension account for such employees to allow higher pension pay outs.

It must be noted that despite this the EPFO has not been accepting applications in this respect from employees working in exempt establishments (i.e. establishments that maintain a PF trust). This approach by the EPFO appears to be without any reasonable basis since the applicability of the RC Gupta ruling to exempt establishments has been re-affirmed by the Rajasthan High Court recently (in the case of *Anil Kumar Sharma And Ors vs U O I And Ors*).

Further, we note that the SC Ruling shall have an impact on 'International Workers' (IWs) - expat employees who hold a non-Indian passport and are employed by an Indian entity covered under the EPF Act. Going forward, IWs would also be eligible to be covered under the Pension Scheme, so employers need to ensure that they are making contributions towards the Pension Scheme for IWs as well.

Undoubtedly, the SC Ruling is a positive measure for employees promising them higher pension payments. However, the judgement is also being criticized for not taking cognizance of the fact that the EPFO will actually not be able to bear the additional cost burden associated with higher pension contributions. Back-of-the-envelope calculations show that contributions made over an employee's career may not be sufficient to back the pension payments that would eventually have to be made, adding significant pressure on the EPFO. The 2014 Amendment had attempted to limit the member base of the pension scheme, which has been undone by the SC ruling, thereby expanding the pension membership, including to high income individuals.

The contents of this newsletter are intended for informational purposes only and are not in the nature of a legal opinion. Readers are encouraged to seek legal counsel prior to acting upon any of the information provided herein.

About the Author



Atul Gupta is a Partner in Trilegal since 2015 and been with the firm since 2006 in the Corporate Practice Group. He is a senior partner in the Employment practice, which he helped establish, and which he is slated to head.

Over the years, Atul has firmly established his credentials as a leading authority and thought leader on Indian labour and employment laws. His views on key developments have featured in major newspapers and are sought by major industry and trade bodies like the CII, NASSCOM, IFCCI, etc. Atul has recently been personally invited by the Central Provident Fund Commissioner (who heads India's largest social security and pension fund) to advise the Employees' Provident Fund Organization on various key changes to Indian social security laws, and has also provided his views extensively to help shape other policy and legislative measures. He recently helped write draft crèche related rules for submission to the Karnataka government and other State governments through the CII and NASSCOM.

Atul focuses his practice on advising clients on high stakes employment law issues – both on the contentious and non-contentious side - including senior management terminations, large scale reductions-in-force and establishment closures, M&A/outsourcing/insourcing transactions with significant employee movements, representation before Provident Fund and other regulatory authorities in large value adversarial assessments, bespoke compensation and benefits structuring, employment disputes and litigation, as well as investigations and inquiries arising from employee misconduct/white-collar crime (including those relating to workplace and sexual harassment). He also handholds clients on a wider range on advisory matters, such as structuring of employment contracts and policies, issues relating to privacy and intellectual property protection, hiring of expats and secondment agreements, preparation of wage and other settlements, voluntary retirement schemes, etc.

Atul and his team have successfully established Trilegal's credentials in the space of 'industrial relations', by effectively handling several mandates involving complex trade union dynamics and disputes. Atul has also established strong and impressive credentials in the firm's white-collar practice and handles several complex and sensitive investigative mandates every year.



Atul is the lawyer of choice for several major international and domestic clients, who bank on his in-depth experience, rigour, responsiveness and authority in handling their complex labour and employment matters. Atul is also the preferred partner on large corporate transactions with a significant human capital element, as he successfully merges his employment law expertise with a corporate law background to provide clients with practical and commercial advice on the most effective strategies to deal with employee and benefits transfers and integration.

Atul has been ranked as '**Band 3**' by Chambers in 2018 & 2019 and has been recognized as a leading lawyer by Chambers Asia Pacific 2014, 2015, 2016 and 2017 guides. [Chambers research](#) cites, Atul Gupta '*combines specialised employment expertise with an extensive familiarity with corporate and foreign exchange law, equipping him well to handle the employment aspects of cross-border M&A transactions. Areas where he offers particularly expert knowledge include employment contract and benefits structuring, secondment arrangements and outsourcing transactions*'. In addition, he has also been praised as: *The "brilliant" Atul Gupta is applauded by sources for his commercial awareness and practical approach. He has advised a diverse group of companies on Indian employment law matters.*