

IN THE HIGH COURT OF JUDICATURE AT MADRAS**Reserved on: 27.02.2019****Delivered on: 27.03.2019****CORAM****THE HONOURABLE MR. JUSTICE V.PARTHIBAN**

W.P.Nos.14368, 10051, 10274, 10413, 10414, 10415, 11609, 11610, 11611, 11612, 13308, 14145, 14189, 14736, 16229, 17170, 20458 to 20464, 22403, 23131, 23713, 24661, 24662, 25483, 29512, 4804, 5405, 5406, 5407, 5562, 5563, 7126, 846, 909, 910, 22343, 30681, 30684, 30688, 31347, 31358, of 2018 and 2429, 2433, 4308, 4436, 5315, 6289, 6296 & 6902 of 2019
and
W.M.P.Nos.12009, 12369 to 12371, 12374 to 12376, 12379 to 12381, 13584 to 13586, 13590, 13591, 13594 to 13596, 13599 to 13601, 15679, 16714, 17415, 20381 to 20384, 20429, 24028 to 24055, 24143, 26245 to 26247, 27031, 27654 to 27658, 28693 to 28702, 29664, 29666, 34481, 34483, 34486, 5953, 6651 to 6653, 6656 to 6658, 6661 to 6663, 6882, 8822 to 8824, 1009 to 1013, 1095 to 1103, 35791, 35796, 35799, 36520, 34936, 36543 to 36545 of 2018 and 697, 2711, 2704, 2706, 2715, 2717, 2719, 2700, 5274, 5276 of 2019

AND

The following W.Ps., Reserved on 26.03.2019

**W.P.NOs.26234, 32879, 33605 to 33607,
34331 of 2017 and
W.M.P.Nos.27887, 27888, 27889, 36239,
36240, 36241, 37157 to 37163, 37165 to 37167,
33606 & 33607 of 2017**

W.P.No.14368 of 2018

ONGC Retired Employees' Welfare Association,
represented by its President,
CMDA Tower 2, 8th Floor Room S-15,
No.1 Gandhi Irwin Road, Egmore,
Chennai-600 008. .. Petitioner

versus

1. Union of India,
represented by the Secretary to Government of India,
Ministry of Labour and Department of Employment,
New Delhi-110 001.

2. Regional PF Commissioner-I (Pension),
Bhavishya Nidhi Bhawan,
14, Bhikanji Cama Palace,
New Delhi-110 066.

3. Addl. Central PF Commissioner HQ (Pension),
Employees Provident Fund Organization,
Bhavishya Nidhi Bhawan,
14, Bhikanji Cama Palace,
New Delhi-110 066.

4. Regional Provident Fund Commissioner,
Employees Provident Fund Organization,
Employee Provident Fund Commissioner (EPFO),

No.37, Royapettah High Road, Azad Nagar,
Chennai-600 014,
Tamil Nadu.

5. Assistant Provident Fund Commissioner (EPFO),
Sub Regional Office,
R-40 A, TNHB Office Complex,
Mugappair Road, Mugappair (East),
Chennai-600 037,
Tamil Nadu.

6. Oil and Natural Gas Corporation Ltd. (ONGC),
represented by its Chairman & MD,
ONGC, Pandi Deendayal Upadhyaya Urja Bhavan,
Anelson Mandela Marg, Vasant Kunj-110 070.

7. ONGC Ltd. Employees Contributory Provident Fund Trust,
represented by its Chairman,
Shed No.21, Tel Bhawan ONGC,
Dehradun-248 003. .. Respondents

Prayer: Writ Petition is filed under Article 226 of the
Constitution of India, praying to issue Writ of Certiorarified
Mandamus, to call for the records pertaining to the impugned
letter issued by the 2nd respondent in No.Pension-
I/12/33/EPS Amendment/96 Vol.II dated 31.05.2017, quash
the same and direct the respondents Association under
Clause 11(3) of the Employees' Pension Scheme, 1995 as
interpreted, clarified and directed by the Hon'ble Supreme
Court in its judgment dated 04.10.2016 read with approval of
the Ministry of Labour and Employment dated 16.03.2017.

For Petitioners :

Mr.M.S.Krishnan Senior Counsel for
M/s.Sarvabhaaman Associates in
W.P.No.14368/2018.

Mr.V.Karthik Senior Counsel for
M/s.Vedavallikumar in WP Nos.10051,
10274, 14189, 14736, 16229,
30681/18, 30684, 30688/18.

M/s.A.Jenasenan, in
WP Nos.33605 to 33607 of 2017,
10413 to 10415/18, 11609 to
11612/18, 20455 to 20464/18,
23713/18, 24661/18, 24662/18,
5405 to 5407/18, 7126/18, 846/18,
909, 910/18.

Mr.A.E.Ravichandran in
W.P.No.26234 & 32879 of 2017

M/s.S.Namasivayam,
in WP No.13308/18, 4804/18.

Mr.B.Ramamoorthy in
W.P.No.34331 of 2017

Mr.K.Elangoo, in WP No.14145/18,
17170/18, 22403/18, 23131/18,
25483, 31358/18.

Mr.K.Govindarajan in WP No.29512/18

Mr.R.Sanjith, Assisted by M/s.Sindhu
Krishnah for M/s.Chaly Associates in
WP Nos.5562, 5563/18

Mr.Yogesh Kannadasan in WP Nos.909,
910/18, 22343/18 and 6902/19

Mr.Balan Haridas in WP Nos.31347/18,
and 4436/19

Mr.G.Sankaran in WP Nos.2429/19,
and 2433/19

Mr.M.R.Raghavan in WP No.4308/19

Mr.A.Nagarathinam in WP No.5315/19

Mr.M.Purushothaman in WP No.6289
and 6296/19

For Respondents:

Mr.M/s.K.Raju, CGSC for R1 in WP
Nos.14368/18, 11609 to 11612/18,
910/18

Mr.S.Makesh for R1 in WP
Nos.10051/18, 10413 to 10415/18,
909, 10274 & for RR1 to 3 in WP
Nos.14189/18, 23713/18, 6902/19

Mr.T.R.Sundaram, for RR1 to 5
in WP Nos.14368/15 & for
RR 2 to 5 in WP Nos.10051/18,
31358/18 & for
RR 2 to 6 in WP Nos.10413 to
10415/18, 11609 to 11612/18,
23131/18, 23713/18, 24661/18,
24662/18, 29512/18,7126/18,
846/18, 909, 910 & for

RR 4 & 5 in WP Nos.14189 of 2018,
6289/19, 6296/19 & for
RR 1 to 5 in WP Nos.14736/18
& for R1-Union of India
R1 in WP No.17170/4 (Union of India
Ministry of Labour & Employment,
New Delhi) & for
RR 1 to 6 in WP Nos.20458 to
20464/18, 5405/18 to 5407/18
& for RR 1 to 3 in WP No.5562/18,
& for RR 2 & 3 in WP No.5563/18.
And RR2 to 4 in WP 26234/17,
32879/17, & for RR2 to 6 in WP
33605 to 33607/17 & for RR2 & 3
in WP 34331/17.

Mr.J.Sathyanarayanaprasad for
RR6 & 7 in WP Nos.14368/18, R7 in
WP No.20458, 20459, 20460, 20461,
20462, 20463, 20464, 23713/18,
24661/18, & 24662/18 and
for R5 in WP 26234 of 17

Mr.R.Veludas, CGC for R1 in
WP 26234/17, 33605 to 33607/17

Dr.R.Gowri Advocate for
RR7 & 8 in WP NO.10413 to 10414/18

Mr.J.Ramesh, Addl.G.P. for
RR 7 & 8 in WP Nos.11609 to
11612/18

Mr.R.Thirunavukarasu, for
RR1 & 2 in WP Nos.13308/18,

4804/18, & for RR2 to 6 in WP Nos.30681/18, 30684 & 30688/18 R2 in WP No.4308/19 & for RR2 & 3 in WP No.4436/19 & for RR5 & 6 in WP No.6902/19 & for R5 in WP 32879/17

Mr.N.Vijaya Baskar, Addl.C.G.S.C., for R1 in WP No.14145/18 and for R7&8 in WP 33605 & 33607/17

M/s.V.J.Latha for RR 2 to 6 in WP Nos.14145/18, 17170/18, 22403/18, 25483 & 31358/18

M/s.Shivakumar & Suresh for RR7 to 9 in WP Nos.25483/18, 14145/18, 17170/18, 22403/18, 31358/18 and 25483/18

Mr.K.Ramu Assisted by K.Vishnu for R5 in WP No.14736/18

Mr.T.S.N.Prabhakaran, SCG for RR1 to 5 in WP No.16229/18

Mr.Anand Goplan for M/s.T.S.Gopalan for RR 8 & 9 in WP Nos.20458/18, 20459/18 & for R4 in WP No.5562/18, 5563/18 & 31347/18 and for R6 in WP 26234/17

Mr.K.Thirukumaran, Addl.C.G.S. for R1 in WP Nos.22403/18 & for RR1 to 3 in WP Nos.6289 & 6296/19 and for R5 in WP 32879/17

Mr.B.K.Girish Neelakandan

for R1 in WP No.23131/18, 4436/19

Mr.K.Seetha Ram, CGSC for
R1 in WP No.24661/18, 24662/18

Mr.K.Ramachandramurthy, CGSC
for R1 in WP No.25483/18 &
for R1 in WP No.32879/17

M/s.B.Ramaratnam, CGSC
for R1 in WP No.29512/18

M/s.K.M.Vijayan Associates
for R3 in WP No.4804 of 2018

Mr.S.Vijayakumar for
RR7 to 9 in WP No.5405/18
to 5406/18

Mr.N.Ramesh, CGSC
for R1 in WP No.5563/18

Mr.K.Raju, CGSC for R1
in WP No.7126/18

Mr.M.R.Raghavan
for RR7 & 8 in WP No.7126/18

Mr.P.Ayyaswamy, CGSC for
R1 in WP No.846/18, 535/19

Mr.K.S.Jeyaganesan, Senior Panel
Counsel for R1 in WP No.30681/18,
30684, 30688/18

M/s.G.Baskaran for R1 to R3

COMMON ORDER

Since all the present Writ Petitions raise common issues and grounds, they are taken up together for final disposal as under:

2. There are two categories of the Writ Petitions pertaining to the employees from 'Exempted Establishments' under Section 17 of The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter, referred to as 'the Act') and 'Un-exempted Establishments, which are governed by the provisions of the Act.

3. The employees of both the above mentioned establishments are aggrieved by the denial of pension on the basis of their actual salaries received by them since the payment of pension was restricted to ceiling of salary as provided under the provisions of the Act and the Scheme framed therein. The dispute has its genesis, wherein, the Employees' Pension Scheme was introduced in 1995 in furtherance of Section 6A of the Act, which reads as under:

“6-A. 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 applies; and

(b) Widow or widower’s pension, children pension or orphan pension payable to the beneficiaries of such employees.

(2) Notwithstanding anything contained in section 6, there shall be established, as soon as may be after framing of the Pension Scheme, a Pension Fund into which there shall be paid, from time to time, in respect of every employee who is a member of the Pension Scheme. (a) Such sums from the employer’s contribution under section 6m not exceeding eight and one- third per cent. Of the basic wages, dearness allowance and retaining allowance, if any, of the concerned employees, as may be specified in the Pension Scheme; (b) Such sums as are payable by the employers of

exempted establishments under sub-section (6) of section 17; (c) The net assets of the Employees' Family Pension as on the date of the establishment of the Pension Fund; (d) Such sums as the Central Government may, after due appropriation by Parliament by law in this behalf, specify.

(3) On the establishment of the Pension Fund, the Family Pension Scheme (hereinafter referred to as the ceased scheme) shall cease to operate and all assets of the ceased scheme shall vest in and shall stand transferred to, and all liabilities under the ceased scheme shall be enforceable against, the Pension Fund and the beneficiaries under the ceased scheme shall be entitled to draw the benefits, not less than the benefits, they were entitled to under the ceased scheme, from the Pension Fund.

(4) The Pension Fund shall vest in and be administered by the Central Board in such manner as may be specified in the Pension Scheme.

(5) Subject to the provisions of this Act, the Pension Scheme may provide for all or any of the matters specified in Schedule III.

(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.

(7) A Pension Scheme, framed under subsection (1) shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period or thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both House agree in making any modification in the scheme or both House agree that the scheme should not be made, the scheme shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that scheme."

4. The Employees' Pension Scheme, 1995 (hereinafter

referred to 'the Pension Scheme') was introduced with effect from 16.11.1995 and and wherever the Act is made applicable, the scheme was made compulsory covering all the employees employed in various establishments which are governed by the Act and the Pension Scheme.

5. The grievances of the employees are two fold, viz., firstly, in respect of unexempted establishments, the Employees Provident Fund Organization (in short, 'EPFO') has introduced a cut off date as 01.12.2004 for the purpose exercising option in terms of proviso introduced to Clause 11(3) of the Pension Scheme, as per which, the employees could contribute PF contribution on the basis of the actual salary drawn by them. The proviso 11(3) introduced on 28.02.1996 by GSR 134 was put into effect from 16.3.1996. Clause 11(3) along with proviso reads as under:

“11. Determination of Pensionable salary.-

(1)

(2)

(3) The maximum pensionable salary shall be limited to (Rupees six thousand and five hundred/Rs.6500/-) 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.6500) per month from the date of commencement of this Scheme or from the date salary exceeds (Rupees six thousand and five hundred/Rs.6500) whichever is later, and 8.33 per cent, share of the employers thereof is remitted into Pension Fund, pensionable salary shall be based on such higher salary.”

and secondly, in respect of exempted establishments, calculation for payment of pension on the basis of actual salary received by the employees, cannot be considered feasible since such contributions were made by the employees to the respective establishments which establishments had their own Provident Fund Trust and maintained by the respective exempted establishments. According to the

employees, the above said grievances/issues are covered by various decisions of the High Courts, viz., Kerala, Rajasthan, Telengana and also a decision of the Hon'ble Supreme Court of India. According to the employees, the EPFO was a party to the litigations before the various High Courts as indicated above and also before the Hon'ble Supreme Court of India and hence, the claim of these writ petitioners and the challenge to the denial of calculation of pension on the basis of actual salary received by them, is not open to any fresh adjudication, as according to them, the issues are no more *res integra*. This was particularly so that the EPFO itself and the Ministry concerned had recognized the right of the employees in regard to the subject claim and implemented the orders of the various High Courts as well as the Hon'ble Supreme Court of India by extending the benefit of higher pension to thousands of employees and therefore, it does not lie in the mouth of EPFO or the Government to resist the claim of the employees herein.

6. As regards the first point of grievance is concerned, i.e., the prescription of cut off date as 01.12.2004 for the purpose of exercising option with reference to *Proviso* to Clause 11(3) of the Pension Scheme, the learned Senior Counsels and the learned Counsels appearing for the employees in the Writ Petitions would draw the attention of this Court to the order passed by the Kerala High Court in W.P.(C) Nos.6643 & 9929 of 2007, dated 4.11.2011, wherein, a learned single Judge of the Kerala High Court dealt with various objections raised on behalf of the EPFO and also after adverting to the claims of the petitioners therein, has finally held that the fixation of cut of date, i.e. 01.12.2004 was invalid and the petitioners therein were entitled to avail the benefit under *Proviso* to Clause 11(3) of the Pension Scheme. The said detailed order passed by the learned single Judge dealing with every objection raised on behalf of the EPFO, has been brought to the attention of this Court, particularly the observation made in paragraphs 3 to 5 which are extracted hereunder:

“3. I have considered the rival contentions in detail. Clause 11 of the Employees' Pension Scheme reads as follows:

"Determination of pensionable salary.- (1) Pensionable salary shall be the average monthly pay drawn in any manner including on piece-rate basis during the contributory period of service in the span of 12 months preceding the date of exit from the membership of the Employees' Pension Fund:

Provided that if a member was not in receipt of full pay during the period of twelve months preceding the day he ceased to be the member of Pension Fund, the average of previous 12 months full pay drawn by him during the period for which contribution to the pension fund was recovered, shall be taken into account as pensionable salary for calculating pension.

(2) If during the said span of 12 months there are non-contributory periods of service including cases where the member has drawn salary for a part of the month, the total wages during the 12 months' span shall be divided by the actual number of days for which salary has been drawn and the amount so derived shall be multiplied by 30 to work out the average monthly pay.

(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."

(underlining supplied)

Proviso to clause 11(3) was added by G.S.R. No.134, dated 28.2.1996 with effect from 16.3.1996. I do not find any merit in the contentions of the learned counsel for the Provident Fund Organization that the proviso is only prospective in nature. The proviso, which was added with effect from 16.3.1996 by G.S.R. Dated 28.2.1996, speaks of contributions on salary from the date of commencement of the Scheme, which is prior to 28.2.1996. Therefore, the very language of the proviso makes it explicitly clear that the proviso is intended to be operative retrospectively from the date of commencement of the Scheme, insofar as the

Scheme came into force with effect from 16.11.1995. Therefore, the proviso is certainly retrospective in nature and consequently the petitioners are entitled to avail of the benefit of the proviso retrospectively, provided they are able to make good the arrears of contributions in respect thereof which they have agreed to be transferred from their Provident Fund account, which the Provident Fund Organization actually did. In fact, originally the Provident Fund Organization was also of the opinion that the proviso is retrospective in nature and that is why they permitted the petitioners to avail of the benefit of that proviso by paying off the arrears of contributions payable by transfer from their Provident Fund account. In fact even according to the Provident Fund Organisation for availing of the benefit retrospectively the cut off date has been fixed. As such, it is too late for the Provident Fund Organization to contend otherwise.

4. The second objection is regarding the cut off date fixed. According to the Provident Fund Organization a cut off date of 1.12.2004 has been fixed for applying for benefit of the

proviso by changing over to payment of contributions on actual salary basis. But the Provident Fund Organization has not been able to produce any document by which such a cut off date has been fixed by anybody. The Employees' Provident Funds and Miscellaneous Provisions Act, the Employees' Provident Fund Scheme and the Employees' Pension Scheme do not contain any provision enabling the 2nd respondent or anybody else to fix a cut off date for the purpose of availing of the benefit of proviso to clause 11(3). Even assuming that anybody has any power to fix that cut off date, certainly it is not the 2nd respondent. As such I am convinced that the cut off date fixed by the 2nd respondent is clearly without jurisdiction. That being so, the benefits already granted to the petitioners under the proviso to clause 11(3) cannot now be reversed or withdrawn as done in this case.

5. The third contention is that under paragraph 26(6) of the Employees Provident Fund Scheme, the employees are required to file a joint application, which has not been done in this case. But, the interesting thing is that the

2nd respondent did not insist on the same, while permitting the petitioners to avail of the benefit of the proviso to clause 11(3). It is when these writ petitions came up that they have taken such a contention. Even assuming that it is so, nothing prevents the Provident Fund Organisation in directing the employer and employee to file a joint application, which they have not done. Added to that, the employer is also a party to these writ petitions before me. They do not have any objection in the petitioners being the given benefit of the proviso to clause 11 (3) of the Employees' Pension Scheme. Therefore, that cannot now be held as ground for denying the benefit to the petitioners. If at all what they can do is to direct the employer and the employee to file a joint application, which is merely procedural in nature which defect can be cured at any time. In the above circumstances, I allow these writ petitions quashing the orders impugned in these two writ petitions. It is declared that the fixation of cut off date of 1.12.2004 is without jurisdiction and despite the fact that the petitioners have filed the applications for benefit

under the proviso to clause 11(3), after the cut off date so fixed, the petitioners are entitled to avail of the benefit under the proviso to clause 11(3) of the Employees' Pension Scheme. As such I declare that the benefits was rightly given to the petitioners. Consequently, the arrears of contributions payable by the petitioners for availing of the benefit of the said proviso shall again to be transferred from the Provident Fund account of the petitioners to the Employees' Pension Fund account of the petitioners. Orders in this regard shall be passed, as expeditiously as possible, at any rate, within one month from the date of receipt of a copy of this judgment.”

7. As against the above order of the learned single Judge, a Writ Appeal in W.A.No.569 of 2012 was preferred before a Division Bench of Kerala High Court and by its judgment dated 5.3.2013, the Division Bench has confirmed the order passed by the learned Single Judge. The operative portion of the judgment passed by the Division Bench as found in paragraphs 9 to 12 is extracted as under:

“9. The learned Single judge noticed that Proviso to clause 11 (3) was added by G.S.R. No.134, dated 28/2/2006 with effect from 16/3/1996. The learned Single Judge has given good reasons to turn down the contention that the proviso is only prospective in nature . As noticed by the learned Single Judge the proviso which was added with effect from 16/3/1996 by G.S.R. Dated 28/2/1996, speaks of contributions on salary from the date of commencement of the Scheme, which is prior to 28/2/1996. We also feel that the very language of the proviso makes it explicitly clear that the proviso is intended to be operative retrospectively from the date of the commencement of the Scheme, in so far as the scheme came into force with effect from 16/11/1995. When it is seen that the proviso is retrospective, consequently the writ petitioners will be entitled to avail of the benefit of the proviso retrospectively provided they are able to make good the arrears of contributions in respect thereof which they have agreed to be transferred from their Provident Fund Account which the Provident Fund Organization

actually did. Originally the Provident Fund Organization was also of the opinion that the proviso is retrospective in nature and that is why they permitted the petitioners to avail of the benefit of that proviso by paying off the arrears of contributions payable by transfer from their Provident Fund Account. The contention of the Provident Fund Organisation is that for availing of the benefit retrospectively the cut off date has been fixed.

10. According to us, the learned Single Judge has correctly understood and decided the issue regarding the cut off date fixed. According to the Provident Fund Organisation, cut off date of 1/12/2004 has been fixed for applying for benefit of the proviso by changing over to payment of contributions on actual salary basis. It was noticed by the learned Single Judge that no document by which such a cut off date has been fixed by anybody is produced by the Provident Fund Organisation. The Employees' Provident Fund Scheme and the Employees' Pension Scheme also do not contain any provision enabling the Regional Provident Fund Commissioner or anybody else

to fix a cut off date for the purpose of availing of the benefit of proviso to clause 11(3). According to us, the decision of the learned Single Judge that - even assuming that anybody has power to fix that cut off date, certainly such power is not with the 2nd respondent-Regional Provident Fund Commissioner, is quite correct.

11. We find that the learned Single Judge has considered the contention of the Provident Fund Organisation that the employers and the employee require to file a joint application which has not been done in this case. But as noticed by the learned Single Judge, the regional Provident Fund Commissioner did not insist on the same, while permitting the petitioners to avail of the benefit of the proviso to clause 11 (3). Hence, the non-filing of the joint application was rightly held to be not a ground for denying the benefit to the writ petitioners.

12. In short, in our opinion there is no infirmity in the leading common judgment and also in the separate judgments which are passed in terms of the leading common

judgment. These appeals fail and will stand dismissed. The parties will suffer their respective costs.”

8. The Division Bench has held that neither the Act nor the Pension Scheme would provide for any cut off date for the purpose of availing of the benefit of the *Proviso* to Clause 11(3). In fact, the Division Bench has also upheld that in case of non-filing of joint application under Clause 11(3) was not a valid ground to deny the benefit of higher pension to the writ petitioners therein. In short, the Division Bench has confirmed the order of the learned Single Judge in toto. Thereafter, it appears that the Hon'ble Supreme Court of India was approached as against the judgment of the Division Bench of the Kerala High Court in SLP (C) No.7074 of 2014 and the Hon'ble Supreme Court has dismissed the same finding no legal or valid ground for interference, vide its order dated 31.3.2016.

9. The learned Senior Counsels would draw attention of this Court to an order dated 4.10.2016 passed by the Hon'ble Supreme Court of India, which according to them, clinches the issue in favour of the employees. The order of the Hon'ble Supreme Court was rendered in Civil Appeal Nos.10013-10014 of 2016 arising out of SLP (C) Nos.33032 to 33033 of 2015 in **“R.C.Gupta and others etc., versus Regional Provident Fund Commissioner, EPFO & Others”**, wherein, the Hon'ble Supreme Court was considering the Civil Appeals arose out of the order of the Division Bench passed by the Himachal Pradesh High Court reversing the order of the learned Single Judge, who directed that the employees would be entitled to the benefit of deposit of 8.33% of their actual salary in the Pension Fund irrespective of the ceiling limit. The Hon'ble Supreme Court has considered the submissions of the rival parties and held as under:

“6. We have heard the learned counsels for the parties. We have read and considered the orders of the High Court, the provisions

of the Act, the Provident Fund Scheme as well as the relevant provisions of the Pension Scheme.

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

11. Determination of Pensionable Salary.

xxx xxx xxx

(3) The maximum pensionable salary shall be limited to 1 [rupees six thousand and five hundred/Rs.6,500/-] per month.

[Provided that if at the option of the 1 Sub-section by G.S.R.774(E), dated 8th October, 2001 (w.e.f.1-6-2001) 2 Sub-section by G.S.R. 134, dated 28th February, 1996 (w.e.f. 16-3-1996) 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.]

8. Reading the proviso, we find 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. A somewhat similar view that has been taken by this Court in a matter coming from the Kerala High Court, wherein the Special Leave Petition (C) No.7074 of 2014 filed by the Regional Provident Fund Commissioner was rejected by this Court by order dated 31.03.2016. A beneficial Scheme, in our considered view, ought not to be allowed to be defeated by reference to a cut-off date, particularly, in a situation where (as in the present case) the employer had deposited 12% of the actual salary and not 12% of the ceiling limit of Rs.5,000/- or Rs.6,500/- per month, as the case may be.

9. A further argument has been made on behalf of the Provident Fund Commissioner that the appellant-employees had already exercised their option under paragraph 26(6) of the Employees' Provident

Funds Scheme. Paragraph 26(6) is in the following terms:

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

(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 3[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].

10. We do not see how exercise of option under paragraph 26 of the Provident Fund Scheme can be construed to estop the employees from exercising a similar option under paragraph 11(3). If both the employer and the employee opt for deposit against the

actual salary and not the ceiling amount, exercise of option under paragraph 26 of the Provident Scheme is inevitable. Exercise of the option under paragraph 26(6) is a necessary precursor to the exercise of option under Clause 11(3). Exercise of such option, therefore, would not foreclose the exercise of a further option under Clause 11(3) of the Pension Scheme unless the circumstances warranting such foreclosure are clearly indicated.

11. The above apart in a situation where the deposit of the employer's share at 12% has been on the actual salary and not the ceiling amount, we do not see how the Provident Fund Commissioner could have been aggrieved to file the L.P.A. before the Division Bench of the High Court. All that the Provident Fund Commissioner is required to do in the case is an adjustment of accounts which in turn would have benefitted some of the employees. At best what the Provident Commissioner could do and which we permit him to do under the present order is to seek a return of all such amounts that the

concerned employees may have taken or withdrawn from their Provident Fund Account before granting them the benefit of the proviso to Clause 11(3) of the Pension Scheme. Once such a return is made in whichever cases such return is due, consequential benefits in terms of this order will be granted to the said employees.

12. Consequently and in light of the above, we allow these appeals and set aside the order of the Division Bench of the High Court."

10. The Hon'ble Supreme Court of India, in the above decision, has categorically held that where the deposit of the employer's share at 12% has been made on the actual salary and not on the ceiling amount, the question of Provident Fund Organization being aggrieved by the order of the learned single Judge, does not arise at all. Once the Hon'ble Supreme Court has held that the contribution if made, i.e. 12% on the actual salary drawn by the employer, it was not open to EPFO to deny the calculation and payment of pension on the basis of

actual salary received by the pensioner and cannot insist in applying the ceiling limit as contemplated under the provisions of the Act and the Pension Scheme. The Hon'ble Supreme Court, in the final paragraph of the order, has held that it was only a matter of book adjustment and even in cases where the amounts were returned to the employees concerned on their retirement, the EPFO can always demand for return of those amounts to the extent of the enhanced PF contribution paid by the employer as well as employee on the basis of salaries received by them and such amounts being returned, pension can be calculated and paid to the employees on the basis of their actual salary received by them at the time of their retirement.

11. In similar circumstances, according to the learned Senior Counsels, the High Court of Telangana has allowed a batch of Writ Petitions in W.P.Nos.33804 of 2012, etc., in favour of the employees, vide its order dated 24.9.2018 having held in paragraphs 12 to 14 as under:

“12. On plain reading of relevant

paragraphs of the EPF Scheme 1952 and Pension Scheme 1995, I am of the considered opinion that no distinction can be drawn between exempted category employer and non exempted category employer for application of Pension Scheme 1995. Admittedly no exemption is granted to RTC from the 1995 pension scheme and its employees are enrolled and contributions are made under 1995 scheme. Further, it is categorical assertion of the respondent RTC that the entire information including higher contributions made based on the actual salary drawn by the petitioners was already furnished to the EPFO. It is not disputed that 8.33% of actual salary was being credited to EPFO all along. As noted above, it was not objected by EPFO. Thus, it is not open to EPFO to raise plea of non compliance of paragraph 26.6 at this distance of time and to deprive higher monthly pension drawable by the petitioners.

13. Pension Scheme 1995 is formulated by Government of India to enable employees working in the establishments where monthly pension system is not in vogue unlike in

Government of India or State Government service and it enables the employees after termination of their service to draw some kind of monthly pension. It is a social welfare scheme to enable post retirement sustenance. Monthly pension is determined based on the amount accrued to the account of employee at the time of termination of service. It is not in dispute that the petitioners herein have made higher contribution than the ceiling limit imposed and amount is accrued to the account of EPFO. Thus, petitioners are entitled to draw higher pension based on the higher contribution made by them than the minimum amount required. Even assuming that there was no compliance of paragraph 26.6 the employees cannot be deprived of their higher pension on this hyper technical ground.

14. Thus, the orders impugned in W P Nos. 32028, 33091 and 33094 of 2013 rejecting the request of the petitioners for higher pension and order in W.P. 33804 of 2012, to the extent of not sanctioning the higher pension to petitioner therein are set aside. The Employees Provident Fund

Organisation is directed to work out the amount of pension payable to petitioners based on the actual contribution made by them over and above ceiling of Rs.6500/- prescribed. The entire exercise shall be undertaken and completed and arrears and monthly pension shall be drawn and paid to petitioners within three months from the date of receipt of copy of this order. 15. Accordingly, the writ petitions are allowed. No costs. Miscellaneous petitions, if any pending, are closed."

12. Similarly, the High Court of Rajasthan, in a batch of Writ Petitions in S.B. Civil Writs No.17616 of 2017, etc. vide order dated 11.12.2018 also, has held in favour of the employees including the exempted establishments, as could be seen from paragraphs 13 to 24 of the order, which are extracted hereunder:

"13. In the case of State of Rajasthan and anr. Vs. Surendra Mohnot and ors: 2014(2) WLC (SC) Civil 358, the Apex Court was examining a similar issue where the order was passed on agreement of the counsel for the

parties and the question arose was whether a review would be maintainable by one of the parties having conceded the decision before the Court. Examining the said aspect, the Apex Court held that it is well settled in law that there is no estoppel in law. The consent given in a Court that a controversy is covered by judgment which has no applicability whatsoever and pertains to a different field, cannot stop a party from raising the point that the same was erroneously cited.

14. In the case of Union of India Vs. Heera Lal: 1996(10) SCC 574, it has been held that the concession made by the Government Advocate on question of law could not be said to be binding upon the Government.

15. The power of review under [Article 226](#) of the Constitution is an inherent power of the High Court as held by the Apex Court in the case of Shivdeo Singh and others Vs. State of Punjab and others: AIR 1963 (SC) 1909. The power can be exercised as plenary jurisdiction to prevent miscarriage of justice or to correct grave palpable errors committed by it.

However, as a word of caution, it is to be noted that the power of review is not to be confused with the appellate power and a review by no means is an appeal in disguise. Finality of a judgment delivered by the Court would not be reconsidered except where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility.

16. Keeping in view the aforesaid guidelines, this Court finds that the order passed by the Court dated 19/05/2017, while noticing the judgment passed by the Supreme Court in the case of R.C. Gupta & ors. (supra) and holding that the ratio of the said judgment is applicable, allowed the bunch of writ petitions. The facts of the cases were not noticed in view of the consent of counsel for both the parties. The respondents- review petitioners by way of these review petitions have sought to distinguish the case of the petitioners herein from the facts of the case in R.C. Gupta & ors. (supra) as a ground for review of the order. Thus, it would be appropriate to notice certain facts of the writ petitions. The petitioners in the writ petitions

were employees of Instrumentation Limited, Kota and though the salary of the petitioners exceeded the limits as prescribed under Paragraph 2(f) of the Employees Provident Fund Scheme, 1952, as well as Clause 11(3) of the Employees Pension Scheme, yet the employer made provident fund contributions calculating the employees' share and employers' share by reckoning the actual total salary without considering the ceiling limit. However, the amount remitted to the petitioners' pension account was the amount reckoning the pay limit to the ceiling prescribed i.e. Rs.6,500/-. The remaining amount remained with the PF Trust of the Instrumentation Limited which is one of the exempted institution in terms of [Section 17](#) of the Act of 1952. Thus, 8.33% of the ceiling limit was deposited with the pension fund being regulated by the EPFO.

17. Similar situation was arising with the employees working in the Instrumentation Limited at Kota and the Kerala High Court in the matters of various employees passed a judgment in the case of M. Sreenivasan & ors.

Vs. Union of India & ors. [W.P. (C) No.11183/2015], decided on 07/04/2015 directing as under:-

5. Following the binding precedents, this writ petition is also disposed of directing that the 8.33% of the employer's contribution, proportionate to the salary of the employee, in excess of Rs.6,500/-, shall now be credited to the Pension Scheme and orders passed in accordance with law. Needless to say, the interest accrued in the Provident Fund Account to that extent also will stand transferred to the Pension Account.

6. With respect to retired employees, who have drawn their retirement benefits by way of Provident Fund proportionate amounts along with interest accrued in the account as also that accrued after the withdrawal of the Provident Fund amounts, have to be refunded to the Provident Fund Organization. The retired employees shall submit joint applications, along with their employer wherever the same has not been done. The directions above noted shall be complied within three months from the date of receipt of a certified copy of this judgment.

7. It is also stated that the judgment passed in the same lines in other writ petitions were confirmed by a Division Bench in W.A No. 1442 of 2014. But, however, leaving the question open to be considered depending upon the result of the petitions filed before the Hon'ble Supreme Court. That reservation shall be there in the present writ petition also.

18. The SLP No.7074/2014 preferred was rejected by the Supreme Court vide its order dated 31/03/2016 and the aforesaid directions were upheld and the said aspect was noticed while delivering the judgment in the case of R.C. Gupta & ors. (supra). Thus, merely because the amount of PF is deposited in the PF Trust of the Exempted Organization and not with the EPFO, the ratio of the judgment passed in the case of R.C. Gupta & ors. (supra) would not alter and has to be applied equally to all the employees who may be either depositing their share in the PF Trust of an exempted organization or with the EPFO directly. Accordingly, the claim of the review petitioners in the aforesaid review petitions that the order should be reviewed on the

ground of the aforesaid distinction is not made out. It is not a case where a different judgment would be applicable to the facts of the case and this Court finds that the judgment passed in the case of R.C. Gupta & ors. (supra) would be squarely applicable to the facts of the present cases also.

19. The judgment passed by the Apex Court takes into its ambit and considering the fact that employees may have already received their provident fund amount and therefore, the directions have been issued accordingly taking into consideration all the aspects.

20. In the other writ petitions, which have been heard alongwith these review petitions, this Court finds that the only difference of facts is in relation to the respondents therein namely; RIICO and RSRTC which are also exempted organizations in terms of [Section 17](#) of the Act of 1952. Further, once a judgment has been passed by the Supreme Court, it would have its applicability to all the organizations uniformly. Thus, it would be useful to quote the relevant paras of the

judgment of the Supreme Court in the case of R.C. Gupta & ors (supra) which are reproduced as under:-

"8. Reading the proviso, we find 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. A somewhat similar view that has been taken by this Court in a matter coming from the Kerala High Court, wherein the Special Leave Petition (C) No. 7074 of 2014 filed by the Regional Provident Fund Commissioner was rejected by this Court by order dated 31.3.2016. A beneficial Scheme, in our considered view, ought not to be allowed to be defeated by reference to a cut-off date, particularly, in a situation where (as in the present case) the employer had deposited 12% of the actual salary and not 12% of the ceiling limit of ' 5,000/- or ' 6,500/- per month, as the case may be.

9. A further argument has been made on behalf of the Provident Fund Commissioner that the Appellant-employees had already exercised their

option under paragraph 26(6) of the Employees' Provident Funds Scheme. Paragraph 26(6) is in the following terms:

26. Classes of employees entitled and required to join the fund xxx xxx xxx (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 Subs. By Notification No. S350/2/2/96-SS II (sic S-35012/2/96- SS II), dated 4th May, 2001, for "rupees five thousand". Earlier the words "rupees five thousand were substituted by G.S.R. 718(E) dated 23rd September, 1994, for the words "rupees three thousand and five hundred" (w.e.f. 1.10.1994) [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].

10. We do not see how exercise of option under paragraph 26 of the Provident Fund Scheme can be construed to estop

the employees from exercising a similar option under paragraph 11(3). If both the employer and the employee opt for deposit against the actual salary and not the ceiling amount, exercise of option under paragraph 26 of the Provident Scheme is inevitable. Exercise of the option under paragraph 26(6) is a necessary precursor to the exercise of option under Clause 11(3). Exercise of such option, therefore, would not foreclose the exercise of a further option under Clause 11(3) of the Pension Scheme unless the circumstances warranting such foreclosure are clearly indicated.

11. The above apart in a situation where the deposit of the employer's share at 12% has been on the actual salary and not the ceiling amount, we do not see how the Provident Fund Commissioner could have been aggrieved to file the L.P.A. before the Division Bench of the High Court. All that the Provident Fund Commissioner is required to do in the case is an adjustment of accounts which in turn would have benefited some of the employees. At best what the Provident Commissioner could do and which we permit him to do under the present order is to seek a return of all such amounts that the concerned employees may have taken or withdrawn from their Provident Fund Account before granting them the benefit of the proviso to Clause 11(3) of the Pension Scheme. Once such a return is made in whichever cases

such return is due, consequential benefits in terms of this order will be granted to the said employees."

21. The said judgment is binding on all the parties.

22. It is also noticed that the Provident Fund Department, in these review petitions, itself has admitted of having released the amount in favour of 1175 pensioners upto 30/06/2017, hence no distinction can be drawn between the contributors to the Pension Scheme.

23. Thus viewed, the action of the respondents in denying the benefit to the pensioners who are members of the Pension Scheme, is held to be unjustified. While reiterating the order passed by this Court earlier, the petitioners are granted liberty to submit option before the Provident Fund Commissioner under Clause 11(3) of the Pension Scheme and the Provident Fund Commissioner shall thereafter obtain the amount from the respective PF Trust as per the said ratio of 8.55% and thereafter release all consequential benefits accordingly in terms

of and as directed by the Apex Court hereinabove.

24. All the petitioners would have to submit an application for seeking of an option for receiving pension on the full salary and only after their depositing the PF amount which they have received from their concerned trust to the extent of 8.33% and the benefit of this judgment would be subject to their depositing the amount already received by them from PF Account of the PF Trust. Upon their depositing the said amount of 8.33% as calculated by the PF Trust, the PF Trust shall accordingly transfer the same to the EPFO Pension Fund and the pension shall accordingly be calculated and released. The exercise in this regard shall be completed by the respondents within a period of four months."

13. The Rajasthan High Court has, in fact, held that even the employees of exempted establishes are entitled to the benefit of the judgment of the Hon'ble Supreme Court of India

rendered in “R.C.Gupta case”.

14. The learned counsels appearing for the petitioners would submit that in respect of the Writ Petitions, pertaining to the employees from the unexempted establishments, the issue has been settled by various High Courts and also by the Hon'ble Supreme Court and the same were also implemented by the EPFO by extending the benefit to thousands of employees. Therefore, the resistance by the EPFO in respect of unexempted establishments was also discountenanced by various High Courts as well as the Hon'ble Supreme Court and therefore, it is no more open to the EPFO to offer fresh resistance before this Court as if that issue was not settled at all. Therefore, the learned counsels would submit that any rejection orders in respect of unexempted establishments or refusing to accept the option exercised by the employees on their retirement for calculation of pension on the basis of their actual salaries, is required to be interfered with since their claims are squarely and fully covered which cannot be denied

by the EPFO. In fact, the learned counsels would also point to the fact that after the orders passed by the Kerala High Court and particularly, the order of the Hon'ble Supreme Court in “R.C.Gupta case”, a Circular was issued on 23.3.2017 wherein, a decision was taken to implement the orders of the Hon'ble Supreme Court of India. The said Circular is extracted here under:

CIRCULAR

No:Pension-I/33/EPsAmendment/96/Vol.II

Dated: 23-03-2017

To,

All Regional P.F. Commissioner,
Regional Office/Sub-Regional Office.

Subject:- Allowing members of the Employees' Pension Scheme, 1995 the benefit of the actual salary in the Pension Fund exceeding wage limit of either Rs. 5000/- or Rs. 6500 per month from the effective date respectively as per the Hon'ble Supreme Court's order in SLP No.33032-33033 of 2015 -Regarding.

Sir,

The matter of determination of pensionable salary exceeding statutory wages ceiling and exercise of option under deleted proviso to Para 11(3) of the EPS, 95 was examined in the light of the Hon'ble Supreme Court's Order in SLP No.33032-33033 of 2015.

2) The Hon'ble Apex court in SLP No.33032-33033 of 2015 observed 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 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. It has further been observed that a beneficial Scheme, ought not to be allowed to be defeated by reference to a cut-off date, particularly, in a situation where (as in the present case) the employer had deposited

12% of the actual salary and not 12% of the ceiling limited of Rs. 5000/- or Rs. 6500/- per month, as the case may be.

In a situation where the deposit of the employer's share at 12% has been on the actual salary and not the ceiling amount, the Provident Fund Commissioner could seek a return of all such amounts that the concerned employees may have taken or withdrawn from their Provident fund Account before granting them the benefits of the proviso to Clause 11(3) of the Pension Scheme. Once such a return is made in whichever cases is due, consequential benefits in terms of this order will be granted to the said employees.

Thus a member contributing to the Provident Fund on the wages exceeding the statutory ceiling or who had contributed to the Provident Fund on wages exceeding the Statutory ceiling cannot be debarred from exercising the option to contribute on such higher wages to the pension fund. (Copy of

the order of the Hon'ble Supreme Court enclosed).

3) Accordingly a proposal was sent to MOL&E to allow members of the Employees' Pension Scheme, 1995 who had contributed on higher wages exceeding the statutory wage ceiling of 6500/- in the Provident Fund to divert 8.33% of the salary exceeding Rs 6500/- to the Pension Fund with up to date interest as declared under EPF Scheme, 1952 from time to time to get the benefit of pension on higher salary on receipt of joint option of the Employer and Employee.

4) The MOL&E vide letter dated 03.2017 has conveyed its approval to allow members of the Employees' Pension Scheme, 1995 who had contributed on higher wages exceeding the statutory wage ceiling of Rs. 6500/- in the Provident Fund to divert 8.33% of the salary exceeding Rs.6500/- to the Pension Fund with up to date interest as declared under EPF Scheme, 1952 from time to time to get the benefit of pension on higher salary

on receipt of joint option of the Employer and Employee. (copy enclosed for ready reference)

5) The officers in charge of all field offices are directed to take necessary action accordingly in accordance with the order of the Hon'ble Supreme Court in SLP No.33032-33033 of 2015 as approved by the Government and as per the provisions of the EPF & MP Act, 1952 and Schemes framed there under.

(This issues with the approval of CPFEC.)

Yours faithfully,
 (Dr. S.K. Thakur)
 Addl. Central PF Commissioner,
 HQ(Pension)"

15. In order to appreciate the stand of the EPFO as to how they rightly understood the legal implication of the orders passed by the Hon'ble Supreme Court of India, the learned counsels would submit that a conscious decision has been taken to implement the orders of the Hon'ble Supreme Court, it is no more open to the EPFO to raise any kind of objection

before this Court as they are estopped from making such objection in the circumstances of the case.

16. Apart from the issue pertaining to unexempted establishments, the real bone of contention in the present batch of Writ Petitions before this Court, is, in regard to the exempted establishments under Section 17 of the Act, as according to the EPFO, the decisions of the Kerala High Court and other High Courts and also the Hon'ble Supreme Court of India in "R.C.Gupta case", there was no consideration of the employees' claim from exempted establishments. According to the EPFO, the employees of the exempted establishments stand on a different footing and they cannot maintain parity in treatment and claim for higher pensionary benefits on the basis of actual salary received by them. Since these establishments were not governed by the Act in view of the exemption granted to them and therefore, the payment of provident fund contribution on the basis of higher salary received by the employees did not arise since the Provident

Fund Scheme, as per para 26(6) is not applicable to these establishments. Para 26(6) of the Pension Scheme is extracted hereunder:

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

(1) to (5)

(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 rupees [fifteen thousand 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.”

17. In the said circumstances, the EPFO has taken a conscious decision not to extend the benefit of the orders passed by the Hon'ble Supreme Court to the employees of the exempted establishments and therefore issued instructions dated 31.5.2017, that no member of the Pension Scheme from the exempted establishments shall be eligible for the benefits as contemplated in the judgment of the Hon'ble Supreme Court of India in R.C.Gupta's case. The instructions dated 31.5.2017 are extracted as under:

CIRCULAR

No.Pension-I/12/33/EPS

Amendment/96Vol.II

Dated : 31.05.2017

To

All Accs (Zonal Offices)

All Regional PF Commissioner (In-charge of Regions),

All Officers – in – charge of SROs.

Subject : Allowing members of the EPS' 95 the benefit of the actual salary in the pension

fund exceeding wage limit of either Rs.5000/- or Rs.6500/- per month from the effective dated respectively as per the Hon'ble Supreme Court's order in Civil Appeal No (S) 10013-10014 of 2016 arising out of SLP No.3302-33033 of 2015-Reg.

Sir,

Please arrange to refer this office letter No.Pension 1/12 (33/EPF/Amendments /96/Vol.I dated 23.03.2017 on the above cited subject. Many references have been received from field officers to confirm to the aforesaid circular dated 23.03.2017 is applicable to employees of EPF exempted establishment in the context, it is informed as under.

i. Approval to comply with the order of the Hon'ble Supreme Court in the matter of Shri R.C.Gupta and others is only in respect of the Provident Fund & Pension members whose accounts are maintained by EPFO and whose PF contribution on higher wages has been received by EPFO.

ii. All the appellant employees in the aforesaid case before the Hon'ble Supreme

Court were from unexempted establishment i.e., an establishment making P.F.Contributions in the statutory Provident Fund managed by EPFO. The employer's contribution of 12% under the Act in respect of the said employees was on actual salary and not on the ceiling limit of either Rs.5000/- or Rs.6,500/-.

iii. Exercise of option under para 26(6) of the EPF scheme, 1952 is a precursor to exercise of option under proviso to clause 11 (3) of the pension scheme. The appellant employees in the aforesaid case had exercised option under para 26(6) of the EPF scheme and contribution on full salary was received in the statutory Provident Fund.

iv. Employee's pension scheme remittances are being made by the establishments and not by the exempted Trusts. As such if establishments with exempted trusts are allowed to make balance remittance on full salary to the Employees pension scheme afresh, the same will have to be considered for unexempted establishments also. It is not contemplated in the Judgment.

v. In the case of exempted establishments the Provident Fund and Pension Fund are managed by separate legal entities. The Provident Fund of employees of exempted establishments are managed by exempted Trusts and pension fund is managed by EPFO. As such, adjustment of contribution from Provident Fund Account to Pension Accounts as contemplated in the Judgment is not possible.

The matter was placed in the 40th PEIC meeting. As decided in the 40th meeting of the PEIF the matter will be placed before the CBT. In the interim is advised that no member of EPS 95 whose contribution of full salary has not been received on the account of the IPCO at the respective periods of contribution shall be eligible for the benefits contemplated in the Judgment as per the aforesaid Hon'ble Supreme Court.

WEB COPY

This issues with the approval of CPFC

Yours faithfully,
(Mukesh Kumar)

Regional PF Commissioner-I (Pension)”

18. According to the EPFO, in case of exempted establishments, the Provident Fund and the Pension Fund are managed by separate legal entities, namely, the Provident Fund of employees of exempted establishments is managed by exempted Trusts and Pension Fund is managed by the EPFO and as such, adjustment of contribution from Provident Fund Account to Pension Accounts as contemplated in the Hon'ble Supreme Court's Judgment is not feasible or possible.

19. The above Circular/instructions issued by the EPFO is the subject matter to challenge in most of the present Writ Petitions filed by the employees of exempted establishments.

20. According to the learned Senior Counsels and the learned counsels appearing for the employees of the exempted establishments, the impugned Circular dated 31.5.2017 cannot be countenanced either in law or on facts for the

simple reason that no matter whether PF trust is maintained by the respective establishments, the Pension Scheme 1995 is the same for all the employees and they formed a homogeneous group and it is not open to the EPFO to make an artificial classification as between the employees of the exempted establishments and the employees of the unexempted establishments. Moreover the Circular dated 31.5.2017 is without the authority of law and without consultation of the Government of India. The learned counsels would submit that it is an admitted case that even in respect of the exempted establishments, the contribution of 12% was paid on the basis of actual salaries received by the employees and a separate fund has been maintained by the respective establishments under the supervision and control of the EPFO. Although the establishment was allowed to maintain its own Trust in respect of Provident Fund contribution, in fact, it was under the control of EPFO as the Act and the Schemes have several provisions wherein the control of the EPFO on such private trust is real and actual. Therefore, the so called

distinction between 'the exempted establishments' and the 'unexempted establishments' does not create any different set of employees for the purpose of calculation and payment of pension payable to the employees who formed a single class/group in the matter of pensionary benefits. In fact, the private trust maintained by the respective exempted establishments in regard to the receipt of Provident Fund contribution, the same can be invested only as per the directives of the EPFO or as laid down by the Government of India, and the respective establishments have no independent power to invest the contribution on their own accord. Therefore, practically the exempted establishments are also under the control of the EPFO in respect of the Trust maintained by them in regard to Provident Fund contribution. In such scenario, it does not lie in the mouth of the EPFO to contend that the employees of the exempted establishments cannot be extended the benefit of calculation and payment for pension on the basis of actual salary received by them at the time of their retirement. The learned counsels would reiterate

the fact that as far as the exempted employees are concerned, they had paid 10% or 12% of Provident Fund contribution as the case may be, towards their contribution on the basis of actual salary received by them from time to time and it was not on the basis of the ceiling limit of either Rs.5000/- which was in force from 15.11.1995 to 31.5.2001 and Rs.6500/- from 1.6.2001 to 31.08.2014 and Rs.15000/- from 1.9.2014 onwards.

21. Once the exempted establishments had received the higher contribution than the ceiling limit prescribed by the provisions of the Act, the employees cannot be at fault and cannot be denied higher pension. This is particularly so when the EPFO has not granted exemption to these establishments under the Pension Scheme and also has not accepted the option in terms of proviso to Clause 11(3). As held by the Hon'ble Supreme Court and also by the other High Courts, it is always open to the EPFO to demand for return of the higher PF contribution paid to the employees at the time of

retirement to the extent of contribution paid on the basis of their actual salaries and such amount can be adjusted and off set while calculating and paying the pension on the basis of actual salary received by them at the time of retirement.

22. Mr. Balan Haridoss, learned counsel appearing for the petitioners, would draw the attention of this Court to a decision rendered by the Hon'ble Supreme Court in "(2018) 6 SCC 195 (***Paradeep Phosphates Limited versus State of Orissa and others***)" wherein, particularly, he would draw reference to paragraph 20, which is extracted hereunder:

"20. Undoubtedly, it is a cardinal principle of law that beneficial laws should be construed liberally. The Industrial Dispute Act, 1947 is one of the welfare legislations which intends to provide and protect the benefits of the employees. Hence, it shall be interpreted in a liberal and broad manner so that maximum benefits could reach to the employees. Any attempt to do strict interpretation would undermine the intention of the legislature. In a

catena of cases, this Court has held that the welfare legislation shall be interpreted in a liberal way."

23. According to the learned counsel, the Act and the Scheme are beneficial piece of legislation and therefore, the Courts must always liberally construe the provisions in favour of the employees, any constricted construction of provisions would defeat the very scheme of such beneficial legislation. As regards the classification between the unexempted and exempted establishments, the learned counsel would rely on a decision of the Hon'ble Supreme Court reported in "(2013) 2 SCC 772 (***Kallakkurichi Taluk Retired Officials Association, Tamil Nadu and others versus State of Tamil Nadu, etc.***) , wherein, the Hon'ble Supreme Court has held in paragraphs 32 and 33 as under:

"32. First and foremost, it needs to be understood that the quantum of discrimination, is irrelevant to a challenge based on a plea of arbitrariness, under Article 14 of the Constitution of India. Article 14 of the

Constitution of India ensures to all, equality before the law and equal protection of the laws. The question is of arbitrariness and discrimination. These rights flow to an individual under Articles 14 and 16 of the Constitution of India.

The extent of benefit or loss in such a determination is irrelevant and inconsequential. The extent to which a benefit or loss actually affects the person concerned, cannot ever be a valid justification for a court in either granting or denying the claim raised on these counts. The rejection of the claim of the by the High Court, merely on account of the belief that the carry home pension for employees who would retire after 1.6.1988, would be trivially lower than those retiring prior thereto, amounts to bagging the issue pressed before the High Court. The solitary instance referred to above, which is not a matter of dispute even at the hands of the first clearly demonstrates, that in a given situation, an employee retiring on or after 1.6.1988 could suffer a substantial loss, in comparison to an employee retiring before 1.6.1988. We are,

therefore satisfied, that the High Court clearly erred while determining the issue projected before it.

33. At this juncture it is also necessary to examine the concept of valid classification. A valid classification is truly a valid discrimination. Article 16 of the Constitution of India permits a valid classification(see, State of Kerala vs. N.M. Thomas (1976) 2 SCC 310). A valid classification is based on a just objective. The result to be achieved by the just objective presupposes, the choice of some for differential consideration/treatment, over others. A classification to be valid must necessarily satisfy two tests. Firstly, the distinguishing rationale has to be based on a just objective. And secondly, the choice of differentiating one set of persons from another, must have a reasonable nexus to the objective sought to be achieved. Legally, the test for a valid classification may be summarized as, a distinction based on a classification founded on an intelligible differentia, which has a rational relationship the object sought to be achieved. Whenever a cut off date (as in the

present controversy) is fixed to categorise one set of pensioners for favourable consideration over others, the twin test for valid classification (or valid discrimination) must necessarily be satisfied."

24. The learned counsel would submit that the distinction sought to be made by the Organization is neither intelligible nor constitutionally valid and hence the impugned order of rejection by the EPFO has to be necessarily held to be invalid and void.

25. Mr.Karthick, learned Senior Counsel would add that a Division Bench of Kerala High Court in W.P.(C) No.13120 of 2015 was called upon to decide the amendment brought about by the Employees' Pension (Amendment) Scheme, 2014 by reviewing the proviso to Clause 11(3) of the Pension Scheme wherein, the ceiling limit has been brought in of Rs.15,000/- and *proviso* to Clause 11(3) providing for payment of contribution in regard to the pension on the basis of actual

salary received by the employees concerned stood deleted. The Division Bench of Kerala High Court has dealt with all the objections and finally held that the amendment brought in Employees' Pension (Amendment) Scheme, 2014 dated 22.8.2014 is invalid and such amendment was also set aside by the Division Bench. In that context, the learned Division Bench of Kerala High Court has dealt with entitlement of the pension on the basis of actual salary received by them and the observations and findings made by the Division Bench of Kerala High Court as found in paragraphs 32 to 38, are extracted hereunder:

32. The Apex Court has thus found the insistence on a date for exercise of the joint option to be without any justification. In other words, the proviso to paragraph 11 of the Pension Scheme does not stipulate a cut off date at all. Any such stipulation of a cut off date for conferring benefits under the Pension Scheme would have the effect of classifying the employees into persons who have retired before or after the said date.

33. As per the amendments, the maximum pensionable salary has been fixed at Rs.15,000/- thereby disentitling the persons who have contributed on the basis of their actual salaries to any benefits on the basis of the excess contributions made by them. The said provision is arbitrary and cannot be sustained. The employees, who have been making contributions on the basis of their actual salaries after submitting a joint option with their employers as required by the Pension Scheme, are denied the benefits of their contributions by the said amendments without any justification. Apart from the above, to cap the salary at Rs. 15,000/- for quantifying pension is absolutely unrealistic. A monthly salary of Rs.15,000/- works out only to about Rs.500/- per day. It is common knowledge that, even a manual labourer is paid more than the said amounts as daily wages. Therefore, to limit the maximum salary at Rs.15,000/- for pension would deprive most of the employees of a decent pension in their old age. Since the pension scheme is intended to provide succour to the retired employees, the said object would

be defeated by capping the salary. The duty of the trustees of the Fund is to administer the same for the benefit of the employees - by wise investments and efficient management. They have no right to deny the pension legitimately due to them on the ground that the fund would get depleted. The demand of additional payment of 1.16% of their salaries exceeding Rs.15,000/- is unsustainable for the reason that, **Section 6A** does not require the employees to make any additional contribution to constitute the Pension Fund. Nor does it empower the authorities to demand additional contribution. In the absence of any statutory backing, the said provision in the Pension Scheme is ultra vires. The amendment in so far as it stipulates the average monthly pay drawn over a span of 60 months preceding the date of exit as the pensionable service is also arbitrary for the reason that it deprives the employees of a substantial portion of the pension to which they would have been eligible had it not been for the amendment. The provision as it originally stood stipulated computation of pensionable salary on the basis of the monthly pay drawn over a

period of 12 months prior to their exit. The reason for the amendments as disclosed by the counter affidavit filed is that payment of pension on the basis of the Scheme as it stood prior to the amendment would result in depletion of the Fund. Absolutely no material or data to support the above contention has been placed before us. On the contrary, placing reliance on a news report carried by "The Hindu" newspaper on 17.8.2014, it is contended by the petitioners that, a staggering amount of Rs.32,000 Crores of unclaimed amount is lying in various inoperative accounts across the country, as unclaimed pension as disclosed by the Central Provident Fund Commissioner at an interactive session with employees at Hyderabad. In the absence of any material to support the contention that the fund is likely to be depleted, we reject the said contention. Apart from the above, there is no provision in the Act that stipulates the pension payments to commensurate with the amounts actually remitted by an employee and his employer. It is also a fact that the administrators of the Fund

invest the amounts and generate profit from such investments.

34. Apart from the above it is common knowledge that, the salary of all employees have gone up to such an extent that, at present even a Class-IV employee or a person employed in Menial jobs would be drawing salaries far in excess of the ceiling limit of Rs.6500/-. Therefore, to cap the salary at Rs.6500/- for the purpose of contributions is unrealistic. The authorities are turning a blind eye to the realities in the society by doing so. The further contention that the ceiling limit was intended to cater to the lower wage earners also has to be rejected for the reason that no such intention is discernible from the provisions of the Act. There would be no employee below the said ceiling limit, at present. Consequently, the allegation that there would be reverse subsidization is ill conceived.

35. It cannot be disputed that, the work force in our country has only been growing in numbers with more and more establishments springing into existence and getting covered by the provisions of the [EPF Act](#). The contributions

paid by them on the basis of the actual salaries drawn by the employees are constantly adding to the base of the fund. Such process of accretion is a continuing phenomenon. Therefore, there is no evidence of the fact that the fund is getting depleted by the payment of pension, as alleged. At the same time, the Statistics only prove otherwise. It is commonly accepted that the fund base has only grown over the years by the accumulation of EPF contributions.

36. Considering the fact that, the pension fund is created for the purpose of providing succour to the employees in their old age, taking into account the further fact that the fund is created by collecting contributions from the employers and employees, casting no financial burden on the State, it follows that no scheme that defeats the purpose of the enactment by reducing the pension payable to the employees in their old age to a ridiculously low amount, which is not sufficient even for ensuring a decent life to them, cannot be sustained. There is no justification for stealing bread from the mouths of the pensioners to

secure the Pension Fund. Though the Fund is replenished by the present workers, its beneficiaries are the old and infirm former workers; the pensioners. The Fund is meant for their sustenance. It is the duty of the Central Board to administer the Fund efficiently and to augment the Fund through wise investments and professional management so as to ensure that it meets the commitment to pay pension to the employees. The said amendments are therefore ultravires the power to frame schemes.

37. The stated objective of the amendments is to prevent depletion of the fund. The said apprehension is absolutely baseless for the reasons stated above. The number of persons who are contributing to the Provident Fund as well as the Pension Fund have only grown over the years. The work force in our country would only grow further in the future. It has to be stated here that in view of the increase in the number of workers over the years, the contributions would also grow. The phenomenon is only bound to continue in future. Therefore, even when payments of pension are made to the retired employees, the

pension fund would continue to get replenished with the contributions of the new entrants. The said ongoing process would maintain the Fund in a stable condition. If at all, a situation where the Fund base gets eroded occurs, the situation could be remedied at that time by enhancing the rates of contributions of persons contributing to the Fund through a legislative exercise. The attempt to maintain the stability of the fund by reducing the pension would only be counter productive and would defeat the very purpose of the enactment.

38. As rightly contended by the counsel appearing for the petitioners, the effect of the amendments to the Pension Scheme is to create different classes of pensioners on the basis of the date, 1.9.2014, the date on which the amended Scheme came into force. Consequently, there would be -

- (i) employees who have exercised option under the proviso to paragraph 11(3) of the 1995 Scheme and continuing in service as on 1.9.2014;
- (ii) employees who have not exercised their option under the proviso to paragraph 11(3) of

the 1995 Scheme, and continuing in service as on 1.9.2014;

(iii) employees who have retired prior to 1.9.2014 without exercising an option under paragraph 11(3) of the 1995 Scheme;

(iv) employees who have retired prior to 1.9.2014 after exercising the option under paragraph 11(3) of 1995 Scheme.

The rationale in so classifying the employees covered by the Pension Scheme on the basis of the above date is not forthcoming. The object sought to be achieved is stated to be prevention of depletion of the Pension Fund, which cannot be accepted as a justification to support the classification. Inasmuch as the statutory scheme is to make the Pension Fund enure to the benefit of the homogeneous class of the totality of employees covered by the Provident Fund, a further classification of the said class by formulating a Scheme is ultra vires the power available to the Central Government under Sections 5 and 7 of the EPF Act. Therefore, it has to be held that, the impugned amendments are arbitrary, ultra vires the EPF Act and unsustainable.

For the foregoing reasons, the petitioners are entitled to succeed. The writ petitions are all allowed as follows:

- i) The Employee's Pension (Amendment) Scheme, 2014 brought into force by Notification No. GSR. 609(E) dated 22.8.2014 evidenced by Ext.P8 in W.P.(C) No. 13120 of 2015 is set aside;
- ii) All consequential orders and proceedings issued by the Provident Fund authorities/respondents on the basis of the impugned amendments shall also stand set aside.
- iii) The various proceedings issued by the Employees Provident Fund Organization declining to grant opportunities to the petitioners to exercise a joint option along with other employees to remit contributions to the Employees Pension Scheme on the basis of the actual salaries drawn by them are set aside.
- iv) The employees shall be entitled to exercise the option stipulated by paragraph 26 of the EPF Scheme without being restricted in doing so by the insistence on a date.
- v) There will be no order as to costs."

26. The learned Senior Counsel would submit that even the amendment which was brought about to Employees Pension Scheme 2014 that capped monthly salary to be considered for contribution to pension scheme at Rs.15000/- instead of the actual salary, came to be struck down by the Kerala High Court in the above mentioned judgment, as far as the present Writ Petitions are concerned when the proviso was in the scheme to Clause 11(3) providing for option exercisable by the employees and such option cannot be restricted by a cut off date which cut off date was found to be invalid and void and in such circumstances, the employees of the exempted establishments are entitled to be treated on par with the employees of the unexempted establishments and any such discrimination cannot be countenanced constitutionally.

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27. Per contra, the learned counsels appearing for the EPFO would primarily submit that first of all these writ petitioners/employees admittedly did not exercise their option

under Section 26(6) of the Employees Provident Funds Scheme, 1952 and also under proviso to Clause 11(3) of the Pension Scheme. According to the learned counsels appearing for the EPFO, the Hon'ble Supreme Court of India in 'R.C.Gupta' case has clearly held that exercise of option under para 26(6) is a necessary pre-cursor to exercise option under proviso to Clause 11(3) of the Pension Scheme. As regards exempted establishments, the question of exercising option under para 26(6) of PF Scheme does not arise as these establishments have their own PF Scheme managed by their own private Trust. Therefore, the employees of such establishments cannot exercise their option under proviso to Clause 11(3) of the Pension Scheme as per the order of the Hon'ble Supreme Court of India. The learned counsels for the EPFO would uniformly contend that the issue of whether the employees of exempted establishments would also be covered by the orders of the Hon'ble Supreme Court of India was not raised before the other High Courts and even before the Hon'ble Supreme Court and thereby as on date, such an issue

was not raised or answered. Therefore, the learned counsels for the EPFO would urge this Court to consider their objections that the employees of the exempted establishments are materially different and they cannot be treated on par with the employees of unexempted establishments. Factually whatever their contribution towards provident fund was made only to the private Trust maintained by the establishments and not by the EPFO. Such higher contribution was not passed on to the EPFO in respect of the Pension Scheme, since admittedly 8.33% contribution has been remitted by the exempted establishments to the Pension Fund only on the basis of ceiling limit of Rs.5000/-, 6500/- and 15000/- as the case may be. That being the case, the question of the EPFO extending the benefit of higher calculation for payment of pension on the basis of actual salary received by the employees would not arise. The question of book adjustment would not arise in this case since the EPF contribution and Pension Scheme are maintained by two different legal entities, one private Trust and the other by the EPFO. Even assuming

that the EPFO can demand for return of excess PF amount received by the retired employees to the extent of higher payment of contribution on the actual salary received by them, such return of the excess contribution would not materially enure to the benefit of the pension fund maintained by the EPFO as that would only cause considerable erosion of the corpus fund maintained by the EPFO. This is because of the fact that the actual contribution on the higher salary has not been remitted to the Pension Account maintained by the EPFO for all those years when the employees of the exempted establishments were in service and in the absence of remittances, the EPFO was precluded from investing the money and prevented from generating more revenue in order to sustain the Fund. According to the learned counsels for the EPFO, that today, practically whatever money to be returned by the employees on the above lines would be too low in comparison to what they are entitled to receive arrears of pension on the basis of higher salary earned by them at the time of their retirement, in which event, there

would be complete depletion of pension fund and in such scenario, the persons affected would be the existing employees of various establishments who make contributions on the ceiling limit as prescribed by the Scheme.

28. In one of the counter affidavits filed on behalf of the EPFO, the above scenario is succinctly expressed with illustration as follows:

"v. If these employees of exempted establishments could have complied in the initial days of beginning of Employees Pension Scheme 1995, the return on investment could have been on a much higher rate of return and for a longer period as the rate of interest in the late 1990's and early 2000's were around 12 to 14% whereas the current interest rate on investment is around 6%. Further, it would have yielded returns for future period also as EPFO investments are for longer tenure. As such deposit of the amount for past many years (having higher return regime) in the current low

interest regime and paying pension on much higher wage for future (say 15 to 20 years) will be detrimental to the financial health of the pension fund. It is not just loss of past interest income, but erosion of corpus itself.

vi. It is stated that if a member is allowed to give option to contribute on higher wages in the pension scheme, retrospectively, it will amount to enhancing monthly pension of the member manifold without getting any contribution from him towards increased pension. This will be evident from the following live example where the member retired on 31.03.2011 and subsequently remitted contribution on higher wages in 2016.

Calculation of Pension:

	Existing	Revised (on higher wages)
Pensionable Salary	6500	78106
Pension as per formula	1613*	19384
Past service benefit	313	313
Total pension	1926	19697

*including weightage	
Amount remitted (contribution at 8.33% on higher wages with interest up to 10/2016	
	: Rs.7,64,971/-
Arrears of Pension paid	:
	Rs.12,21,076/-

Thus in this case the member received an amount of Rs.4,56,105/- up front as arrears of pension and his monthly pension was increased 10 times from Rs.1926 to Rs.19697, without practically paying single Rupee towards the enhanced pension in the Pension Scheme. The liability of this enhanced monthly pension will be borne by the members who are presently contributing to the pension scheme.”

29. From the above illustration, the learned counsels would submit that the employees herein would be practically paying nothing, but they would be paid enhanced pension and the liability of the enhanced pension will be borne by the members who are presently contributing the pension scheme. This would be unjust enrichment which cannot be allowed. The learned counsel would also submit that the employees who had foresight to contribute higher contribution on the

basis of their salary and invested their money by such contribution cannot be placed on par with these employees who have not exercised their option at all during the period of their employment and these employees have woken up only when the orders were passed by the Kerala High Court and the Hon'ble Supreme Court. The present claim, if it is going to be considered favourably, would completely unsettle the Pension Fund maintained by the EPFO and the maintenance of such fund would be challenging as the EPFO may have to look at the Government for budgetary allocation in case of huge deficit in the Corpus Fund. Therefore, the consideration of the petitioners' claim today is not either in the interest of the industry or the employees concerned and therefore, urge this Court to dismiss at least the claims of the employees who are from the exempted establishments.

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30. Mr.Ramu, learned counsel appearing for the EPFO would particularly draw the attention of this Court that once a member has retired from service, he ceased to be a member of

the Fund. He would refer to Clause 2(iv) of the Pension Scheme which deals with 'Contributory Service' and also Clause 2(vi) (ix), (xiii) and (xv), which are extracted hereunder:

"2(iv) "Contributory service" means the period of 'actual service' rendered by a member for which the contributions to the fund have been 1[received or are receivable].

"2(vi) "Existing Member" means an existing employee who is a "Member of the Employees' Family Pension Scheme, 1971";

"2(ix) "Member" means an employee who becomes a member of the Employees' Pension Fund in accordance with the provisions of this Scheme.

"2(xiii) "Pay" means basic wages, with dearness allowance, retaining allowance and cash value of food concessions admissible, if any.

"2(xv) "pensionable service" means the service rendered by the member for which contributions have been received or are receivable."

31. The learned counsel would also rely on Clauses 3 and 6A of the Pension Scheme, which are extracted as under:

"3. Employees' Pension Fund.- (1) From and out of the contributions payable by the employer in each month under Section 6 of the Act or under the rules of the Provident Fund of the establishment which is exempted either under clauses (a) and (b) of sub-section (1) of Section 17 of the Act or whose employees are exempted under either paragraph 27 or paragraph 27-A of the Employees' Provident Fund Scheme, 1952, a part of contribution representing 8.33 per cent of the Employee's pay shall be remitted by the employer to the Employees' Pension fund within 15 days of the close of every month by a separate bank draft or cheque on account of the Employees' Pension Fund contribution in such manner as may be specified in this behalf by the Commissioner. The cost of the remittance, if any, shall be borne by the employer.

(2) The Central Government shall also contribute at the rate of 1.16 per cent of the

pay of the members of the Employees' Pension Scheme and credit the contribution to the Employees' Pension Fund: Provided that where the pay of the member exceeds 1[rupees six thousand and five hundred] per month the contribution payable by the employer and the Central Government be limited to the amount payable on his pay of 9[rupees six thousand and five hundred] only 9. Subs. by G.S.R.383 (E) dated the 24.5.2001 (w.e.f. 1.6.2001).

(3) Each contribution payable under sub-paragraphs (1) and (2) shall be calculated to the nearest rupee, fifty paise or more to be counted as the next higher rupee and fraction of a rupee less than fifty paise to be ignored.

(4) The net assets of the Family Pension Scheme, 1971 shall vest in and stand transferred to the Employees' Pension Fund."

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"6-A. Retention of membership: A member of the Employees' Pension Fund shall continue to be such member till he attains the age of 58 years or he avails the

withdrawal benefit to which he is entitled under para 14 of the Scheme, or dies, or the pension is vested in him in terms of para 12 of the Scheme, whichever is earlier.”

32. Relying on the above, Mr.Ramu, learned counsel would submit that these employees have ceased to be the members of the Pension Fund on their retirement and therefore, they cannot claim to have any right to exercise their option after their retirement since they were not treated as members of the Pension Fund Scheme in order to consider their option.

33. All the learned counsels appearing for the EPFO would also uniformly and vehemently contend that a conscious decision has been taken by the EPFO by taking into consideration actuarial liability and the consequence of such enhanced pension to be paid to these writ petitioners as well as in view of large scale outflow of fund for the retired

employees more than the inflow of the fund from them, a decision has been taken not to extend the benefit as per the order of the Hon'ble Supreme Court to the employees of the exempted establishments. In any event, such claim by the employees is incapable of compliance as it would expose the pension fund maintained by EPFO to depletion.

34. At this, the learned Senior Counsels as well as the other learned counsels appearing for the employees would submit that the question of financial implication need not be given undue importance for the simple reason that once the employees are entitled to be paid enhanced pension on the basis of right to be treated equally in terms of Article 14 of the Constitution of India, the question of consideration of financial implication would not be proper. Moreover, on behalf of the EPFO, nothing has been brought out in clear terms as to how the pension corpus would get depleted or eroded. No financial statement has been filed in regard to the liability of the EPFO towards higher pension and what is inflow into the Pension

Fund in regard to new employees being covered under the Pension Scheme as on date. In the absence of any such details, merely by showing a stray illustration in the counter affidavit, cannot form a basis for rejection of the employees claim on the ground of financial crisis. Moreover, the enhanced pension payable to each of the employee is only during life term of the employee and such life time being unpredictable and the enhanced pension cannot be denied on the basis of so-called actuarial liability and risk on such payment from the pension fund.

35. The learned counsels appearing for the employees would therefore submit that both set of employees, one from the exempted establishments and another from unexempted establishments are entitled to be paid pension on exercising

their option in terms of *Proviso* to Clause 11(3) of the Pension Scheme and the employees in order to receive higher pension are willing to return the excess provident fund contribution received by them to the extent which were contributed on the basis of their actual salaries received by them with reasonable interest. The learned counsels at the same time would also urge this Court that the EPFO may be directed to calculate the excess Provident Fund amount to be returned with the interest to be fixed by this Court and on the basis of arrival at a particular figure, the amount to be returned by the employee concerned shall be adjusted with the amount payable by the EPFO to the employees towards enhanced pension. In case the employees are required to pay more than what is to be paid to them by EPFO towards pension, the same may be directed to be returned and in case the employees are to receive more quantum by way of arrears of pension than what is to be returned by them to EPFO, the same may be adjusted and the remaining amount to be paid to the respective employees.

36. Heard the learned Senior Counsels and the learned counsels appearing for the respective parties. On conclusion of the arguments, this Court has bestowed upon itself its anxious consideration to various submissions made on behalf of the writ petitioners/employees and also on behalf of the EPFO which would touch upon the following salient points for consideration of this Court, viz.,

1. Whether the employees of unexempted establishments are also entitled to higher pension on the basis of their contribution towards Provident Fund paid to them over and above the ceiling limit as prescribed in the Act, PF Scheme and the Pension Scheme without reference to the cut off date as 01.12.2004 for exercising the option by the employees?

2. Whether these employees' right to receive higher pension has crystallized by the legal principles as laid down by the various High Courts as aforementioned and also by the judgment of the Hon'ble Supreme Court in 'R.C.Gupta case?

3. Whether in regard to unexempted establishments, the issue is still open for adjudication by this Court in view of the law laid down by the various High Courts on the subject matter including the order passed by the Hon'ble Supreme Court in R.C.Gupta case?

4. Whether the writ petitioners who are from the exempted establishments are any way different from beneficiaries of the orders passed by the High Courts of Kerala, Telangana, Rajasthan and also the Hon'ble Supreme Court of India or they form a homogeneous group?

(OR) whether the employees from the exempted establishments can be treated materially different within the frame work of EPF Act, PF Scheme 1952 and the Employees Pension Scheme 1995?

37. **POINT NO.1:**

"Whether the employees of unexempted establishments are also entitled to higher

pension on the basis of their contribution towards Provident Fund paid to them over and above the ceiling limit as prescribed in the Act and the Pension Scheme, PF Scheme and the Pension Scheme without reference to the cut off date as 01.12.2004 for exercising the option by the employees? ?"

In regard to the above issue, this Court has to consider as to what is the substance of the resistance to the claim of these employees by the EPFO. As far as this Court could see from the submissions and pleadings placed on record that the cut off date was prescribed by EPFO as 01.12.2004 for exercising the option in terms of proviso to Clause 11(3) of the Pension Scheme. The said cut off date was the subject matter of challenge inter alia before the Kerala High Court and a learned single Judge of Kerala High Court in his order dated 4.11.2011 has held that the scheme does not contain any provision enabling the EPFO to prescribe any cut off date. The particular paragraph, i.e. Para 4 in which such finding given by the learned single Judge of the Kerala High Court is

extracted herein once again for the purpose of giving a finding for the present claim.

“4. The second objection is regarding the cut off date fixed. According to the Provident Fund Organization a cut off date of 1.12.2004 has been fixed for applying for benefit of the proviso by changing over to payment of contributions on actual salary basis. But the Provident Fund Organization has not been able to produce any document by which such a cut off date has been fixed by anybody. The Employees' Provident Funds and Miscellaneous Provisions Act, the Employees' Provident Fund Scheme and the Employees' Pension Scheme do not contain any provision enabling the 2nd respondent or anybody else to fix a cut off date for the purpose of availing of the benefit of proviso to clause 11(3). Even assuming that anybody has any power to fix that cut off date, certainly it is not the 2nd respondent. As such I am convinced that the cut off date fixed by the 2nd respondent is clearly without jurisdiction. That being so, the benefits already granted to

the petitioners under the proviso to clause 11(3) cannot now be reversed or withdrawn as done in this case.

38. Admittedly, the order of the learned Single Judge has been confirmed by the Division Bench of the Kerala High Court in W.A.No.569 of 2012 by its judgment dated 5.3.2013, holding that the learned single Judge has correctly understood and decided the issue regarding the cut off date. In fact, the Division Bench has also given a detailed reasoning as to how such a cut off date is legally impermissible in paragraph 10, which once again is extracted hereunder:

“10. According to us, the learned Single Judge has correctly understood and decided the issue regarding the cut off date fixed. According to the Provident Fund Organisation, cut off date of 1/12/2004 has been fixed for applying for benefit of the proviso by changing over to payment of contributions on actual salary basis. It was noticed by the learned Single Judge that no document by which such a cut off date has been fixed by anybody is

produced by the Provident Fund Organisation. The Employees' Provident Fund Scheme and the Employees' Pension Scheme also do not contain any provision enabling the Regional Provident Fund Commissioner or anybody else to fix a cut off date for the purpose of availing of the benefit of proviso to clause 11(3). According to us, the decision of the learned Single Judge that - even assuming that anybody has power to fix that cut off date, certainly such power is not with the 2nd respondent-Regional Provident Fund Commissioner, is quite correct.

39. The Division Bench order of the Kerala High Court ultimately was confirmed by the Hon'ble Supreme Court of India where SLP filed against the order came to be dismissed vide order dated 31.3.2016 finding that there was no valid ground for interference. Therefore, in all fours, the exclusion of the employees from unexempted establishments from the purview of grant of higher pension on the basis of actual salaries received by them, cannot be countenanced both in

law and on facts.

40. The Hon'ble Supreme Court in R.C.Gupta case, has held that the beneficial scheme ought not be defeated by referring to cut off date particularly when the employer had deposited 12% of the actual salary and not 12% of the ceiling limit of Rs.5000/- or Rs.6500/- per month, as the case may be. Once the cut off date has no sanctity in law and allowed the claim of the employees, the issue is no more *res integra* and therefore, it does not lie in the mouth of the EPFO today to argue against the grant of relief to the employees who are from unexempted establishments. Therefore, this Court hold the first Point in favour of the employees from the unexempted establishments as the resistance put up by the EPFO has no legal legs to stand. Therefore, it is concluded that the employees of the unexempted establishments are entitled to higher pension on the basis of their contribution towards Provident Fund on the actual salaries received by

them at the time of their retirement.

41. **POINT NO.2:**

"Whether these employees' right to receive higher pension has crystallized by the legal principles as laid down by the various High Courts as aforementioned and also by the judgment of the Hon'ble Supreme Court in 'R.C.Gupta case?'"

As regards the above issue is concerned, in view of the categoric pronouncement by a learned single Judge of the Kerala High Court which was confirmed by the Division Bench of the Kerala High Court and dismissal of the SLP preferred by the EPFO and the extension of benefits of higher pension to thousands of employees in pursuance of the orders of the Kerala High Court and of the Hon'ble Supreme Court, the right of these employees from unexempted establishments has crystallized beyond any controversy or dispute. Once the Hon'ble Supreme Court has rendered a decision on the

subject matter, which becomes the law of the land under Article 141 of the Constitution of India and such declaration of law would cover every employee in every corner of the country. Therefore, the writ petitioners from unexempted establishments have a right to claim enhanced pension if they are willing to exercise their option as per proviso to Clause 11(3) of the Pension Scheme. Denial of parity in this regard would offend Article 14 of the Constitution of India.

42. **POINT NO.3:**

Whether in regard to unexempted establishments, the issue is still open for adjudication by this Court in view of the law laid down by the various High Courts on the subject matter including the order passed by the Hon'ble Supreme Court in R.C.Gupta case?

Although stiff resistance was put up by the EPFO in regard to grant of relief to the employees even from the

unexempted establishments as if these employees were different in status as that of employees covered by the orders passed by the Kerala High Court and the Hon'ble Supreme Court, the fact remains that these employees are not different from the employees who are the beneficiaries of the orders of the Kerala High Court as well as the Hon'ble Supreme Court of India. Therefore, this Court is unable to comprehend as to the legal basis for EPFO to question the claim of these writ petitioners when the EPFO itself was a party to all the litigations afore mentioned and the matter has reached its finality in favour of the employees. In fact, admittedly, the EPFO itself has extended the benefit in terms of the order of the High Courts and the Hon'ble Supreme Court to thousands of employees and therefore, any semblance of resistance put up by the EPFO against the claim of these categories of employees, is amounted to patent discrimination and violative of Article 14 of the Constitution.

In view of the above conclusion by this Court, the issue of grant of enhanced pension to this set of employees from unexempted establishments, is not still open for this Court to adjudicate as the dispute is no more alive seeking any further resolution of the same as the issue has already been settled categorically in favour of the employees, which means, the issue of grant of higher pension to the employees of unexempted establishments on the basis of their option for payment of higher contribution on the basis of actual salary received by them, is no more *res integra* and the writ petitioners who are the employees of the unexempted establishments are also entitled to be treated on par with other similarly placed employees who are beneficiaries of order of the Hon'ble Supreme Court in R.C.Gupta case for grant of enhanced pension.

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44. **POINT NO.4:**

"Whether the writ petitioners who are from the exempted establishments are any way different from beneficiaries of the orders passed by the High Courts of Kerala, Telangana, Rajasthan and also the Hon'ble Supreme Court of India or they form a homogeneous group?

(OR) whether the employees from the exempted establishments can be treated materially different within the frame work of EPF Act, PF Scheme 1952 and the Employees Pension Scheme 1995?

As regards the employees of exempted establishments are concerned, the EPFO has vehemently opposed for grant of any relief to them on the basis of the orders passed by the Kerala High Court and also on the basis of the Hon'ble Supreme Court's decision in R.C.Gupta case and also on the basis of other High Courts decisions, viz., Telengana, Rajasthan, etc. According to the learned counsels appearing

for the EPFO, the issue of treating the employees of the exempted establishments on par with the employees of unexempted establishments was not specifically raised and answered by the Courts and therefore, the said issue needs to be examined by this Court. According to the learned counsels, the exempted establishments cannot be placed on par with the unexempted establishments for the various reasons as stated above and therefore, the employees of such exempted employees cannot draw parallel as to that of the employees of unexempted establishments in the matter of extension of benefit of higher pension. This Court, therefore, has to see whether the employees of the exempted establishments can be placed on par with the employees of unexempted establishments for the purpose of extending the benefit of higher pension and whether the parity as between the exempted and unexempted employees would be permissible within the constitutional frame work and statutory scheme. No doubt that the employees of the exempted establishments whose Provident Fund is maintained by Private Trust of the

respective establishments and out of Provident Fund paid to the Private Trust, only 8.33% is remitted to the Pension Fund maintained by the EPFO on the basis of the ceiling limit of salary i.e. 5000/-, 6500/- or 15000/- per month as the case may be. However, ultimately, the essence of the scheme and the right of the employees need to be seen in the larger context of the Act, PF Scheme as well as the Pension Scheme.

45. As rightly contended by the learned counsels for the employees that although the exempted establishments are allowed to have their own Private Trust for their Provident Fund contribution, nevertheless such fund is essentially controlled and supervised by the EPFO under the Employees' Provident Funds Scheme, 1952. In fact, the exemption as given under Section 17 of the Act is only on the basis of the fact where the rates of contribution were not less favourable than those specified in Section 6 of the Act. Section 17 along with proviso, is extracted as under:

"17. Power to exempt.- (1) The appropriate Government may, by notification in the Official Gazette, and subject to such conditions as may be specified in the notification, exempt, whether prospectively or retrospectively, from the operation] of all or any of the provisions of any Scheme-

(a) any establishment to which this Act applies if, in the opinion of the appropriate Government, the rules of its provident fund with respect to the rates of contribution are not less favourable than those specified in section 6 and the employees are also in enjoyment of other provident fund benefits which on the whole are not less favourable to the employees than the benefits provided under this Act or any Scheme in relation to the employees in any other establishment of a similar character; or

(b) Any establishment if the employees of such establishment are in enjoyment of benefits in the nature of provident fund, pension or gratuity and the appropriate Government is of opinion that such benefits,

separately or jointly, are on the whole not less favourable to such employees than the benefits provided under this Act or any Scheme in relation to employees in any other establishment of a similar character.

Provided that no such exemption shall be made except after consultation with the Central Board which on such consultation shall forward its views on exemption to the appropriate Government within such time limit as may be specified in the Scheme.

(1-A) where an exemption has been granted to an establishment under clause (a) of subsection (1)- (a) The provisions of section 6, 7A, 8 and 14B shall, so far as may be, apply to the employer of the exempted establishment in addition to such other conditions as may be specified in the notification granting such exemption, and where such employer contravenes, or make default in complying with any of the said provisions or conditions or any other provisions of this Act, he shall be punishable under section 14 as if the said establishment

had not been exempted under the said clause (a); (b) The employer shall establish a Board of Trustees for the administration of the provident fund consisting of such number of member as may be specified in the Scheme; (c) The terms and conditions of service of members of the Board of Trustees shall be such as may be specified in the Scheme; (d) The Board of Trustees constituted under clause (b) shall- (i) Maintain detailed accounts to show the contributions credited, withdrawals made and interest accrued in respect of each employee; (ii) Submit such returns to the Regional Provident Fund Commissioner or any other officer as the Central Government may direct from time to time; (iii) Invest the provident fund monies in accordance with the directions issued by the Central Government from time to time; (iv) Transfer, where necessary, the provident fund account of any employee; and (v) Perform such other duties as may be specified in the Scheme."

It is also relevant to extract the revised conditions for grant of exemption under Section 17 of the Act, which are found in Appendix -A of Section 27-AA of the Provident Funds Scheme, which read as under:

27AA. Terms and conditions of exemption.- All exemptions already granted or to be granted hereafter under section 17 of the Act or under paragraph 27A of the scheme shall be subject to the terms and conditions as given in the Appendix A.

APPENDIX "A"

1. The employer shall establish a Board of Trustees under his Chairmanship for the management of the Provident Fund according to such directions as may be given by the Central Government or the Central Provident Fund Commissioner, as the case may be, from time to time. The Provident Fund shall vest in the Board of Trustees who will be responsible for and accountable to the employees' Provident Fund Organisation, inter alia, for proper accounts of the receipts into and payment from the Provident fund and the

balance in the custody. For the purpose, the "employer" shall mean)

i) in relation to an establishment, which is factory, the owner or occupier of the factory; and

ii) In relation to any other establishment, the person who, or the authority, that has the ultimate control over the affairs of the establishments.

2. The Board of Trustees shall meet atleast once in every three months and shall function in the accordance with the guidelines that may be issued from time to time by the Central Government/Central Provident Fund Commissioner (CPFC) or an officer authorized by him.

3. All employees, as defined in section 2(f) of the Act, who have been eligible to become members of the Provident Fund, had the establishment not been granted exemption, shall be enrolled as members.

4. Where an employee who is already a member of Employees' Provident Fund or a provident fund of any other emempted

establishment is employed in his establishment, the employer shall immediately enroll him as a member of the fund. The employer should also arrange to have the accumulations in the provident fund account of such employee with his previous employer transferred and credited into his account.

5. the employer shall transfer to the Board of Trustees the contributions payable to the provident fund by himself and employees at the rate prescribed under the Act from time to time by the 15th of each month following the month for which the contributions are payable. The employer shall be liable to pay simple interest in terms of the provisions of section 7Q of the Act for any delay in payment of any dues towards the Board of Trustees.

6. The employer shall bear all the expenses of the administration of the Provident Fund and also make good any other loss that may be caused to the Provident Fund due to theft, burglary, defalcation, misappropriation or any other reason.

7. Any deficiency in the interest declared

by the Board of Trustees is to be made good by the employer to bring it up the statutory limit.

8. The employer shall display on the notice board of the establishment, a copy of the rules of the funds as approved by the appropriate authority and as and when amended thereto along with a translation in the language of the majority of the employees.

9. the rate of contribution payable, the conditions and quantum of advances and other matters laid down under the provident fund rules of the establishment and the interest credited to the account of each member, calculated on the monthly running balance of the member and declared by the Board of Trustees shall not be lower than those declared by the Central Government under the various provisions prescribed in the Act and the Scheme framed there under.

10. Any amendment to the Scheme, which is more beneficial to the employees than the existing rules of the establishment, shall be made applicable to them automatically pending formal amendment of the Rules of the Trust.

11. No amendment in the rules shall be made by the employer without the prior approval of the Regional Provident Fund Commissioner (referred to as RPFC hereafter). The RPFC shall before giving his approval give a reasonable opportunity to the employees to explain their point of view.

12. All claims for withdrawals, advance and transfer should be settled expeditiously, within the maximum time frame prescribed by the Employees' Provident Fund Organisation.

13. The Board of Trustees shall maintain detailed accounts to show the contribution credited, withdrawal and interest in respect of each employee. The maintenance of such records should preferably be done electronically. The establishments should periodically transmit the details of members' accounts electronically as and when directed by the CPFC/RPFC.

14. The Board of Trustees shall issue an annual statement of accounts or pass books to every employee within six months of the close of financial/accounting year free of cost once

in the year. Additional printouts can be made available as and when the members want, subject to nominal charges. In case of passbook, the same shall remain in custody of employee to be updated periodically by the trustees when presented to them.

15. the employer shall make necessary provisions to enable all the members to be able to see their account balance from the computers terminals as and when required by them.

16. The Board of Trustees and the employer shall file such returns monthly/annually as may be prescribed by the Employees' Provident Fund Organization within the specified time-limit, failing which it will be deemed as a default and the Board of Trustees and employer will jointly and separately be liable for suitable penal action by the Employees' Provident Fund Organisation. Provided that above mentioned return shall be filed by the employer in electronic format also, in such form and manner, as may be specified by the

Commissioner.

17. the Board of Trustees shall invest the monies of the provident fund as per the directions of the government from time to time. Failure to make investments as per directions of the Government shall made the Board of Trustees separately and jointly liable to surcharge as may be imposed by the Central Provident Fund Commissioner or his representative.

18. (a) The securities shall be obtained in the name of Trust. The securities so obtained should be in dematerialized (DEMAT) form and in case the required facility is not available in the area where the trust operates, the Board of Trustees shall inform the Regional Provident Fund Commissioner concerned about the same. b) the Board of Trustees shall maintain a script wise register and ensure timely realization of interest. c) The DEMAT Account should be opened through depository participants approved by Reserve Bank of India and Central Government in accordance with the instruction issued by the Central

government in this regard. d) The cost of maintaining DEMAT account should be treated as incidental cost of investment by the Trust. Also all types of Cost of investment like brokerage for purchase of securities etc. shall be treated as incidental cost of investment by the Trust.

19. All such investment⁶ made, like purchase of securities and bonds, should be lodged in the safe custody of depository participants, approved by reserve bank of India and Central Government, who shall be the custodian of the same. On closure of establishment or liquidation or cancellation of exemption from EPF Scheme, 1952, such custodian shall transfer the investment obtained in the name of the Trust and standing in its credit to the RPFC concerned directly on receipt of request from the RPFC concerned to that effect.

20. The exempted establishment shall intimate to the RPFC concerned the details of depository participants (approved by the Reserve Bank of India and Central

Government), with whom and in whose safe custody, the investments made in the name of trust, viz., Investments made in securities, bonds, etc. have been lodged. However, the Board of Trustees may raise such sum or sums of money as may be required for meeting obligatory expenses such as settlement of claims, grant of advances as per rules and transfer of member's P.F. accumulations in the events of his/her leaving service of the employer and any other receipts by sale of the securities or other investments standing in the name of the Fund subject to the prior approval of the Regional Provident Fund Commissioner.

21. Any commission, incentive, bonus, or other pecuniary rewards given by any financial or other institutions for the investments made by the Trust should be credited to its account.

22. The employer and the members of the Board of Trustees, at the time of grant of exemption, shall furnish a written undertaking to the RPFC in such format as may be prescribed from time to time, inter alia, agreeing to abide by the conditions which are specified and this shall be legally binding on

the employer and Board of Trustees, including their successors and assignees, or such conditions as may be specified later for continuation of exemption.

23. The employer and the Board of Trustees shall also give an undertaking to transfer the funds promptly within the time limit prescribed by the concerned RPFC in the event of cancellation of exemption. This shall be legally binding on them and will make them liable for prosecution in the event of any delay in the transfer of funds.

24. (a) The account of the Provident Fund maintained by the Board of Trustees shall be subject to audit by a qualified independent chartered accountant annually. Where considered necessary, the CPFC or the RPFC in-charge of the Region shall have the right to have the accounts re-audited by any other qualified auditor and the expenses so incurred shall be borne by the employer. (b) A copy of the Auditor's report along with the audited balance sheet should be submitted to the RPFC concerned by the Auditors directly

within six months after the closing of the financial year from 1st April to 31st March. The format of the balance sheet and the information to be furnished in the report shall be as prescribed by the Employees' Provident Fund Organisation and made available with the RPFC Office in electronic format as well as a signed hard copy. (c) The same auditors should not be appointed for two consecutive years and not more than two years in a block of six years.

25. A company reporting loss for three consecutive financial years or erosion in their capital base shall have their exemption withdrawn from the first day of the next/succeeding financial year.

26. The employer in relation to the exempted establishment shall provide for such facilities for inspection and pay such inspection charges as the Central Government may from time to time direct under clause (a) of subsection (3) of section 17 of the Act within 15 days from the close of every month.

27. In the event of any violation of the

conditions for grant of exemption, by the employer or the Board of Trustees, the exemption granted may be cancelled after issuing a show cause notice in this regard to the concerned persons.

28. In the event of any loss to the trust as a result of any fraud, defalcation, wrong investment decisions etc. the employer shall be liable to make good the loss.

29. In case of any change of legal status of the establishment, which has been granted exemption, as a result of merger, demerger, acquisition, sale amalgamation, formation of a subsidiary, whether wholly owned or not, etc., the exemption granted shall stand revoked and the establishment should promptly report the matter to the RPFC concerned for grant of fresh exemption.

30. In case, there are more than one unit/establishment participating in the common Provident Fund Trust which has been granted exemption, all the trustees shall be jointly and separately liable/responsible for any default committed by any of the

trustees/employer of any of the participating units and the RPFC shall take suitable legal action against all the trustees of the common Provident Fund Trust.

31. The Central government may lay down any further condition for continuation of exemption of the establishments."

46. From the above, it could be seen that these establishments have rates of contribution towards Provident Fund more favourable to the employees than what is provided under the Act or atleast not less than what is provided under the Act in which extent, whether the employees of such establishments can be allowed to suffer disadvantageous position vis-à-vis the employees of the unexempted establishments in the matter of calculation and payment of pension under the Pension Scheme, the answer would be obviously 'no' for the following reasons, viz.,

Firstly, the fact of the matter is that Pension Fund maintained by the respective establishments cannot be

independently handled or operated as the respective exempted establishments deem fit. The Fund is always subject to the pervasive control and supervision of the EPFO and operation of the same is also guided as per the provisions of the PF Scheme. Each and every action of the private Trust of the exempted establishments is to be scrutinized and monitored by the EPFO/Government. The control over such Trusts is not nominal but real and ubiquitous. In fact, the only palpable difference is that private Trust maintained by the respective establishments, absolves the EPFO of burden of maintaining the day-to-day accounts of such establishments. In the said circumstances, the exempted establishments cannot be treated differently for the purpose of extending the benefit of higher pension to the employees of such establishments. A differential classification of such establishments is a specious distinction which cannot stand the test of constitutional scrutiny.

Secondly, it is an admitted fact which cannot be disputed which this Court finds based on the materials produced that

the employees of these establishments have paid contribution on the basis of actual salary received by them. It was not their fault that the respective private Trusts have not remitted the enhanced Provident Fund contribution to the Pension Fund maintained by the EPFO. Further, the exempted establishments even otherwise was prevented from time to time from making 8.33% remittances into the Pension Fund on the basis of higher contribution made by their employees, as no option was obtained by them under Clause 11(3) of the Pension Scheme. In any event, non-remittance by the exempted establishments into the Pension Fund on the basis of higher Provident Fund contribution by the employees commensurate with the actual salaries received by them, cannot result in negation of the employees' right to exercise their option for payment of enhanced pension with reference to *Proviso* to Clause 11(3) of the Pension Scheme.

Thirdly, the Employees Pension Scheme 1995 is the same for all the employees regardless of their employment in either exempted establishments or unexempted establishments.

Once the Pension Scheme does not make a distinction as a whole, the question of treating the employees from the exempted establishments would be constitutionally impermissible and statutorily unacceptable. In fact, admittedly, these establishments from where the writ petitioners were employed were not exempted from the Pension Scheme under Section 39 of the Pension Scheme which is extracted hereunder:

“39. Exemption from the operation of the Pension Scheme.-

The appropriate Government may grant exemption to any establishment or class of establishments from the operation of this Scheme, if the employees of the establishments are either members of any other pension scheme or proposed to be members of a pension scheme wherein the pensionary benefits are at par or more favourable than the benefits provided under this Scheme. Where exemption is granted to any establishment or class of establishments under this paragraph, withdrawal benefits

available to the credit of the employees of such establishment(s) under the ceased Family Pension Scheme, 1971, shall be paid, subject to the consent of the employees, to the pension fund of the establishment(s) so exempted. An application for exemption under this paragraph shall be presented to the Regional Provident Fund Commissioner having jurisdiction by the establishment or class of establishments, together with a copy of the pension scheme of the establishment (s) and other relevant documents, as may be called for by him. On receipt of such an application, the Regional Provident Fund Commissioner shall scrutinise it, obtain the recommendations of the Central Provident Fund Commissioner and submit the same to the appropriate Government for decision, pending disposal of application for exemption under this paragraph employers' share of the contribution shall not be remitted to the pension fund as envisaged in sub-paragraph (1) of paragraph 3. An application for exemption presented under this paragraph shall be disposed of within a period of six

months from the date of its receipt or such further time as may be extended for reasons to be recorded in writing. If the application for exemption is not disposed of within the period so specified, the exemption applied for shall be deemed to have been granted.

Explanation. - For the purpose of this paragraph, the period of six months will count from the date on which the application for exemption is given in complete form to the satisfaction of the Regional Provident Fund Commissioner."

In the absence of exemption to the Pension Scheme, all the establishments regardless of exemption granted under the Provident Funds Scheme or the Act, are to be treated alike and in which event, the employees of the exempted establishments cannot be placed on disadvantageous position in the matter of receipt of enhanced pension than the employees of the unexempted establishments. Once the Pension Scheme is same for all the employees, they formed a

homogeneous group and any distinction to be drawn as between the same set of employees would amount to invidious discrimination and such attempted classification by the EPFO is unintelligible, irrational, arbitrary, unreasonable and cannot stand to the scrutiny of the mandate as provided under the Article 14 of the Constitution of India.

Fourthly, both the High Courts of Telengana and Rajasthan have dealt with the cases relating to the exempted establishments and the High Courts have held in favour of those employees in the matter grant of enhanced pension. In fact, in the earlier part of the decision, the finding of the Rajasthan High Court has been extracted in extenso in regard to the exempted establishments and the finding would be a fitting answer to the objections raised on behalf of the EPFO before this Court. The Rajasthan High Court has in fact, in respect of the exempted establishments has finally given directions as under in paragraphs 23 and 24, which are extracted as under:

23. Thus viewed, the action of the respondents in denying the benefit to the pensioners who are members of the Pension Scheme, is held to be unjustified. While reiterating the order passed by this Court earlier, the petitioners are granted liberty to submit option before the Provident Fund Commissioner under Clause 11(3) of the Pension Scheme and the Provident Fund Commissioner shall thereafter obtain the amount from the respective PF Trust as per the said ratio of 8.55% and thereafter release all consequential benefits accordingly in terms of and as directed by the Apex Court hereinabove.

24. All the petitioners would have to submit an application for seeking of an option for receiving pension on the full salary and only after their depositing the PF amount which they have received from their concerned trust to the extent of 8.33% and the benefit of this judgment would be subject to their depositing the amount already received by them from PF Account of the PF Trust. Upon their depositing the said amount of 8.33% as

calculated by the PF Trust, the PF Trust shall accordingly transfer the same to the EPFO Pension Fund and the pension shall accordingly be calculated and released. The exercise in this regard shall be completed by the respondents within a period of four months."

In fact, the Telengana High Court has also dealt with the establishments which were exempted under the Act and the learned Judge of the Telengana High Court has clearly held in paragraph 12 as under:

"12. On plain reading of relevant paragraphs of the EPF Scheme 1952 and Pension Scheme 1995, I am of the considered opinion that no distinction can be drawn between exempted category employer and non exempted category employer for application of Pension Scheme 1995. Admittedly no exemption is granted to RTC from the 1995 pension scheme and its employees are enrolled and contributions are made under 1995 scheme. Further, it is categorical assertion of the respondent RTC that the entire information

including higher contributions made based on the actual salary drawn by the petitioners was already furnished to the EPFO. It is not disputed that 8.33% of actual salary was being credited to EPFO all along. As noted above, it was not objected by EPFO. Thus, it is not open to EPFO to raise plea of non compliance of paragraph 26.6 at this distance of time and to deprive higher monthly pension drawable by the petitioners."

From the above, it is very clear that the objections regarding exempted establishments was repeatedly discountenanced by the High Courts and therefore, it is too late in the day for the EPFO to sustain its objections before this Court.

Fifthly, the orders passed by the Kerala High Court *inter alia* covered the establishments including the establishments exempted by the Act. This fact has not been disputed by the EPFO in the counter affidavit. Only statement in the counter affidavit in regard to the same is that the EPFO has implemented in respect of the exempted establishments

because of the Courts' order and in the teeth of such factual position, this Court is unable to appreciate the kind of vehemence displayed by the EPFO in objecting to the grant of the relief to the employees of the exempted establishments. So much hue and cry was raised on behalf of the EPFO as if the issue considering the grant of benefit to the employees of the exempted establishments is to be examined by this Court as the issue was not the subject matter of the litigation before any other Court. But this Court finds such submission made on behalf of the EPFO is too hallow and unacceptable since already Telangana and Rajasthan High Courts have allowed the Writ Petitions in respect of the exempted establishments and even Kerala High Court has granted the relief to some of the exempted establishments and the judgment of the Kerala High Court has been confirmed by the Hon'ble Supreme Court.

Sixthly, so much so is said about the financial implication and about the unjust enrichment of the employees who were already retired and gone. The learned counsels for the EPFO

would also rely on several provisions of the Pension Scheme where, it is stressed that once the employee retired, he ceased to be the member of the Pension scheme and therefore, exercising his option does not arise. This Court is unable to appreciate such submissions made on behalf of the EPFO since the right of these employees to get enhanced pension has crystallized after the orders passed by the various High Courts as aforementioned and also the Hon'ble Supreme Court in 'R.C.Gupta case. Once the right to get enhanced pension has taken a concrete shape in support their claim, the employees cannot be denied their claim only on the basis of the so-called financial implications. The expression 'so-called' has been used consciously by this Court since on behalf of the Government or on behalf of the EPFO, no financial statement has been filed in clear terms as to what is going to be the inflow and outflow in case the present employees are given enhanced pension. No materials have been placed before this Court on behalf of the EPFO in support of their vehement objection in regard to depletion of

the pension corpus and erosion of the fund. In fact, from their own statement in the counter affidavit, it appears that the period of deficit pension fund was over and the in the latest period, the fund has surplus amount. Though it is attributed to the admission of several lakh new members into the fund, nevertheless, the fund as such cannot be said to suffer depletion merely because small per centage of employees from the exempted establishments is paid enhanced pension for unpredictable life time. In fact, this Court is also of the view that the issue of grant of enhanced pension to the employees of the exempted establishments is also no more *res integra* in view of the various decisions of the High Courts and the Hon'ble Supreme Court. Even otherwise, this Court is of the considered view that assuming the objections of the EPFO in regard to the exempted establishments are considered afresh by this Court, the employees of the exempted establishments are part of homogeneous group of pensioners and any attempt by the EPFO to differentiate such homogenous group would only amount to unintelligible and unjust classification which

cannot be countenanced in law or on facts.

Lastly, this Court is in agreement with the submissions made by the learned counsels for the writ petitioners that the Circular dated 31.5.2017 which is impugned in many of the Writ Petitions, appears to have been issued in haste without proper consultation with the Government of India. Ostensibly it was issued to ward off the claims of the employees from the exempted establishments. This Court is therefore of the view that the impugned Circular was a product of non-application of mind and hence, it has to go lock, stock and barrel.

46. In view of the above conclusion, this Court has to ultimately resolve as to what kind of the relief to be granted to all the writ petitioners. The Hon'ble Supreme Court, in fact, in the final paragraph of the judgment has held that the employees may be directed to return their PF amount received by them before granting the benefit under the *Proviso* to Clause 11(3) of the Pension Scheme. In case of the employees from the unexempted establishments, it is only a matter of

book adjustment as per the dictum of the Hon'ble Supreme Court in 'R.C.Gupta case'. Even in cases where the employees have retired and received the PF contribution, the employees can be directed to return appropriate amount. As regards the employees of the exempted establishments are concerned, the same yardstick may be adopted. After all the effect of return of contribution today is one and the same for both set of employees from unexempted as well as exempted establishments.

47. Pension is neither a charity nor a largesse to be claimed as a matter of concession. It is a right which is accrued to all the employees of pensionable service, as they toiled to the grind of employment for number of years of service. The minimum expectation of such employees in the evening of their life is to be compensated modestly. As one French Philosopher, Albert Camus in 20th Century, said, "**It is a kind of spritual snobbery that makes people thnik**

they can be happy without money". The profound statement of the Philosopher is more true and apt today as the world around us is rotating on a materialistic axis and every humble citizen becomes vulnerable and exposed to harsh realities of life. Life always revolves around hope and for pensioners adequate pension is the only hope left in their remaining part of life. Without that hope, final phase of existence become too mundane and impoverished. Therefore, the right to receive adequate pension is implicit within the framework of the Constitution, particularly in terms of Article 21 of the Constitution of India.

48. In the above mentioned circumstances, this Court consider the following directions as expedient to resolve the issues as projected in the Writ Petitions.

- i) Both the employees of the exempted and

unexempted establishments are entitled to the benefit of enhanced pension on the basis of their contribution with reference to actual salary received by them to their Provident Fund accounts;

ii) The cut off date as prescribed i.e. 01.12.2004 is invalid in law and therefore, the same is held to be illegal and invalid;

iii) The employees, namely, the writ petitioners shall be permitted to exercise their option in terms of *Proviso* to Clause 11(3) of the Pension Scheme and while permitting so, the EPFO is at liberty to seek return of the higher Provident Fund contribution received by the respective employees with simple interest at the rate of 6% p.a. from the date of receipt of Provident Fund amount and till the date of payment;

iv) The amounts to be refunded by the employees concerned shall be verified by the EPFO in consultation with the respective establishments in which the employees were employed;

v) On refund of the verified amount with interest, the EPFO shall calculate and grant enhanced pension on the basis of actual salaries received by the employees with arrears of pension from the date of their retirement and continue to pay their monthly enhanced pension through out their life time;

vi) In case where the refund of the amount by any employee with interest is higher than the enhanced pension with arrears payable to him, the refund shall be insisted upon and in case where the refund, after calculation, is lower than the arrears

of pension payable to the employee, the same shall be adjusted while disbursing the arrears to the employees concerned;

vii) The respective Managements of the exempted establishments which maintained the Private Trust are directed to cooperate with the EPFO and render all assistance in quantifying the amount to be refunded by the respective employees with interest at 6% p.a. on such refund;

viii) The entire exercise shall be initiated and completed by the individual Managements and the EPFO within a period of six months from the date of receipt of a copy of the order.

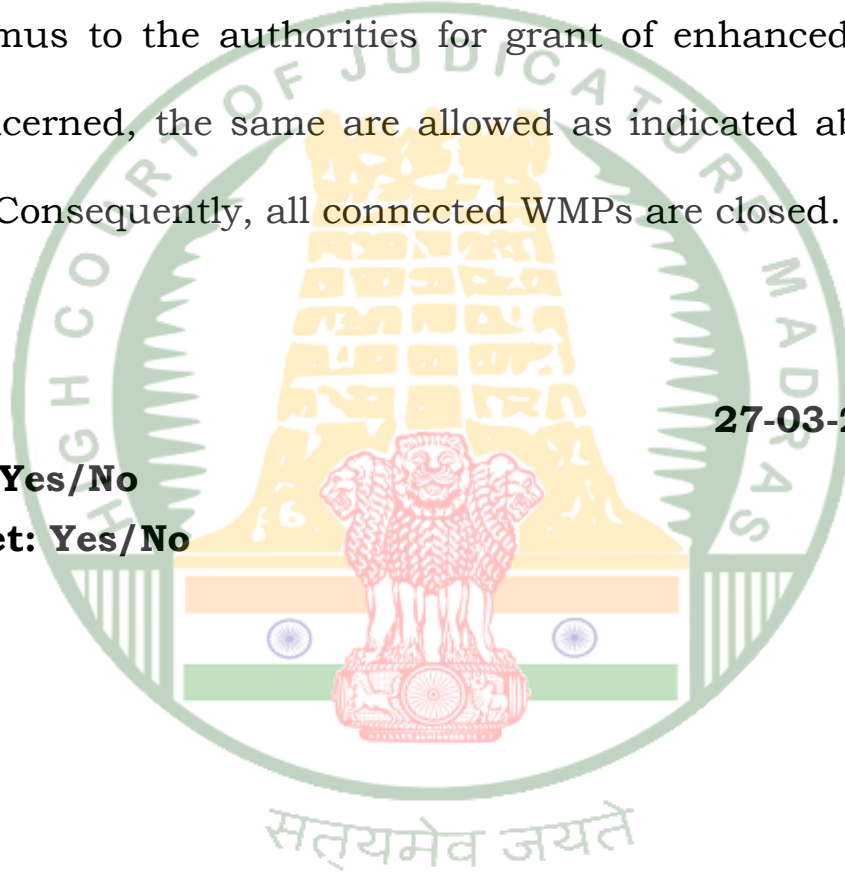
49. **In the result**, all the Writ Petitions are allowed on the above terms. The orders of rejection which are impugned in the respective Writ Petitions, are hereby quashed and as regards the Writ Petitions pertaining to the grant of Writ of Mandamus to the authorities for grant of enhanced pension are concerned, the same are allowed as indicated above. No costs. Consequently, all connected WMPs are closed.

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27-03-2019

Index: Yes/No

Internet: Yes/No



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V.PARTHIBAN, J.

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**Pre delivery of Common Order in
WP.Nos.14368 of 2018, etc., etc.,**

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27-03-2019