

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

Wednesday, the 12th day of April 2023 / 22nd Chaithra, 1945

WP(C) NO. 7838 OF 2023

PETITIONERS:

1. A.M. YOUSEF , AGED 70 YEARS ANAPARAMBIL (H) , MOOLEPADAM KALAMASSERY ERNAKULAM DISTRICT, PIN - 683104
2. VALSAN. C. AGED 67 YEARS CHULLIPARAMBIL HOUSE, MOOLEPADAM ROAD, KALAMASSERY ERNAKULAM DISTRICT, PIN - 683104
3. T.K. ABDUL REHIMAN AGED 68 YEARS C/O. T.A. KOCHU MOHAMMED THACHAYIL HOUSE, ASOKAPURAM, ALUVA, ERNAKULAM , PIN - 683101
4. A.G. MOHANAN AGED 68 YEARS ARAYAKULATH HOUSE, NETAJI ROAD, PADIVATTOM ANCHUMANA ERNAKULAM , PIN - 682024
5. K.X. JOHN AGED 67 YEARS KALLUVEETIL HOUSE, PARAKKATTU TEMPLE ROAD, CHEMBUMUKKU THRIKKAKARA P.O.ERNAKULAM, PIN - 682021
6. P.G. VENU AGED 69 YEARS PARAPARAMBIL HOUSE, ASOKAPURAM, ALUVA P.O, ERNAKULAM , PIN - 683101
7. K.P. SHYAMKUMAR AGED 70 YEARS M-30, KASTHURBA NAGAR, KOCHU KADAVANTHRA, ERNAKULAM, PIN - 682020
8. P.P. BABY AGED 68 YEARS PUTHENPURAYIL HOUSE, KOKKAPPILLY P.O. , ERNAKULAM, PIN - 683305
9. P. PONNUKUTTAN AGED 73 YEARS C/O. PAZHANIMALA, PRADEESH BHAVAN, PENINGAZH, HMT COLONY P.O. KALAMASSERY, ERNAKULAM, PIN - 683503
10. SURESH RAMACHANDRAN AGED 61 YEARS 39/644 UTHARA BLDG, KARAKKADROAD, M.G. ROAD P.O. , ERNAKULAM , PIN - 682016
11. K. ABDUL SALAM , AGED 66 YEARS PEEDIKAPARAMBIL (H) , CMC-31, CHERTHALA P.O. , ALAPPUZHA , PIN - 688524
12. ASOKAN P.R. AGED 71 YEARS PULIMUTTATH HOUSE, LABOUR CENTRE, EROOR, ERNAKULAM , PIN - 682306
13. POULOSE P.M. AGED 69 YEARS PATHICKAL HOUSE, RAYAMANGALAM P.O. KURUPPAMPADY, ERNAKULAM , PIN - 683545
14. BHASKARAN V.K. AGED 68 YEARS VADAKKEVETTA PARAMBU, NADUVATH NGAR, CHERTHALA, ALAPPUZHA, PIN - 688526
15. RAMAN. M.N. AGED 72 YEARS CHERIYIL HOUSE KANJIRAKAD, RAYONPURAM P.O. , PERUMBAVOOR, ERNAKULAM , PIN - 683543
16. VASUDEVA KURUP AGED 68 YEARS GEETHANJALI VEDIYATHUCHIRAM S.L. PURAM, CHERTHALA, ALAPPUZHA , PIN - 688523
17. CHITHAMBARAN P.K. AGED 75 YEARS PEECHANATTU (H) , CHENGAMANAD P.O. ALUVA, ERNAKULAM, PIN - 683578
18. K.N. GOPALAN AGED 72 YEARS ASHA NIVAS, HMT COLONY P.O. ,KALAMSSERY ERNAKULAM, PIN - 683503
19. HARIHARAN PILLAI M.S. AGED 69 YEARS MONIPPILLILE HOUSE N.F. GATE JN. , TRIPUNITHURA, ERNAKULAM , PIN - 682301
20. PANKAJAKSHAN K.K. AGED 69 YEARS PRATHIBHA, C.NAGAR P.O. , KOCHI, ERNAKULAM, PIN - 682036
21. T.K. SURESH AGED 67 YEARS KALLAMPARAMBIL (H) , POONTHANAM ROAD, THIRUVAMKULAM P.O. ERNAKULAM, PIN - 682030
22. K.V. JOY AGED 68 YEARS KAITHARAN HOUSE NEAR PATTITHAZHAM BRIDGE,

- FRIENDSHIP LANE ROAD N. PARAVUR, ERNAKULAM, PIN - 683513
23. P.R. KANAKAN AGED 71 YEARS PALLATHUMPARAMBIL, P.O. EROOR NORTH, THRIKUNITHUR, ERNAKULAM, PIN - 682306
 24. P. RAVINDRAN NAIR AGED 70 YEARS KALLAPALLIL (H), KUDAMALLOOR, PULIMCHUVADU, KOTTAYAM, PIN - 686017
 25. K.I. ABDUL JALEEL AGED 68 YEARS KOKKATTU HOUSE, EDAVANAKAD P.O. ERNAKULAM, PIN - 682502
 26. SYED MOHAMMED M.P AGED 69 YEARS MEENATHARAKKAL (H), KUNNATHERI, THAIKATTUKARA P.O., ALUVA, ERNAKULAM, PIN - 683106
 27. K. CHANDRAN, AGED 70 YEARS PRASHANTHI HOUSE, ASSARIKADAVA ROAD, PULINCHODE, ALUVA, ERNAKULAM, PIN - 683101
 28. MUKUNDAN. P AGED 70 YEARS C/O. KUNHIKRISHNAN NAIR PULUKOOL HOUSE, PALIYATHU VALAP, KANNUR, PIN - 670331
 29. K.P. KRISHNAN AGED 68 YEARS KAKKADAMPALLY HOUSE, EDATHALA, ERNAKULAM, PIN - 683561
 30. KUMARAN. C.A. AGED 71 YEARS ANU BHAVAN, HIGH COURT KAVALA, THRIKKARIYOOR P.O., ERNAKULAM, PIN - 682692
 31. ROBERT VARGHESE AGED 66 YEARS S/O. K.F. JOHN KOLLASHANY HOUSE, KAZHUTHUMUTT, THOPPUMPADY ERNAKULAM, PIN - 682005
 32. M.P. VARGHESE AGED 70 YEARS MALIKUDY PADAYATTIN HOUSE, CHEMBARKEY, SOUTH VAZHAKULAM, ALUVA, ERNAKULAM, PIN - 683105
 33. M.T. GEE VARGHESE AGED 68 YEARS MARIKUDYIL HOUSE, MANNOOR, KEEZHILLAM P.O., ERNAKULAM, PIN - 683541
 34. K.O. THOMAS AGED 71 YEARS KUMAMBATTUKUDY (H), POOPANI ROAD, KOOVAPPADY P.O. ERNAKULAM, PIN - 683572
 35. P.R. VARGHESE AGED 67 YEARS PUTHUSSERY, ERUMATHALA P.O., ERNAKULAM, PIN - 683112
 36. KRISHNANKUTTY C.V. AGED 70 YEARS HARI NAGAR, 16TH STREET, PUTHENKULANGARA, PONKUNNAM P.O., THRISSUR, PIN - 680002
 37. SATHY. S. MENON AGED 67 YEARS SREENILAYAM, KOTTEKADU LANE, VIYYURM THRISSUR, PIN - 680010
 38. SEETHA AGED 66 YEARS ALANGATTU HOUSE, OLOOR P.O., KESHAVAPADY, THRISSUR, PIN - 688306
 39. AUGUSTIN PUTHUSSERY AGED 68 YEARS PUTHUSSERY HOUSE VYDAR ROAD, SRA-50, NARAKKAL P.O., ERNAKULAM, PIN - 682505
 40. T.K. RAJAGOPALA PILLAI AGED 67 YEARS THOTTUNKAL HOUSE, KAITHAKODI P.O., PATHANAMTHITTA, PIN - 689614
 41. C.S. MADHUSUDANAN AGED 70 YEARS CHIRUKANDATH HOUSE, MANALLOOR P.O., TRICHUR, PIN - 680617
 42. RUGMANY E.N AGED 70 YEARS KODAPPARAKKAL HOUSE, ARINPOOR P.O., THRISSUR, PIN - 680620
 43. KUNJAN K.K AGED 68 YEARS PALAKUDY HOUSE, KANINADU P.O. PUTHENCROZ ERNAKULAM, PIN - 682310
 44. MOHANAN M.A., AGED 66 YEARS MANGANALIL HOUSE, VEMBILLY P.O., KUMARAPURAM ERNAKULAM, PIN - 683565
 45. VASUDEVAN NAMBOOTHIRI A.K. AGED 67 YEARS ALAMKOTH ILLAM, MARKET P.O., MUVATTUPUZHA, ERNAKULAM, PIN - 686673
 46. JOSE O.A. AGED 67 YEARS OJAS' PLOT NO. 101 NEW GARDENS, AYYANTHOLE P.O., THRISSUR, PIN - 680003
 47. T.R. KAMALAKARAN AGED 72 YEARS THIRUNILATHIL (H), MURIYAD P.O.,

IRINJALAKUDA, THRISSUR, PIN - 680683

48. K A SEBASTIAN AGED 70 YEARS KIRIYANTHAN CHAKKUNNY VILLA NAYARAMBALAM
P.O. ERNAKULAM , PIN - 682509

49. K M GEORGE AGED 75 YEARS 39/884(NJRA 274) KUNNAMKOTE HOUSE CITIZEN
LANE NORTH JANATHA ROAD KOCHI , ERNAKULAM , PIN - 682025

RESPONDENTS:

1. EMPLOYEES PROVIDENT FUND ORGANIZATION, REPRESENTED BY THE REGIONAL PROVIDENT FUND COMMISSIONER - I (PENSION), EMPLOYEES PROVIDENT FUND ORGANIZATION HEAD OFFICE, MINISTRY OF LABOUR & EMPLOYMENT (UNION OF INDIA) BHAVISHYANIDHI BHAWAN, 1, BHIKAJICAMA PLACE NEW DELHI, PIN - 110066
2. CHIEF PROVIDENT FUND COMMISSIONER ZONAL OFFICE EMPLOYEES PROVIDENT FUND ORGANIZATION PATTOM ,TRIVANDRUM , PIN - 695004
3. REGIONAL PROVIDENT FUND COMMISSIONER EMPLOYEES PROVIDENT FUND ORGANIZATION REGIONAL OFFICE NO.36/685A, BHAVISHYA NIDHI BHAVAN, KALOOR, ERNAKULAM, KERALA , PIN - 682017
4. REGIONAL PROVIDENT FUND COMMISSIONER EMPLOYEES PROVIDENT FUND ORGANIZATION REGIONAL OFFICE BHAVISHYA NIDHI BHAWAN, V K COMPLEX FORT ROAD, KANNUR, PIN - 670001
5. REGIONAL PROVIDENT FUND COMMISSIONER EMPLOYEES PROVIDENT FUND ORGANIZATION REGIONAL OFFICE BHAVISHYA NIDHI BHAWAN, P.B. NO.1016, PATTOM, THIRUVANANTHAPURAM KERALA , PIN - 695004

Writ petition (civil) praying inter alia that in the circumstances stated in the affidavit filed along with the WP(C) the High Court be pleased to direct the respondents to pay back the amount unlawfully deducted from the pension of the petitioners 1 - 49 for the month of january 2023 immediately, pending disposal of the writ petition.

This petition again coming on for orders upon perusing the petition and the affidavit filed in support of WP(C) and this court's order dated 08.03.2023 and upon hearing the arguments of M/S. S.KRISHNA MOORTHY(ERNAKULAM), MARIAMMA MERCY KANJANAPILLY, V.KRISHNAN KUTTY & BALAGOPALAN B., Advocates for the petitioners the court passed the following:

ZIYAD RAHMAN A.A., J.

W.P. (C) Nos. 8979/2023, 16018/2020, 11737/2021,
4958/2023, 5300/2023, 5442/2023, 5460/2023,
5473/2023, 5503/2023, 5510/2023, 5513/2023,
5790/2023, 5876/2023, 5987/2023, 6178/2023,
6206/2023, 6260/2023, 6284/2023, 6292/2023,
6499/2023, 6502/2023, 6681/2023, 6703/2023,
6710/2023, 6723/2023, 6725/2023, 6731/2023,
6740/2023, 6779/2023, 6811/2023, 6905/2023,
6941/2023, 6990/2023, 7015/2023, 7043/2023,
7073/2023, 7105/2023, 7141/2023, 7261/2023,
7547/2023, 7578/2023, 7614/2023, 7838/2023,
7990/2023, 8412/2023, 8727/2023, 8777/2023,
8990/2023, 9061/2023, 9177/2023, 9241/2023,
9351/2023, 9358/2023, 9494/2023, 9614/2023,
9659/2023, 9979/2023, 10175/2023, 10186/2023,
10219/2023, 10535/2023, 10650/2023, 10711/2023,
11442/2023 & 11554/2023.

Dated this the 12th day of April, 2023

O R D E R

In all these cases, the issue involved is pertaining to the legal entitlement of the petitioners for higher pension, as per the provisions of the Employees Provident Funds and Miscellaneous Provisions Act, 1952. These writ petitions are already admitted.

2. As per the decision rendered by the Honourable Supreme Court in EPF Organisation v. Sunil Kumar [2022(7) KHC 12 (SC)], certain directions were issued in this regard with respect to the options to be submitted by the employees concerned, to be eligible for the benefits of higher pension under the Employees Pension Scheme, 1995. In para 44 (iv) of the said decision, the following observations were issued by the Honourable Supreme Court.

" 44 (iv) The members of the scheme, who did not exercise option, as contemplated in the proviso to paragraph 11(3) of the pension scheme (as it was before the 2014 Amendment) would be entitled to exercise option under paragraph 11(4) of the post amendment scheme. Their right to exercise option before 1st September 2014 stands crystallized in the judgment of this Court in the case of R.C. Gupta (supra). The scheme as it stood before 1st September 2014 did not provide for any cut-off date and thus those members shall be entitled to exercise option in terms of paragraph 11(4) of the scheme, as it stands at present. Their exercise of option shall be in the nature of joint options covering pre-amended paragraph 11(3) as also the amended paragraph 11(4) of the pension scheme."

3. The Honorable Supreme Court permitted the employees who could not submit the options in the

light of para 11(3) of the pre-amendment scheme, to submit fresh options within a period of four months. Though the said period expired on 3.03.2023, the same was further extended for two months i.e. up to 3.05.2023. The petitioners in these cases are employees intending to submit their options in the light of directions of the Honourable Supreme Court.

4. The EPF organization made available to the employees the facility to submit the options through online mode by providing necessary links for the same on their website. Ext P9 in WP(C)8979/2023 is the option form the employee has to fill up while submitting the option.

5. The grievance highlighted by the petitioners is that one of the details to be furnished in the said option form is the copy of the permission under para 26(6) of the Employees Provident Fund Scheme, 1952. According to the

petitioners, even though they were permitted to pay the contribution based on the salary, exceeding the ceiling limit prescribed (Rs 5,000/- and Rs 6,500/-), as contemplated under para 26(6) of the Scheme 1952, no formal option has been submitted. According to them, submission of such an option was never necessitated or insisted upon, and instead, higher contributions were being accepted all along by the EPFO. Therefore, they are unable to fill up the said column in the online option form, and the said form is formulated in such a fashion that, unless the details of the option under para 26 (6) of the Scheme, 1952 are incorporated, they cannot successfully submit the online options. If they are not submitting their options on or before the cut-off date, i.e. 3.05.2023, they will be deprived of the benefits of the Scheme to which they are legally entitled. In such circumstances,

the petitioners seek an interim order permitting them to submit options without insisting on the details/copies of the options submitted by them under para 26(6) of the Scheme 1952.

6. The prayer for interim relief is stoutly opposed by the respective Standing Counsels for the EPFO. According to them, the option under para 26(6) is one of the crucial requirements for availing the benefits, and therefore, it is absolutely necessary for processing the options submitted by the employees.

7. The learned counsels for the petitioners would point out that higher contributions were being accepted by the EPFO all along, even without formal options from the employees and without any insistence for submission of options as referred to above. The petitioners relied on various circulars issued by the EPFO to substantiate the said contentions.

8. In circular bearing No: Pension/Misc.2005/65836 dated 22.01.2006, it was mentioned in para 4 (4) that, if the option was not exercised at the time of salary crossing the statutory limit or on 16.3.1996 as the case may be and the contributions were deposited on salary exceeding the limit after receiving instructions from the Office before the date of issue of circular dated 22.06.2004, the department has the vicarious liability (restricted to specific cases only) of honouring such a commitment and hence the pensionable salary shall be on the actual salary, i.e. on the salary (exceeding the statutory limit) on which contribution paid. However, it is true that, in para 4 (5) of the said Circular, it was clarified that, in cases where no options were given, or no commitment was made by the concerned office, but the contribution on higher pay was deposited by the establishment/employee on their

own, excess contributions will be considered as erroneous contributions, and the pensionary salary will be restricted to statutory ceiling existing from time to time. But the fact remains that the said Circular clearly indicates that certain offices of the EPFO used to give instructions for accepting the higher contributions, even without options being actually submitted, and permitting payment of higher contribution.

9. Besides the same, in Circular No Pen-1/12/33/96/Amendment/Vol.IV/16762 dated 22.01.2019 (Ext P3 in WP(C) 8979/2023), it is mentioned as follows: *"However, if an employer and employee have contributed under the EPF Scheme, 1952 on wages higher than the statutory wage limit, without joint option of employee & employer, and the EPF Account of the concerned employee has been updated by the EPFO on the basis of such contribution received, then by action of employee, employer and EPFO, it can be inferred that joint option of the employee and employer has been exercised and accepted by EPFO....."*

10. Of course, the said Circular has been withdrawn as per Circular dated 7.02.2019, in the light of the observations made by a Division Bench judgment of this Court in WP(C)13120 of 2015. However, the said Circular dated 22.01.2019 clearly conveys the manner in which the EPFO treated the issue as regards the necessity of submitting options under para 26(6) of the Scheme 1952, and it indicates that the submission of options was never made mandatory.

11. In addition to the above, the petitioners have also raised a contention that, in the judgment passed by the Division Bench of this Court, in Sasikumar P. and others v. Union of India and others [ILR 2019 (1) Kerala 614], it was clarified that, 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. Therefore, even if

the submission of an option is mandatory, it is still open for the employees to submit the same without any cut-off date. It was further contended that, even though the said judgment was set aside by the Honourable Supreme Court in Sunil Kumar's case (supra), it would not affect the direction of the Division Bench judgment of this court in Sasikumar's case (supra), as there is no contrary finding in the decision of the Honourable Supreme Court, with regard to the option under para 26(6) of the Scheme 1952. In my view, this is also a matter to be considered at the time of the final hearing.

12. Thus, when all the above aspects are considered, it can be seen that, right from the inception, higher contributions were being accepted by the EPFO, even without submitting options under para 26(6) of the Scheme 1952. It is also evident that in some cases, instructions were

issued from some of the offices of EPFO to accept the same, and in some cases, accounts of respective employees were also updated in tune with such higher contributions.

13. Further, the petitioners also have a contention that, going by the language used in para 26(6) of the Scheme, 1952, it could be interpreted as an enabling provision, which provides the power to the EPFO to accept higher contributions in certain circumstances and the same cannot be treated as a provision which makes the submission of option mandatory. The exercise of such options and their acceptance by the EPFO can be inferred from the conduct of the employees, employers and the EPFO, as mentioned in Circular dated 22.01.2019. After considering the provisions in this regard, I am of the view that this is also a relevant aspect to be considered in detail.

14. Thus, when considering all the above aspects, the only view that can possibly be taken is that the petitioners have succeeded in establishing a prima facie case, warranting an interim order in the matter. It is to be noted that the balance of convenience also favours the petitioners. Evidently, the Honourable Supreme Court fixed the cut-off date as 3.05.2023 for submitting the options. Now on account of the insistence from the EPFO to furnish the details of the option under para 26(6) of the Scheme, 1952, and also in view of the peculiar nature of the online facility provided for such submissions, they are now prevented from submitting the said options. There cannot be any dispute that if they were not permitted to submit their options before the cut-off date, they would be deprived of their opportunity to claim the benefits of the judgment of the Honourable Supreme Court forever.

Therefore, the petitioners deserve an interim order for that reason, i.e. the balance of convenience, as well.

15. The learned Standing Counsel for the EPFO also raised a contention that some of the writ petitions are submitted by the employees of the exempted establishments, and they cannot be granted the benefits. However, in para 38 of the judgment in Sunil Kumar's case (supra), this aspect was considered, and it was found that employees of the exempted establishments should not be deprived of the benefit of remaining in the pension scheme while drawing salary beyond the ceiling limit. Therefore the said contention of the EPFO is also not prima facie sustainable.

In the light above of the observations, I am inclined to pass an interim order; Accordingly, the Employees Provident Fund Organization and the authorities under the same are directed to make

adequate provisions in their online facility to enable the employees/pensioners to furnish the options in tune with the directions of the Honourable Supreme Court, without the production of the copies of option under paragraph 26(6) of the Scheme, 1952 and the details thereof, for the time being. If appropriate modifications cannot be made in the online facility, feasible alternate arrangements, including the permission to submit hard copies of the options, shall be made/granted. The facilities mentioned above shall be made available to all the employees/pensioners within a period of ten days from today.

Sd/-
ZIYAD RAHMAN A.A.,
JUDGE