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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on : 30.04.2019

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Judgment Pronounced on: 22nd May, 2019.

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W.P.(C) 5678/2018 & CM APPL. 22108/2018

BHARTIYA KHADYA NIGAM

KARAMCHARI SANGH AND ANR.

..... Petitioners

Through: Mr.Bahar U. Barqi, Advocate

versus

UNION OF INDIA AND ORS.

..... Respondents

Through: Mr.Arun Bhardwaj & Mr. Nikhil
Bhardwaj, Advocates for UOI
Mr. Keshav Mohan & Mr. Rishi K.
Awasthi, Advocates for EPF.
Mr. B.P. Singh, Mr. Anubhav Gupta,
Mr. Amit Singh & Ms. Geetanjali,
Advocates for R-4 & 5.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J.

1. The present writ petition has been filed seeking, quashing of the letter/circular dated 31.05.2017 issued by respondent No. 2/Employees Provident Fund Organization as well as Notification dated 22.08.2014. A further direction is sought to the respondents to comply with the orders passed by the Hon'ble Apex Court in Civil Appeal Nos. 10013-10014/2016 titled *R.C. Gupta & Ors. vs. Regional Provident Fund Commissioner & Ors.* dated 04.10.2016 as also a direction to the respondents to treat the

members of the petitioners' Association at par with the employees of unexempted establishments in getting benefits of higher pension on actual salary.

2. Before embarking on adjudication of the present case, we would like to give a brief background and genesis of the Pension Scheme with which we are concerned in this case. Due to the establishment of large number of industrial units, thousands of workmen of various categories who came from rural areas started making demands for better salaries and also for some financial security for their old age, on retirement. The Government acting under the Directive Principles, thought of devising ways to provide financial security to the industrial workers during their old age. Thus, a method was devised to constitute a Fund, and this gave birth to the Employees Provident Fund & Miscellaneous Provisions Act, 1952 (hereinafter referred to as 'EPF Act'). The Provident Fund was to be constituted by contributions both from the employer and the employee. This, however, had no contribution from the State Exchequer. Thus, the EPF Act was primarily enacted for providing some terminal benefits to the employees of various establishments, post their retirements. A certain prescribed percentage of the monthly wages of the employee was to be deducted and credited to the employee's Provident Fund, with an equal amount of contribution from the employer. This was statutorily envisaged under Sections 5 & 6 of the EPF Act.

3. Under Section 6 of the EPF Act, 10% [subsequently 12%] of the basic wages including the dearness allowance is required to be deposited in the Provident Fund account of an employee as the employee's share and the employer has to contribute an equal amount. This constitutes the Provident

Fund Account. Initially, the EPF Act did not provide for creation of a Pension Fund or for payment of Pension. Later on, Section 6A was inserted in the EPF Act, authorizing creation of a Pension Fund and framing of a Pension Scheme. Accordingly, in 1995, the Employees Pension Scheme was framed. As per the said Scheme, the maximum pensionable salary was Rs. 5000/-. The corpus of the Pension Fund was to be constituted by transferring 8.33% out of the employer's contribution under Section 6 of the EPF Act. Subsequently, by an amendment, the ceiling limit was enhanced from Rs. 5000/- to Rs. 6500/- w.e.f. 08.10.2001.

4. In the meantime, a proviso was added to para 11(3) of the Pension Scheme w.e.f. 16.03.1996 granting an option to the employer and the employee, on joint request, to contribute amounts towards the Provident Fund over and above the ceiling limits and on the actual salary.

5. The ceiling limit of Rs. 6500/- was subsequently enhanced to Rs.15,000/- vide Notification No. G.S.R. 609(E) dated 22.08.2014 effective from 01.09.2014. The Notification amended Para 11(1) and stipulated that the pensionable salary would be the average monthly pay drawn in any manner during the contributory period of service in the span of 60 months preceding the date of exit from the membership of the Pension Fund and the pensionable salary was to be determined on pro-rata basis for pensionable service upto 01.09.2014, subject to a ceiling of Rs.6500/- per month and for the period thereafter upto a ceiling of Rs. 15000/- per month. Further, sub-para 4 was added to provide that the employees contributing on salary exceeding Rs. 6500/- could give a fresh option to be exercised jointly by the employer and employee and continue to contribute on a salary exceeding Rs.

15000/- per month. The proviso provided that the fresh option was to be exercised within a period of six months from 01.09.2014 extendable by another six months at the discretion of the RPFC. A further proviso was added, that if the option was not exercised by the member within the stipulated period or extended period, it would be deemed that the member had not opted for contribution over the wage ceiling and the extra contributions to the Pension Fund would be diverted to the Provident Fund Account of the member, along with interest.

6. Some of the employees of an establishment covered under the EPF Act, on the eve of their retirement, sometimes in the year 2005, filed a writ petition in the Himachal Pradesh High Court. These employees were not sanctioned monthly pension on the basis of their contributions made on actual salary, on the ground that they had not exercised their option within the cut-off dates as per the proviso to Para 11(3) inserted by the amendment to the Pension Scheme in 1996. The main grievance in that writ petition was that the proviso was not within their knowledge and therefore, the cut-off date should not come in their way of getting the benefit of the pension on the contribution, made above the wage ceiling, more particularly, when they as a matter of fact, had been contributing on the actual salary and not on the basis of the ceiling limit of either Rs. 5000/- or Rs. 6500/- per month. The plea raised by the Provident Fund authorities was that the proviso visualizes a cut-off date, for exercise of the option and the request of the employees therein being subsequent to the cut-off date could not be acceded to.

7. The learned Single Judge decided the writ petition in favour of the employees but the Division Bench reversed the said decision upholding the

stand of the Provident Fund authority, that under proviso to clause 11(3) of the Pension Scheme, there was a cut-off date. The judgment of the Division Bench was then challenged before the Hon'ble Supreme Court and Civil Appeal No.10013-14/2016 was allowed in favour of the employees by a judgment dated 04.10.2016 titled ***R.C. Gupta*** (supra). By the said judgment the Hon'ble Supreme Court held that reading of the proviso showed 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, for calculation of pensionable salary and the said dates were not cut-off dates to determine the eligibility of the employer-employee to indicate their option under proviso to Para 11(3). It was further 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 the employer and the employee had actually deposited contributions on the actual salary. In fact, the Hon'ble Apex Court expressed its surprise as to how the Provident Fund Commissioner was aggrieved, once the employer and employee were willing to contribute on the actual salary and at best, the Provident Fund Commissioner could seek a return of all amounts that the concerned employee may have withdrawn from their Provident Fund Account before granting them the benefit of proviso to Para 11(3).

8. A similar issue had also arisen for consideration before a Division Bench of the Kerala High Court in a writ petition bearing W.P.(C) No.13120/2015 in the case of ***P. Sasikumar & Ors. vs. Union of India & Ors.*** The said petition was decided on 12.10.2018 along with several other connected writ petitions. In those writ petitions, one of the issues involved was similar to the present one, namely, validity of the cut-off dates to

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exercise the option for contributing over the wage ceiling limit. In addition, there was also a challenge to the Employee's Pension (Amendment) Scheme, 2014. The Kerala High Court after tracing out the background to the enactment of the EPF Act as well as noticing the creation of the Pension Fund and its various amendments, came to a conclusion that the amendment to the Pension Scheme brought about by the Notification dated 22.08.2014 was bad in law and quashed and set aside the said Notification. The High Court has directed the EPF organization to permit the employees to exercise options stipulated under para 26 of the Employees' Provident Fund Scheme, without adhering to or restricting the same to any cut-off date. The High Court observed that as per the provisions of the Act, every employee who is a member of the Provident Fund is entitled and required to become a member of the Pension Fund and has no other option. The only option is to make contribution to the Provident Fund on the basis of the actual salary drawn by him. It also observed that there was no provision in the EPF Act contemplating payment of any amount by either the employer or the employee in addition to what is stipulated by Section 6 of the EPF Act and therefore it was not possible to require any further payment to be demanded from the contributories and perhaps this was the reason why both the employer and the employee are given an option to express their willingness to make contribution in excess of the salary limit mentioned therein.

9. The High Court has observed that the object of the EPF Act was to provide succor to the large section of the working class of our country, who live a life of penury in their old age, when they are not in a position to earn a living and the resources with the State Exchequer are insufficient to provide old age pension to such people. It is for this reason that creation of a

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Pension Fund was envisaged by collecting contributions compulsorily from the employer and the employee and then creating the Pension Fund by transferring 8.33% of the contribution made by the employer to the Provident Fund, with no additional contribution from the employee. This scheme thus ensures that the State Exchequer would not be burdened with any financial liability and at the same time, the employees would be assured of a decent pension in their old age. The Kerala High Court then posed itself a question as to whether the amendments would subserve attaining the objective envisaged by the EPF Act. To answer this question, the Kerala High Court examined the various provisions of the EPF Act and the Pension Scheme, more particularly, paragraph 26 and paragraph 11 respectively.

10. The defence raised by the Provident Fund organization before the Kerala High Court was that payment of pension computed on the basis of contributions made on actual salaries by the employees would deplete the Pension Fund and make the scheme unworkable. The said contention was negated by the Court and it was held that the Pension Fund was constituted by transferring 8.33% of the employer's contribution remitted to the Employees Provident Fund under Section 6 of the EPF Act without making the employees liable for any further contribution. Since an option was given to the employees to make contribution in excess of the ceiling limit and on the basis of actual salaries, no other restrictions could be imposed on their right to receive pension. Reliance was placed on the judgment of **R.C. Gupta** (*supra*) in which the Apex Court had decided both the issues and held the date of commencement of the scheme as not being a cut-off date to determine the eligibility of the employer-employee to indicate their options under the proviso and also held that if the employer and the employee jointly

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contributed above the wage ceiling limit, then the pension would have to be sanctioned on the actual contribution. The High Court further held that in fact, proviso to Para 11 (4) of the Pension Scheme does not stipulate a cut-off date at all and any such stipulation for conferring benefits will have the effect of classifying the employees into persons who have retired before or after the said date. We quote the relevant paragraphs as under:

“38. As rightly contended by the counsel appearing for the pensioners, 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 homogenous 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”

11. We were shown the order by which the SLP bearing No. 8658-8659/2019 filed by the EPFO against the judgment of the Kerala High Court has been dismissed by the Apex Court on 1.4.2019. The same was taken on record. The relevance of referring to the two judgments (*supra*) is that by virtue of these two judgments, certain issues are now settled. Firstly, it is no longer *res integra* that for employees who have been contributing towards Provident Fund on actual salary, the ceiling limit would not apply and they will be entitled to pension *de hors* the ceiling limit on the basis of contributions made on actual salary. Secondly, the cutoff date would no longer apply and those employees who have not exercised a fresh option by the cutoff date envisaged by the EPFO would remain entitled to pension on actual salary, if they have actually contributed to the PF Fund on actual salary. The Gazette Notification dated 22.08.2014 GSR No. 609(E) stands quashed by the judgment of the Kerala High Court, as upheld by the Apex Court.

12. One of the prayers as pointed out above in the present petition is for quashing of this Notification dated 22.08.2014. Since the Kerala High Court has quashed the said Notification and the judgment has been upheld by the Apex Court, we need not delve into the issue of validity or otherwise of the said Notification.

13. Having narrated the background to the pension scheme and the ensuing litigation, we may now pen down certain facts relevant to the present case. Petitioner No. 1 in the present case is a Trade Union registered and recognized and represents the serving employees of the Food

Corporation of India (hereinafter referred to as 'FCI'). Petitioner No. 2 is a Federation of retired employees of the FCI and is also duly registered.

14. Section 17 of the EPF Act provides for exemption for organizations from depositing their Provident Fund, both employee and employer's share, with the EPFO. These exempted organizations maintain their own account by creating a Trust, but have to ensure compliance with various provisions of the Act. The Provident Fund is deposited with the Trust and they have to have a Scheme not less favourable than the Scheme under the Act. Although the exempted establishments deposit the PF contributions in the Trust, but insofar as the Pension scheme is concerned, the employees are eligible to be enrolled under the Employees Pension Scheme which is totally administered by the EPFO.

15. The case of the petitioners herein is that being an exempted establishment, their employer, FCI, had a Provident Fund Trust, in which the contributions were being made both by the employer and the employees on the basis of their actual salary, which was naturally beyond the respective ceiling limits applicable at different times. After the judgment of the Apex Court in **R.C. Gupta** (supra), which permitted the pension to be paid on contributions on actual salary, the petitioners also became entitled to the same relief.

16. The petitioners claim that instead of granting them the same benefit, the respondents created a class of exempted and non-exempted establishments. In fact, respondent No. 1 had, on 16.03.2017 written to the EPFO to allow the benefits of pension on actual salary in terms of the judgment of **R.C. Gupta** (supra). It is further claimed that the EPFO had on 23.03.2017, written to all its Regional offices to comply with the judgment

and the said letter did not contain any classification of employees, based on the nature of establishment being unexempted or otherwise.

17. According to the petitioners, while they were awaiting the implementation of the judgment, they were surprised to know that the EPFO had issued a letter dated 31.05.2017, vide which it created two classes, one of exempted establishment and the other of the unexempted establishment, and sought to deny the benefit of the judgment of ***R.C. Gupta*** (supra) to the employees of exempted establishment.

18. Aggrieved by this letter, the petitioners filed a writ petition in this Court bearing W.P.(C) No. 869/2018. The said petition was disposed of on 30.01.2018, with the following order:

“Counsel for the Petitioner seeks permission to withdraw the present Writ Petition in view of certain errors noticed therein.

Counsel for the Respondent Nos. 2 and 3, who appears on advance notice, has drawn our attention to Annexure P-6 and states that final decision is yet to be taken and the matter has been placed before the Central Board of Trustees.

We hope and trust that the matter would be examined and decided at the earliest. The writ petition is dismissed as withdrawn. We clarify that this order will not bar or prohibit the Petitioner from filing a fresh Writ Petition, if required and necessary.”

19. After withdrawal of the said petition, a representation was made by petitioner Nos. 1 & 2 to the EPFO on 6/9.02.2018 requesting them to decide the controversy at the earliest. However, the representation was never decided and the petitioners were constrained to file the present petition seeking the following reliefs:

“(a) Pass Writs, Orders and/or directions in the nature of declaration declaring letter dated 31.5.2017 issued by

Respondent No. 2 vide No. Pension-I/12/33/EPS Amendment/96/Vol. as illegal and contemptuous and notification dated 22.8.2014 infructuous, illegal and void;

(b) Pass further Writs, Orders and/or directions in the nature of certiorari quashing the letter No. Pension-I/12/33/EPS Amendment/96/Vol. dated 31.5.2017 issued by the Respondent No.2;

(c) Pass further Writs, Orders and/or directions in the nature of mandamus directing the Respondents to comply with the order passed by Hon'ble Supreme Court in Civil Appeal Nos. 10013-10014 of 2016 – R.C. Gupta & Ors. etc. etc. versus Regional Provident Fund Commissioner Employees Provident Fund Organization and Ors. etc. dated 4.10.2016 with interest @ 15% per annum from the date of the order passed by Hon'ble Court.

(d) Pass further writs, orders and/or directions in the nature of mandamus directing the Respondents especially respondent No. 2 to treat the members of the petitioners' association at par with other employees who belong to exempted class of establishment and getting benefits of pension of higher salary.”

20. The controversy in the present petition is now in a very narrow compass. The issue that arises for consideration is whether the benefit of the judgment in the case of *R.C. Gupta* (supra) would be available to the petitioners, who are a mix of serving and retired employees of exempted establishment under Section 17 of the EPF Act.

21. Learned counsel for the petitioners contends that the circular dated 31.05.2017 cannot be countenanced either in law or in facts for the reason that even if the PF Trust is maintained by the respective establishment, the Pension Scheme, 1995 is the same for all the employees and it is not open to the EPFO to draw a classification between a homogenous group by dividing them into exempted and unexempted establishments. He further contends that even in respect of the exempted establishments, the employees were contributing 12% on their actual salaries and that was being put into a

separate fund maintained by the Trust. Although, the establishments were maintaining their respective Trusts, but all the provisions of the EPF Act were being mandatorily applied to manage the Trust and the Pension Scheme, in any case, was administered by the EPFO. Not only this, the contributions under the PF could only be invested as per the directives of the EPFO and practically speaking, the main control of the Trust was actually with the EPFO. In such a situation, it was not open for the EPFO to even contend that the employees of the exempted establishments could not be given the benefit of pension on their actual salary.

22. *Per contra* learned counsel for the respondent No. 2 has opposed the present petition. It is contended by the learned counsel that in case of exempted establishments, the Provident Fund is managed by a separate legal entity which is the exempted Trust and therefore, the 12% contribution of the employer and the employee, remained with the Trust and the money never came into the account of the EPFO. It was further argued that the employees of the exempted establishment stand on a different footing, as the exercise of an option under para 26(6) of the Pension Scheme, which is a necessary pre-cursor for exercising option under proviso to clause 11(3) for contributing on actual wages is not applicable to the employees of exempted establishments as they have their own Provident Fund scheme. It was further argued that the EPFO is not competent to interfere in the working of the exempted establishment, except where the Board of Trustees contravenes and defaults in complying with provisions of Section 17(1)(d) of the Act. The learned counsel further argued that para 3 of Pension scheme starts with the words “From and out of contributions payable by the employer in each month”, and therefore, the contribution received each month from the

employer is the basis for maintaining the corpus of the Pension Fund and it does not provide that the contributions can be received in one go for the entire past services and since the employees of the exempted establishments did not contribute with the EPFO, there is no provision which enables the EPFO to now collect contributions for the past several years and release pension on the actual salaries. He also points out that under Para 26 of the scheme, the Pension Fund has to be invested as per para 52 of the EPF Act with RBI etc. or in securities. Therefore, the monthly contributions received several years ago and deposited in terms of para 26 will fetch more interest than those deposited in the present. Counsel further contends that if the benefit is now given to the petitioners, the corpus of the Fund will have to be shared with those employees, whose employers have contributed for years together with the EPFO on higher and actual salary. According to the learned counsel, if the members of the exempted Trust, such as FCI are now allowed contribution on a higher salary, there will be a liability of over Rs. 8 Crores, and which would cause a huge depletion in the Pension Fund. He thus submits that the judgment of **R.C. Gupta** (supra) cannot be implemented for the petitioners herein and the classification based on exemption granted to an establishment under Section 17 of the Act, has a reasonable nexus with the object sought to be achieved and is a valid classification.

23. Learned counsel for the petitioner in response to the contention of the respondents has argued that the issue now involved in this case and which is in a narrow compass, is no longer *res integra*. He points out that the various courts have now examined this issue and held that the benefit of the judgment of **R.C. Gupta** (supra) would be available to the exempted

establishments as well. He has, in support of this submission, relied upon the judgment of the Madras High Court in the case of **ONGC Retired Employees Welfare Association vs. Union of India & Ors.**, decided on 27.03.2019, judgment of High Court of Rajasthan in the case of **Vinod Kumar Sharma & Ors. vs. Chairman Central Board of Trusts & Ors.**, , decided on 11.12.2018, High Court of Telangana in the case of **K. Narasimha Rao vs. The Regional Provident Fund Commissioner**, decided on 24.09.2018 as well as the High Court of Bangalore in the case of **Sri S. Arul Prakash & Ors. vs. Union of India & Ors.**, decided on 27.03.2019.

24. We have heard the learned counsels for the parties and examined the contentions of both sides.

25. The sum and substance of the opposition by the EPFO is that in the case of Exempted Establishments, the Provident Fund and the Pension Fund are managed by separate legal entities and as such the adjustment of contribution from PF Account to Pension Account as contemplated in the case of **R.C. Gupta** (supra) is not feasible. The submission is that the judgment of **R.C. Gupta** (supra) dealt with employees of the Unexempted Establishments and hence will not apply to the present petitioners as they are employees of an Exempted Establishment. The employees of these establishments have not made any contributions under Section 26(6) of the Employees Provident Fund Scheme and the actual contribution even if made on higher salary, has not been remitted to the Pension Account maintained by the EPFO in all these years. Paying them enhanced pension at this stage, would mean that the liability of the enhanced pension will be borne by those who have been regularly contributed to the Pension Scheme, and thus, a conscious decision was taken by the EPFO taking into consideration the

actuarial liability to issue the impugned circular, excluding the employees of the Exempted Establishments from the benefit of the judgment in the case of ***R.C. Gupta*** (supra).

26. Per contra the argument of the petitioners can be summed up to state that having contributed into the PF Fund on actual salaries, they form a homogenous class with the employees of the unexempted establishments and the impugned circular is violative of Article 14 of the Constitution of India as it creates a class within a class. According to them financial implications cannot be a criteria to deprive the petitioners of the benefit of the said judgment and a higher pension.

27. The questions, therefore, that need to be decided by us in the present petition are as follows:

- (i) Whether the employees of the Exempted Establishments are entitled to higher pension on the basis of their contribution towards the Provident Fund, made on the actual salary, over and above the ceiling limit prescribed under the Act and its Schemes from time to time?;
- (ii) Whether the petitioners have a right to be treated at par with the employees of the Unexempted Establishments and thus entitled to the benefits of the judgment of the Apex Court in the case of ***R.C. Gupta*** (supra)?

28. There is no dispute that the employees of Exempted Establishments make their contributions towards the Provident Fund in a private Trust maintained by the respective establishments. The employer makes an equal contribution and only 8.33% is remitted from the private Trust to the Pension Fund maintained by the EPFO. There is also no dispute that 8.33% was being remitted by the Trust to the Pension

Fund but that was on the basis of the ceiling limit of the salary i.e. Rs. 5,000/-, 6500/- or 15000/- per month from time to time. At the same time, there is also no dispute that the Pension Fund, even for these exempted establishments was controlled and supervised by the EPFO, under the Act and the Scheme. Pertinent it is to note that while granting exemption to an establishment under Section 17 of the Act, it is to be ensured that the benefits and the contribution are not less favourable to these employees vis-à-vis those of the unexempted establishments. For a ready reference, we may quote Section 17 hereinunder:

“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, 2[exempt, whether prospectively or retrospectively, from the operation] of all or any of the provisions of any Scheme—

(a) any 3[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 3[establishment] of a similar character; or

(b) any 3[establishment] if the employees of such 3[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 3[establishment] of a similar character: 3[establishment] if the employees of such 3[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 3[establishment] of a similar character\:" 4[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.] 5[***] 6[(1A) Where an exemption has been granted to an establishment under clause (a) of sub-section (1),—*

(a) the provisions of sections 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 makes default in complying with any of the said provisions or conditions or any other provision 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 members 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.”*

29. A reading of the above para leaves no doubt in our mind that there is a complete and pervasive control of the EPFO over the private Trusts as regards the Provident Fund contributions, even in the case of an Exempted Establishment. In fact, one of the preconditions to grant of exemption, is the formation of an opinion by the Government that the Rules of the Provident Fund with respect to the rates of contribution of such an establishment are not less favourable than those specified in Section 6 and more importantly the employees are in enjoyment of other Provident Fund benefits which are again not less favourable than the employees of the other establishments of a similar character. Certain other provisions of the Act such as Sections 6, 7A, 8 and 14B have been made mandatorily applicable to these establishments and any contravention by the employer has been made punishable under Section 14 of the Act as if the establishment was unexempted. Section 17 itself has made it obligatory upon the Board of Trustees to maintain their accounts in a particular manner, submit their returns to the Provident Fund Commissioner, invest the Provident Fund monies in accordance with the directions of the Central Government etc.
30. The entire rationale behind this control mechanism over the private Trusts is not far to seek. The intent and purpose is to ensure that the employees do not suffer any disadvantage qua their Provident Fund and other retiral benefits, once they are making contributions, only because the employer has chosen to seek exemption. If the Act itself

provides safeguards to regulate the Provident Fund, it can hardly be argued by the EPFO that the employees of the Exempted Establishments would not be entitled to higher pension on actual salaries only because they belong to a class of Exempted Establishments. The disadvantage that the Act itself seeks to prevent cannot be indirectly imposed on these employees by giving them lesser benefit out of the Pension Fund, which the EPFO itself maintains.

31. Having so analysed, the ultimate conclusion that can be drawn is that the difference between the two categories is, that while in the case of Exempted Establishments, the employees deposit their PF contributions into a private Trust and the EPFO may not have a day-to-day handling of accounts and receipt or disbursement of the Provident Fund. While in the case of unexempted establishments, the contribution towards the PF is into the Provident Fund account maintained by the EPFO and resultantly there is a day-to-day handling of the Provident Fund accounts. The recipient of the Provident Fund and the frequent dealing of the accounts, in our view, is too minor a factor to withstand the test of Article 14 of the Constitution of India.
32. Another important factor that weighs with us is the undisputed fact that the petitioners had actually been contributing towards the Provident Fund on the basis of their actual salaries, which was higher than the ceiling limits. There is a clear averment in the writ petition to this effect and which is not denied by the respondents. Thus, the only distinction between the petitioners and the employees of the Unexempted Establishments is that while in the case of the former,

the recipient of the contribution was a private trust and in the case of the latter, the recipient was the EPFO. This again was not the fault of the petitioners and this cannot be the basis to negate their right to receive higher pension on the contributions made on actual salary.

33. We cannot agree with the contention of the respondents that the Supreme Court has had no occasion to deal with the cases of employees of the Exempted Establishments as the case of **R.C. Gupta** (supra) dealt with only the unexempted establishments. In fact, on perusal of the judgment of the Apex Court in the case of R.C. Gupta, we find that in para 8 of the judgment, the Apex Court has taken note of a judgment rendered by the Supreme Court in SLP (C) No. 7074/2014 which was filed by the Regional Provident Fund Commissioner against an earlier judgment of the Kerala High Court. From para 9 of the judgment of the Rajasthan High Court in the case of **Vinod Kumar Sharma** (supra) SB Civil Writ No. 17616/2017, decided on 11.12.2018, which has been relied upon by the petitioners herein, we find that the Kerala High Court dealt with the cases of employees of Instrumentation Limited which was an Exempted Establishment and had a Provident Fund Trust. The Kerala High Court in this case had taken the same view that the Pension should be paid on actual salary and not on the ceiling limit. SLP filed against the said judgment was dismissed on 31.03.2016. In this view of the matter, it may not be right for the respondents to contend that the Apex Court has not dealt with the similar issue with respect to Exempted Establishment.

34. The other and a very significant factor which persuades us to hold in

favour of the petitioners is that like the employees of the Unexempted Establishments, the petitioners are also governed by the same Employees' Pension Scheme, 1995. Section 39 of the Pension Scheme exempts establishments from the operation of the Scheme but the FCI where the petitioners were or are employed, was not exempted from the operation of the Pension Scheme. Hence all employees who are governed by the Pension Scheme will have to be treated alike as they form a homogenous group and any discrimination to one group by paying lesser pension would be clearly arbitrary, unreasonable and violative of Article 14 of the Constitution of India.

35. Insofar as the contention of the respondents that there will be financial implications and a depletion of the Pension Fund, is concerned, we cannot agree with the said contention. Once we have found that the petitioners are a homogenous class with the employees of the Unexempted Establishments, the corollary to this is that by virtue of the law laid down by the Apex Court in the case of **R.C. Gupta** (supra), a right to get enhanced pension has crystalised in favour of the petitioners. This right cannot be taken away on the ground of financial implications. In fact, we are not even sure, if there would be any depletion of the Pension Fund as the respondents have not placed any material or accounts to substantiate this argument.
36. The issue of grant of enhanced pension on contributions on actual salary to the employees of Exempted Establishments is now even otherwise no more *res integra*. The High Court of Rajasthan has, in the case of **Vinod Kumar Sharma & Ors.** (supra), clearly held that the benefit of the judgment of the Apex Court in the case of **R.C. Gupta**

(supra), would clearly be available to the employees of the Exempted Establishments and the deposit of the Provident Fund with the Private Trust will make no difference. The contention of financial implication and depletion of Pension Fund on behalf of the EPFO has been negated. Subsequently the High Court of Bangalore in the case of *Sri S. Arul Prakash & Ors.* (supra) decided on 27.03.2019 has reiterated the same view and has followed the decision of the Rajasthan High Court. Madras High Court also has very recently in two cases viz. *ONGC Retired Employees Welfare Association* (supra) and *M.Masilamani & Ors. v. Union of India & Ors.*, decided on 27.03.2019 and 24.04.2019 respectively, has held that benefit of enhanced pension over the ceiling limit cannot be denied to employees of Exempted Establishments, only because their Provident Fund was deposited with the Trust and has observed that the employees of the both kinds of establishments are a part of the homogenous group of pensioners.

37. We thus have no hesitation in holding that the petitioners also form a part of the homogenous group of pensioners with those who have worked in the unexempted establishments. Any attempt by the respondents to discriminate the petitioners would amount to unintelligible and unjust classification which cannot be countenanced in law. In view of this finding, we also are of the view that the impugned circular dated 31.05.2017 has made a class within a class and has without any legal justification deprived the employees of the Exempted Establishments from receiving higher salary despite their contributions to the Provident Fund on actual salaries above the

ceiling limit. The circular seems to have been issued in a haste without any application of mind and is clearly discriminatory and violative of Article 14 of the Constitution of India. The said circular thus deserves to be quashed.

38. The question that now arises is the nature of relief that can be granted to the petitioners and also how to resolve the predicament and the dilemma of the respondents, in view of the fact that while the petitioners were contributing the requisite percentage towards the PF Fund on the actual salary, but insofar as the Pension Fund maintained by the EPFO is concerned, they were recipient only of 8.33% of the salary upto a ceiling limit. According to us, this dilemma can be easily resolved by directing the petitioners to return the higher Provident Fund benefits received by them with simple interest at the rate of 6% per annum from the date of receipt of the Provident Fund amount till the date of payment. The management of the FCI would then forward the contributions made by the petitioners as well as the employer towards the Pension Fund on actual salaries as a corpus to the Pension Fund of the EPFO, along with the accrued interest and other gains in these many years. Once this happens, the EPFO would have no difficulty in releasing the higher pensions and nor would there be any depletion of the Pension Fund, if any.
39. Petitioner no. 1 before us is a registered trade union which has espoused the cause of serving employees' of the Food Corporation of India. In view of the fact, that these are serving employees somewhat different directions would be required in their case. In our view, the cases of these serving employees do not pose much difficulty either.

The Notification dated 22.08.2014 by which the proviso to clause 11(4) of the Pension scheme was deleted has been quashed by the Kerala High Court and has been upheld by the Apex Court. Even otherwise, the same could not have applied to the existing employees who are already members of the scheme. Thus, in so far as the petitioners in this petition are concerned, the matter can be simply resolved by directing respondent nos. 4 and 5 to transfer their 8.33% contribution on the actual salaries received by the petitioners to the corpus of the pension fund for the past period along with the gains and the interest accrued thereon and continue to contribute the requisite percentage on the actual salary.

40. We, thus, allow the present petitions and quash the circular dated 31.05.2017. We hold that the petitioners would be entitled to higher monthly pension on the basis of their contributions on the actual salary, without any cutoff date and de hors the ceiling limit. We deem it fit to pass the following directions to resolve the issues as expeditiously as possible:

- i. The petitioners being employees of the exempted establishment would be entitled to the benefit of enhanced pension on the basis of their contribution to the provident fund on the actual salaries received by them.
- ii. The EPFO is at liberty to seek return of the higher provident fund contribution received by the petitioners with simple interest at the rate of 6% p.a. from the date of receipt of provident fund amount till the date of payment.
- iii. The respondent Nos. 4 and 5 are directed to cooperate with the

EPFO and render all assistance in quantifying the amount to be refunded by each of the petitioners, with interest @ 6% p.a. on such return. The Trust has already remitted 8.33% of the contribution of the petitioners on the ceiling amount. The balance corpus comprising of the remaining contributions on the actual salary @ 8.33% would be transferred by the Trust to the Pension Fund of the EPFO with all gains and the interest accrued so far.

- iv. On refund of the above-mentioned amounts, the EPFO shall calculate and disburse enhanced pension to the petitioners on the basis of the actual salaries. The arrears of pension falling due to the petitioners from the date of their respective retirement will be cleared by the EPFO and the EPFO shall continue to pay the monthly pension henceforth at the enhanced rates.
 - v. The entire exercise shall be completed by respondent no.4 and 5 and the EPFO within a period of six months from the date of receipt of a copy of this order.
41. The above writ petition is thus allowed on the above terms and directions with no order as to costs.

JYOTI SINGH
(JUDGE)

G. S. SISTANI
(JUDGE)

MAY 22nd, 2019 /rd

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