



# Tax Flash News



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## Karnataka High Court ruling declares the provisions under EPF Act for International Workers as unconstitutional

### Executive summary



In October 2008, Government of India ('GOI') had made fundamental changes in the Employees' Provident Funds Scheme, 1952 ('EPFS') and Employees' Pension Scheme, 1995 ('EPS') by bringing International Workers ('IWs') under the purview of Indian social security regime. Consequently, foreign nationals who were working in an organisation covered under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act) were required to pay the Provident Fund (PF) contributions. Enabling provisions for such IWs were introduced under Para 83 (EPFS) and Para 43A (EPS).

Recently, the Karnataka High Court has struck down the provisions of para 83 of EPFS and para 43A of EPS and held these provisions to be unconstitutional and arbitrary and consequently, all the orders passed thereof are unenforceable.

## Background



In October 2008, Government of India ('GOI') had made fundamental changes<sup>1</sup> in the Employees' Provident Funds Scheme, 1952 ('EPFS') and Employees' Pension Scheme, 1995 ('EPS') by bringing International Workers ('IWs') under the purview of Indian social security regime. Consequently, foreign nationals who were working in an organisation covered under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (EPF Act) were required to pay the Provident Fund (PF) contributions. Enabling provisions for such IWs were introduced under Para 83 (EPFS) and Para 43A (EPS).

However, certain expatriate employees were exempted from PF contributions in India subject to specified conditions. Such employees have been defined as 'excluded employee' under the EPFS. The Government of India has amended Para 83 of EPFS to enlarge the definition by adding a new clause. According to the newly added clause, expatriate employees, deputed from a country with which India

has entered into a bilateral comprehensive economic agreement prior to 01 October 2008, will also qualify as excluded employee.

With respect to withdrawal, the Government of India amended the refund clause by a notification<sup>2</sup> dated 05 October 2012.

According to the amended clause, IWs who are covered under a Social Security Agreement (SSA) between India and any other country can withdraw their accumulated PF balance under EPFS on ceasing to be an employee in an establishment covered under EPF Act.

In view of the special provisions introduced for IWs, a petition was filed in the Bombay High Court in the case of Sachin Vijay Desai vs Union of India & Ors (Writ Petition no. 1846 of 2018) challenging the provisions for IWs as arbitrary and discriminatory. The Bombay High Court had dismissed the petition and held that provision of 'International Workers' are constitutionally valid. The court had held that, the international worker forms a separate and distinct class by themselves. Special provisions were sought to be made for such class of employees which would include the Indian workers going to work abroad and non-Indian workers going to be working in India.

<sup>1</sup> The Gazette of India

[http://egazette.nic.in/WriteReadData/2008/E\\_538\\_2010\\_002.pdf](http://egazette.nic.in/WriteReadData/2008/E_538_2010_002.pdf)

<sup>2</sup> The Gazette of India

[http://egazette.nic.in/WriteReadData/2012/E\\_507\\_2012\\_020.pdf](http://egazette.nic.in/WriteReadData/2012/E_507_2012_020.pdf)

Now recently, the Karnataka High Court<sup>3</sup> has struck down the provisions of para 83 of EPFS and para 43A of EPS and held these provisions to be unconstitutional and arbitrary and consequently, all the orders passed thereof are unenforceable.

## Facts of the case



Multiple petitions before the Karnataka High Court raised a common question of law, whether introduction of para 83 of EPFS and para 43A of EPS is unconstitutional and hit by Article 14<sup>4</sup> of Constitution of India.

Since all petitions dealt with a common question, they were grouped together, and a common order was passed by the Karnataka High Court.

<sup>3</sup> In the High Court of Karnataka, dated 25th April, 2024, before the hon'ble Justice K.S. Hemalekha, writ petition no.18486/2012 (I-pf), between, Stone Hill Education Foundation and The Union of India, Regional Provident Fund Commissioner and the Central Provident Fund Commissioner

<sup>4</sup> Article 14. Equality before law –The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

## Petitioner's contention



The petitioner contended that:

- Introduction of para 83 and para 43A is opposed to the object and intendment of the EPF Act;
- The EPF Act provides for coverage of the weaker sections where there is a ceiling limit;
- The amendment is opposed to the very purpose and object of the EPF Act. The object of the legislature is to ensure for compulsory institution of contributory provident funds for weaker sections of the workers working in industrial undertakings;
- At no point of time, the EPF Act was intended to cover high-ranking officials and therefore, any amendment to the Scheme must be done within the framework of statutory provisions of the EPF Act amended to the Scheme pertaining to IWs;
- The Scheme framed under Section 5 of the EPF Act cannot go beyond the definition of 'employee' laid under the EPF Act.

- No salary ceiling limit for international workers which is in contravention to the EPF Act. The EPF Act under the Scheme provides for a ceiling limit of INR15,000 and any person who crosses the salary of INR15,000 per month is an excluded employee, but in the case of an international worker, such limit is not prescribed.
- Para 83 and para 43A are unconstitutional and hit by Article 14 of the Constitution of India and also illegal being opposed to the very object of the EPF Act.
- Article 14 is applicable to foreign citizens, even non-citizens have to be protected under Article 14 and 21 of the constitution of India.
- A foreign citizen has a right to challenge the constitutional validity of a plenary legislation or subordinate legislation under Article 14 of the Constitution of India on the ground of discrimination and under Article 21 of the Constitution of India on the ground of right to life.
- A separate legislation shall be enacted for an IW who is not covered under the Social Security Agreement or Bilateral Comprehensive Economic Agreement.

## EPFO/ GOI's contention



The Government of India (GOI) had contended that multiple changes had been made to the EPF Act by introducing special provisions for different class of workers from time to time. For example, newspapers establishments and the employees working therein were covered under the ambit of EPF Act in 1956 whereas special provisions for cine-workers were introduced in 1981. Similarly, the EPF Act was amended in 2008 to extend the coverage of IWs and accordingly para 83 was inserted under the EPFS and Para 43A under EPS.

The scheme had been amended to honour the bilateral agreements with foreign countries.

Also, to ensure that no person is deprived of the social security benefits and no Indian deputed to work outside India should be deprived of the benefits.

The GOI further contended that the rights of the Indian workers should be protected since during their posting in the overseas countries for a limited period, such Indian workers are required to make mandatory social security contributions in accordance with the laws of those countries. In such a case, even after remittance of social security contribution in the host countries, such Indian workers are not entitled to any social security.

Government of India took several steps in negotiating SSA with other countries and the benefits available to the IWs and the benefits enjoyed by the Indian workers on foreign country are based on the reciprocity and provisions of bilateral SSAs between the countries.

Thus, International Workers being a special class, and to fulfil international obligations, the Government of India has made special provisions for IWs, which is distinct from employees covered under the EPF Act and that the classification made is intelligible differentia which has rational relations to the object sought to be achieved.

The EPFS is neither discriminative nor violative of Article 14 of the Constitution and by the process of classification, the State has the power to determine who should be regarded as a class for the purpose of legislation and in relation to law enacted on a particular subject.

Considering their special status and in order to fulfil the international obligations, the GOI has made special provisions for IWs, which is distinct from the employees covered under the EPF Act.

The classification is not arbitrary and is rational and it is based on some qualities and characteristics which are found in all persons grouped together and not in others who are let out. There is a nexus between the differentia which is the basis of classification and the object of the EPF Act. The attack of the petitioners on the constitutional validity of the EPF Act based on Article 14 is, therefore, unsustainable.

As the classification held to be based on intelligible differentia, therefore, the provisions made in the scheme are neither arbitrary nor discriminatory.

In support of his case, counsel appearing for GOI and EPFO had relied upon multiple decisions of the Supreme Court and various High Courts.

## High Court's ruling



The High Court carefully considered the contentions urged by both the parties and perused the material on record, and having heard the point that arises for consideration is, *“Whether introduction of para 83 of EPFS and para 43A of EPS is unconstitutional hit by Article 14 of Constitution of India?”*

Article 14 in Indian Constitution guarantees the right to equality for every citizen of the country. It encompasses the general principles of equality before the law and prohibits unreasonable discrimination between two persons.

The honourable High court had discussed the provisions of IWs in detail.

The intention of the Parliament to amend EPFS is to ensure that no person is deprived of social security benefits and also no Indian deputed to work outside India should be deprived of the benefits.

The objective of introducing para 83 under EPFS is to protect the Indian employees going abroad to work from being subjected to the social security and to motivate these countries for entering into such Social Security Agreements with India.

Further, the High Court stated that Para 83 is a subordinate legislation and therefore, the subordinate legislation cannot travel beyond the scope of the mother Act. The GOI is unable to substantiate any nexus with the object sought to be achieved, hence para 83 is clearly discriminatory in treating the IWs of Indian origin and foreign origin differently and thus violative of Article 14 of the Constitution of India.

The distinction in the amount of contribution between an employee going to a non-SSA country and an employee from a non-SSA country coming to India is clearly discriminatory and violative of Article 14. The contribution on global salary i.e., salary earned by an international worker or remuneration received by an IW from some other country or in home country should also be computed for the purpose of the contribution is on the face of it, arbitrary and hit by Article 14 of the Constitution. Therefore, there is no rational basis for this classification nor there is reciprocity that compels to classify foreign employees from non-SSA countries as IWs.

The introduction of para 80 and 81 under the Scheme in respect of working journalists and the cine employees cannot be equated with bringing IWs under EPFS. In the case of working journalists, considering the fact that they undergo a lot of risk on duty, the said amendment was made.

The legislation has arbitrarily and unreasonably enacted para 83, the GOI introducing para 83 of EPFS and para 43A of EPS is violative of Article 14 and the classification made is unreasonable and would defeat the very intent of the EPF Act. The legislation cannot run beyond the parameters of the Parent Act.

Thus, the High Court held that the introduction of Para 83 of EPFS and Para 43A of EPS are hereby struck down as unconstitutional and arbitrary and consequently, all the orders passed thereof are unenforceable.

## Our comments



This ruling raises plethora of questions with respect to past and ongoing compliances for IWs. It is likely that the ruling may be challenged further.



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