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

\+ W.P. (C) 6657/2018

SHIVANI ..... Petitioner

Through: Mr. K.C. Mittal, Advocate with Ms. Saroj Bidawat, Mr. Yugansh Mittal, Ms. Ruchika Mittal and Mr. Amit Prakash Shahi, Advs.

versus

EMPLOYEE STATE INSURANCE CORPORATION ...... Respondent

Through: Mr. V.K. Singh and Ms. Nisha Hans, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T

% **15.07.2019**

1. The petitioner, who is an "insured person", within the meaning of clause (14) in Section 2 of the Employees State Insurance Act, 1948 (hereinafter referred to as "the ESI Act") seeks, by means of the present writ petition, issuance of a writ of mandamus, to the respondent-Employee State Insurance Corporation (hereinafter referred to as "the ESIC"), to issue, to her ward Ms. Ashi, a "Ward of Insured Persons Certificate", so as to enable her to secure admission, in the MBBS course in an Institute affiliated to the ESIC, for the academic session 2018-2019. Inasmuch as, during the pendency of this writ petition, the said academic session is almost over, the entitlement of the petitioner, to the reliefs sought by her, would

necessarily have to be gauged apropos the 2019-2020 academic session.

Facts, and applicable legal provisions

2. The petitioner is an "insured person", within the meaning of clause (14) of Section 2 of the ESIC Act, which defines the said expression thus:

> "(14) "insured person" means a person who is or was an employee in respect of whom contributions are or were payable under this Act and who is by reason thereof, entitled to any of the benefits provided by this Act;"

3. The petitioner has two daughters, namely Ms. Ashi and Ms. Riya. "e-Pehchan" cards have been issued to the petitioner, as well as to her daughters, by the ESIC.

4. Having successfully cleared her Senior Secondary Examination, Ms. Ashi appeared in the Undergraduate National Eligibility Entrance Test-2018 (UG-NEET), for the purpose of admission to the MBBS course. Consequent to clearing of the said examination, candidates are also eligible for admission to medical/dental colleges established and administered by the ESIC. A specific Admission Policy, however, stands issued by the ESIC, governing such admissions.

5. For the academic session 2018-2019, three notices, dated 29th January, 2018, 9th May, 2018 and 31st May, 2018, were issued, by the

ESIC, wherein the Admission Policy for admission to the MBBS/BDS courses in ESI Medical/Dental Colleges stands adumbrated.

6. Para 3 of the Notice, dated 29th January, 2018 *supra*, issued by the ESIC, notifying the Admission Policy for undergraduate (MBBS/BDS) submissions for the 2018-19 academic session stipulated that "wards of insured persons", under the ESI Scheme, who met the laid down eligibility criteria, including qualifying in the UG-NEET-2018 examination, could apply for admission to MBBS/BDS courses in ESIC medical/dental colleges, under the "IP quota", for the 2018-19 academic session. Para 6 set out the methodology for filling up the Insured Person (IP) Quota, and stipulated that candidates would be allotted seats, based on their 'Group' and merit-cum-preference of institution, through a centralised counselling. Para 7 specified that the critical date for determining the age of the "ward of IP", and for eligibility under the IP quota would be 1st January, 2018.

7. A second "Admission Notice", with respect to "Admission of 'Wards of Insured Persons' (IPs) in UG Course (MBBS/BDS) in ESIC Medical/Dental and some Government Medical Colleges under 'IP (IPs) Quota' for Academic Session 2018-19" was released, by the ESIC on 9th May, 2018. Para 5 set out the mechanism, for filling up the IP quota. Sub-para 5.1 stipulated that available IP quota seats in various states would be pooled on All India basis and allotted, amongst the wards of IPs. Clause b) of Sub- para 5.2.3 required an applicant to have a valid "Ward of Insured Person" (hereinafter

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referred to as "WIP") Certificate, issued by the concerned Regional Director/SRO I/C. The last date, for submission of application to the concerned ARO/SRO, for issuance of WIP certificate, was stipulated in para 6.2.

8. Annexure-1 to the aforesaid Admission Notice, dated 9th May, 2018, clarified that the remaining seats, after allocation to the All India quota and the State Government quota, would be treated as IP quota seats, and would be allotted to the WIP, to be filled up on merit-cum-preference basis. The methodology for filling up the IP quota seats was set out in para 4 of the said Annexure-1, which may be reproduced thus:

> "**4. Methodology for filling up of Insured Persons (IPs) Quota:** Available seats of "Insured Persons (IPs) Quota" in various States will be pooled on 'All India Basis' and allotted, among the wards of Insured persons (IPs). The 'guiding principles' for filling up of 'IP quota' will be as under: –
>
> > **4.1** The IP (IPs) Quota seats will be filled through merit cum preference basis.
> >
> > **4.2** Reservation policy of the Central Government will be followed, within the IP (IPs) Quota enumerated above.
> >
> > **4.3** Candidates seeking admission under 'Insured Person (IPs) Quota' will have to *fulfil the following eligibility criteria*:
> >
> > > **4.3.1** Minimum eligibility criteria for admission will be as per MCI regulations.
> > >
> > > **4.3.2** Submit "Award of Insured Person" certificate issued by Competent/designated Authority for the purpose by ESIC.

4.4 Prospective/desirous and eligible candidates will be required to appear in an All India competitive examination in force or any other similar equivalent approved Central entrance test as may be specified from time to time by ESIC.

4.5 After qualifying in such Centralised test, candidates had to respond to the advertisement by the ESIC and apply for admission under Insured Persons (IPs) Quota, **under three groups, as follows**:

- **Group-I:** IPs who have been in continuous insurable employment for a minimum period of 5 years as on, and immediately preceding the 1st January of the year of admission. The continuous insurable employment of 5 years herein means that the contribution in respect of him/her were paid/payable for not less than 78 days in all the 9 contribution periods (CPs) immediately preceding the above 1st January and shown in the table below. However, if the IP does not satisfy the requirement of the above 78 days on account of exigency/exigencies beyond the control of the IP, the 9 such contribution periods shall be allowed to reckon from among the 09 + 02* contribution periods immediately preceding the above 1st January and shown in the table below.

S.No.	Contribution periods for academic session 2018-19
(i)*	*1st April, 2012 – 30th September, 2012*
(ii)*	*1st October, 2012 – 31st March, 2013*
1.	1st April, 2013 – 30th September,

	2013
2.	1st October, 2013 – 31st March, 2014
3.	1st April, 2014 – 30th September, 2014
4.	1st October, 2014 – 31st March, 2015
5.	1st April, 2015 – 30th September, 2015
6.	1st October, 2015 – 31st March, 2016
7.	1st April, 2016 – 30th September, 2016
8.	1st October, 2016 – 31st March, 2017
9.	1st April, 2017 – 30th September, 2017

♦ **Group-II:** IPs who have been in continuous insurable employment for a minimum period of 4 years as on, and immediately preceding the 1st January of the year of admission. The continuous insurable employment of 4 years herein means that the contribution in respect of him/her were paid/payable for not less than 78 days in all the 7 contribution periods CPs) immediately preceding the above 1st January and shown in the table below. However, if the IP does not satisfy the requirement of the above 78 days on account of exigency/exigencies beyond the control of the IP, the seven such contribution periods shall be allowed to reckon from among the 07 + 02* contribution periods immediately preceding the above 1st January and shown in the table below.

S. No.	**Contribution periods for academic session 2018-19**

(i)*	*1st April, 2013 – 30th September, 2013*
(ii)*	*1st October, 2013 – 31st March, 2014*
1.	1st April, 2014 – 30th September, 2014
2.	1st October, 2014 – 31st March, 2015
3.	1st April, 2015 – 30th September, 2015
4.	1st October, 2015 – 31st March, 2016
5.	1st October, 2016 – 31st March, 2017
6.	1st April, 2016 – 30th September, 2016

♦ **Group-II:** IPs to have been in continuous insurable employment for a minimum period of three years as on, and immediately preceding the 1st January of the year of admission. The continuous insurable employment of 3 years herein means that the contribution in respect of him/her were paid/payable for not less than 78 days in all the five contribution periods CPs) immediately preceding the above 1st January and shown in the table below. However, if the IP does not satisfy the requirement of the above 78 days on account of exigency/exigencies beyond the control of the IP, the five such contribution periods shall be allowed to reckon from among the 05 + 02* contribution periods immediately preceding the above 1st January and shown in the table below.

S.No.	**Contribution periods for academic session 2018-19**
(i)*	*1st April, 2014 – 30th September,*

	2014
(ii)*	*1st October, 2014 – 31st March, 2015*
1.	1st April, 2015 – 30th September, 2015
2.	1st October, 2015 – 31st March, 2016
3.	1st April, 2016 – 30th September, 2016
4.	1st October, 2016 – 31st March, 2017
5.	1st April, 2017 – 30th September, 2017

Note:

a) It is clarified that the minimum continuous period (including all exigencies) of 5 years shall commence from 1.1.2012; of 4 years shall commence from 1.1.2013 and of 3 years shall commence from 1.1.2014 respectively.

4.6 Merit list would be prepared for each Group, i.e. Group-I; Group-II; and Group-III in that order, based on the All India rank of eligible applicants in the specified test/merit list for the year, consistent with the reservation policy of the Central Government for preparation of category -wise inter-se merit.

4.7 Candidates will be allotted the seats, based on their merit cum preference of Institution and category, through a centralised counselling for the IP(IPs) Quota, as under:

♦ Candidates belonging to Group-I would be considered for allotment of available seats first, based on their merit

cum preference of Institution and reservation status.

♦ Candidates belonging to Group-II would be considered for allotment of unfilled/leftover seats, after allotment to Group-I candidates and after the specified cut-off date. The seats would be allotted, based on their merit cum preference of Institution and reservation status.

♦ Candidates belonging to Group-III would be considered for allotment of unfilled/leftover seats if any, after allotment to Group-II candidates and after the specified cut-off date. The seats would be allotted based on their merit cum preference of Institution and reservation status.

♦ **Mop-up Counselling** – Mop-up counselling would be conducted as per feasibility. Seats falling vacant/remaining unfilled/leftover, due to any reason, would be offered to balance candidates left out from Group I; II; and III, and the allotment of these seats would be based on merit cum preference of Institution. The merit list for this counselling would be prepared from the pool of balance candidates, Group-wise, and the order of allotment of these seats would be to Group-I; Group-II; and Group-III candidates, in that order."

9. Clause 8 of Annexure-1 to the Admission Policy, as notified *vide* Notice dated 9th May, 2018, provided the following stipulations/specifications in respect of "Insured Persons":

"**Insured person** for the purpose of availing benefits of Insured Persons (IPs) Quota for his/her wards shall be, as under

a) "The 'Insured Person' shall be an 'employee' was as defined in the ESI Act; and he/she should have been in continuous insurable employment for a minimum period of 5/4/3 years as on, and immediately preceding 1st January of the year of admission; and contribution in respect of him/her were paid/payable for not less than 78 days in all the 9/7/5 contribution periods immediately preceding 1st January of the year of admission with the proviso that the return of contribution as provided under Section 44 of the ESI Act read with Regulation 26(a) of the ESI (General) Regulations be filed within 42 days of termination of contribution period to which it relates, during this 5/4/3 year period. However, the IP does not fulfil the requirement of minimum 78 days of paid or payable contribution as above in the specified CPs on account of exigency beyond control of IP, 78 days of paid/payable contribution shall be allowed to reckon from among the 02* contribution periods shown in the tables in Para (4.5) during the 5/4/3 year period for determining eligibility. The 5/4/3 year period also with extended period of one year for the purpose eligibility should lie between record the date of entry into the scheme and critical dates for eligibility, i.e. 1st January of the year of admission.

b) The insured person for the said purpose having 5/4/3 years of continuous insurable employment shall be grouped as Group-I/II/III respectively.

c) The date of entry into the scheme for calculating the minimum continuous period would be the date of registration available in the IP

database of the ESIC as uploaded by the employer in the Web Portal of ESIC.

d) In case there is default or delay on the part of the employer in getting itself or the concerned employee covered under the Scheme, the ESIC will not be responsible for the said default or delay.

e) Any period prior to the date of entry described above will not be counted towards the 5/4/3 year period of eligibility for the purpose of availing benefits of Insured Persons (IPs) Quota.

f) The combined earnings of the IP and spouse (parents of the applicant) not exceed Rs. 06 (six) lakh per annum."

10. A third, clarificatory, Notice, the subject whereof was "Clarification – Issue 'Board of Insured Person' Certificate – Academic Session 2018-19" came to be issued, by the ESIC, on 31st May, 2018. This third notice was stated to have been issued in continuation of the Admission Notice dated 9th May, 2018 *supra*. Clauses 1 to 3 of this Notice, dated 31st May, 2018, merit reproduction, *in extenso*, thus:

"**1.** In case the IP does not satisfy the condition of filing Return of Contribution (RC) as per Section 44 of the ESI Act read with Regulation 26(a) of the ESI (General) Regulations, on account of delay by the employer, the status of days worked/filing of contribution would be considered in the two grace periods (immediately preceding the first CP under consideration) already provided under each group, for determining eligibility.

2. Further, the condition under regulation 26(a) is relaxed to the extent if 78 days of contribution, paid or payable, has been filed by the due date of monthly contribution as per Regulation 31 of the ESI (General) Regulations, in the relevant six-month contribution period.

3. In such cases the IP be deemed eligible for the issue of Ward of IP certificate."

11. It becomes necessary, at this juncture, to reproduce Section 44 of the ESI Act as well as Regulations 26(a) [actually, Regulation 26(1)(a)] and 33 of the Employees State Insurance (General) Regulations, 1960 (hereinafter referred to as "the Regulations"). Section 44 of the ESI Act reads thus:

"**44. Employers to furnish returns and maintain registers, in certain cases. —**
(1) Every principal and immediate employer shall submit to the Corporation or to such officer of the Corporation as it may direct such returns in such form and containing such particulars relating to persons employed by him or to any factory or establishment in respect of which he is the principal or immediate employer as may be specified in regulations made in this behalf.

(2) Where in respect of any factory or establishment the Corporation has reason to believe that a return should have been submitted under sub-section (1) but has not been so submitted, the Corporation may require any person in charge of the factory or establishment to furnish such particulars as it may consider necessary for the purpose of enabling the Corporation to decide whether the factory or establishment is a factory or establishment to which this Act applies.

(3) Every principal and immediate employer shall maintain such registers or records in respect of his

factory or establishment as may be required by regulations made in this behalf."

Regulations 26(1) and 33 of the Regulations read as under:

"**26. Return of contribution to be sent to appropriate Office.** – (1) Every employer shall send a return of contributions in quadruplicate in Form 5 alongwith receipted copies of challans for the amounts deposited in the Bank, to the appropriate Office by registered post or messenger, in respect of all employees for whom contributions were payable in a contribution period, so as to reach that office –

(a) within 42 days of the termination of the contribution to which it relates;

(b) within 21 days of the date of permanent closure of the factory or establishment, as the case may be;

(c) within 7 days of the date of receipt of requisition in that behalf from the appropriate office."

"**33. Other modes of payments of contribution.** – Subject to the directions of the Standing Committee, the Director-General may, if he thinks fit and subject to such terms and conditions as he may impose, approve of any arrangement, whereby contributions are paid at times or in a manner other than those specified in these regulations and such arrangements may include provision for the payment to the Corporation of such fees as may be determined by him to represent the estimated additional expenses to Corporation, and may require such deposit of money by way of security as he may determine."

12. The rights of the petitioner, and the legitimacy of her claim, have to be adjudged in the backdrop of the above provisions, and the Admission Policy.

13. On 26th May, 2018, the petitioner applied, to the ESIC, for issuance, to her, of a WIP certificate. The request was reiterated on 6th June, 2018. On receiving no response, the petitioner applied, on 8th June, 2018, under the Right to Information Act, 2005. The response, from the ESIC to the petitioner, issued on 12th June, 2018, was as under:

> "With reference to your application under RTI Act – 2005 dated 08/6/2018 on the subject cited above. In this regard it is to inform you that as per the guidelines issued by ESI Hqrs for "issuing Ward Certificate" it is required "that the Return of contribution as provided uunder Section 44 of the ESI Act read with Regulation 26A of the ESI (General) Regulation be filed within 42 days of termination of contribution period to which it relates, during this 5/4/3 year period."
>
> *The above said condition was not fulfilled because of which Ward Certificate was not issued.*'
>
> (Emphasis supplied)

14. Aggrieved thereby, the petitioner has moved this Court for relief, by means of the present writ petition.

15. The petitioner has set out, in a tabular form, the number of days for which she has worked, in the various contribution periods, thus, along with the wages drawn by her:

Contribution Period	Total wages (₹)	Total days worked
1st October, 2011 – 31st March, 2012	23,861	116
1st April, 2012 – 30th September, 2012	26,903	120
1st October, 2012 – 31st March, 2013	50,332	167
1st April, 2013 – 30th September, 2013	85,906	183
1st October, 2013 – 31st March, 2014	1,02,883	183
1st April, 2014 – 30th September, 2014	88,667	183
1st October, 2014 – 31st March, 2015	58,500	179
1st April, 2015 – 30th September, 2015	57,000	179
1st October, 2015 – 31st March, 2016	59,000	167
1st April, 2016 – 30th September, 2016	60,000	183
1st October, 2016 – 31st March, 2017	60,000	181
1st April, 2017 – 30th September, 2017	50,000	153

This tabular statement has been signed and certified by the Manager, Branch Office (Shahdara), ESIC. The writ petition also points out that the salary/wages, were disbursed to the petitioner, were always worked out after deduction of her contribution, whereafter the duty to deposit the said contribution and file the return, in respect thereof, was of her employer. It is pointed out that in the event of default, on the part of the employer, in not depositing the contribution, payable under the ESIC Act, on the date when it becomes due, Section 39(5)(a) of

the ESIC Act exposes him to liability to simple interest @ 12% p.a. An employee, it is pointed out, has no way of knowing whether the employer has deposited the contribution with the ESIC in time, or has filed the requisite return the due date. Pointing out that Ms. Ashi had cleared her NEET examination, the writ petition avers that denial, to her, of a WIP certificate, would result in her being denied the opportunity of pursuing her undergraduate studies.

16. The ESIC has, in its counter-affidavit filed in response to the writ petition, sought to contend that the petitioner practised a deliberate fraud on the ESIC. To bring this point home, it has been averred thus:

(i) Though the petitioner had been divorced, from her husband Mr. Sunil Panwar in January, 2011, her status, in her application for obtaining and e-Pehchan card, was shown as "married".

(ii) The petitioner had, in her application for obtaining the WIP certificate for her daughter, shown her address as 4/2232/A, Bihari Colony, Shahdara. This, however, was the address of Mr. Sunil Panwar. The same address was shown as the address of her employer. The petitioner was, in fact, an employee of M/s J.S.R. Facility India Private Limited, which belonged to her husband Mr. Sunil Panwar.

(iii) These facts had come to the notice of the respondent only when they had scrutinised the petitioner's case, which was after

responding, to the RTI query of the petitioner, *vide* communication dated 12th June, 2018 *supra*.

(iv) The petitioner was, therefore, effectively grabbing a seat meant for the poor and impoverished.

(v) Mr. Sunil Panwar was found to be the owner/employer/associate of all the three companies where the petitioner claimed to have worked, i.e. Jai Shri Radhey Enterprises, Sumer Security and J.S.R. Facility Private Ltd. The entire façade had been created by Mr. Sunil Panwar in order to grab a WIP certificate for his daughter.

(vi) As Mr. Sunil Panwar, the father of Ms. Ashi, was a director in several Companies, Ms. Ashi, *ipso facto*, stood disentitled to the benefit of the IP quota. The ESI Act was meant for employees earning less than ₹ 21,000/– per annum.

(vii) The petitioner's daughters were not, in the circumstances, solely dependent on her. This was also established by the fact that the address of Ms. Ashi, in her NEET Admit Card was also 4/2232/A, Bihari Colony, Shahdara, Dist. New Delhi, Delhi which was the address of the petitioner and Mr. Sunil Panwar. In the said Admit Card, Mr. Sunil Panwar had signed as the father of Ms. Ashi.

(viii) The petitioner had, in her letters dated 30th May, 2018 and 31st May, 2018, averred that, in order to earn more, to bring up her daughters, she had, during the period October, 2013 to

March, 2014, worked in two establishments, and that, owing thereto, her total wages, during the said period, was ₹ 102,883/–, which was more than the maximum permissible income of ₹ 90,000/–, as per the stipulations governing the Admission Policy. However, her income dropped to the permissible limit in the very next contribution period.

(ix) As against this asseveration of the petitioner, in the records of the ESIC, contribution, during the aforesaid period October, 2013 to March 2014, was received only from Jai Shree Radhey Enterprises, and not from Sumer Security. According to the petitioner's statement, during the same period, she had worked for the same 31 days in each of the said two establishments, and had, thereby, earned more than the maximum permissible limit, to entitle an applicant to the benefit of the IP quota for admission of her ward.

(x) The situation that resulted was that, therefore, during the period January, 2013 to September, 2014, the petitioner had worked in two establishments. Moreover, during the period October, 2011 to September, 2014, she had worked in Jai Shree Radhey Enterprises and, from January, 2013 to September, 2017, in Sumer Security. She did not, however, disclose, to the ESIC, the salary received by her from each of the said establishments. If the said salary was in excess of ₹ 90,000/– within one contribution period of six months, she stood disentitled to the benefit of the IP quota.

(xi) Sumer Security had deposited the ESI contribution, in respect of the petitioner, for the period February, 2015 to September, 2017, only belatedly on 13th, 14th and 15th May, 2018, after the admission notification, for admission to the MBBS course, had been released. Obviously, therefore, this was done only in order to obtain the benefit of the IP quota. The contribution had, therefore, been deposited much after the permissible period of 42 days following the termination of the contribution periods.

(xii) The petitioner's husband, Mr. Sunil Panwar, was apparently supporting the petitioner, as well as her daughters, and bearing their expenses. The income of the petitioner's husband, Mr. Sunil Panwar, therefore, merited addition to the income of the petitioner, in order to assess the petitioner's entitlement to the benefit of the IP quota, for admission of her daughter. Viewed thus, the combined income of the petitioner and her husband, Mr. Sunil Panwar, was in excess of ₹ 6 lakhs, thereby disentitling their ward to the benefit of the said quota for securing admission to the ESI Hospitals.

17. Addressing the controversy on merits as well, para 21 of the counter-affidavit avers thus:

> "I say that in order to get the benefit of the admission policy for undergraduate courses which provides for "Insured Person Quota" in the ESIC Medical and Educational Institutions, the Insured Person should fulfil the eligibility criteria as prescribed by the admission policy. As per **Clause 8(a)** of Annexure 1 of the policy notification dated 09.05.2018, ***Firstly*** the Insured Person

shall be an employee as defined in the Act, ***Secondly*** she/he should have been in continuous insurable employment for a minimum period of 5/4/3 years, ***Thirdly*** the contribution in respect of him/her were paid/payable for not less than 78 days in all the 9/7/5 contribution periods with the proviso that return of contribution as provided under Section 44 of the ESI Act read with Regulation 26(a) of the ESI (General) Regulations be filed within 42 days of termination of contribution period to which it relates during this 5/4/3 year period. *The 1st and the 2nd condition are satisfied.* As far as 3rd condition is concerned the Petitioner failed to pay the contribution within the stipulated time and hence is not entitled to receive benefits under the category of Insured Person Quota. It is further submitted that as per **Clause (d)** of the same Clause if there is default or delay on the part of the employer in getting itself for the concerned employee covered under the Scheme, the ESIC will not be responsible for the said default or delay. It is further submitted that as per **Clause 8(f)** of the same Annexure, the proof of combined income of the IP and Spouse is to be submitted which should not exceed Rs. 6 Lakh per annum. In such case when the employer is the ex-husband of the Petitioner who is looking after the expenses of the Petitioner and her daughter, how can the total income of both the IP and the Spouse be less than Rs. 6 Lakh per annum? It is also submitted that as per **Clause 9** of the same Annexure the Ward of Insured Person will be entitled to the benefit if she is a legitimate natural born child of the Insured Person and who is dependent wholly on the earnings of the Insured Person which is not in the present case as seen in the foregoing paras."

(Emphasis supplied)

18. It is further averred, in the counter-affidavit, that there was no need to refer to the relaxation provided in the clarificatory Notice dated 31st May, 2018 *supra*, as "here the number of days of the Petitioner were already more than 78 and there is no need to look into

the two grace periods from the date of first Contribution Period under consideration".

19. The petitioner has filed a rejoinder to the counter-affidavit of the ESIC, in which she has pointed out that she declared her status as "married", while applying for her e-Pehchan card only because the application form did not contain any provision for an applicant to declare herself, or himself, as a "divorcee". She has categorically denied the allegation that Jai Shree Radhey Enterprises, or Sumer Security, was owned, or controlled, by her husband, contending, *per contra*, that Jai Shree Radhey Enterprises, located at 4/2808, Gali No. 2, Bihari Colony, was headed and controlled by the "Goswami Sisters" and that Sumer Security was a partnership firm, of which the partners were Ram Singh Mehar and Jagdish. She has contended that, during the period 1st October, 2011 till 2014, she worked in Jai Shree Radhey Enterprises, and that it was thereafter that she joined Sumer Security, where she worked till September, 2017. She has sought to submit, further, that, during the entire period, which was relevant to determine her entitlement to the IP quota for admission of Ms. Ashi, she had no concern with M/s J. S. R. Facilities India Private Limited. Insofar as the address 4/2232, Bihari Colony, was concerned, she has sought to submit that more than 100 houses bore the same address and has, in support of the said submission, annexed, to her rejoinder, the electoral list. She has also sought to explain why different addresses were reflected in different forms/applications. Apropos her income, she has drawn attention to her Income Tax return for the assessment year 2016-2017, which reflected her income as ₹ 3,00,340/–. She has

also pointed out that, as Mr. Sunil Panwar remained – and would remain – the biological father of Ms. Ashi, no exception could be taken, to his signing the Admit Card, for her NEET Examination, as her father. She has pointed out that she had worked at Jai Shree Radhey Enterprises from 7:00 AM till 2:30 PM and at Sumer Security from 4:00 to 9:00 PM. It is pointed out that the only ground provided, for rejecting the petitioner's application for issuance of WIP Certificate, is that the return of contribution, under Section 44 of the ESI Act read with Regulation 26(a) of the Regulations, had not been filed within 42 days of the termination of the contribution period to which it related. There was no allegation; it is pointed out, of any fraud having been perpetrated by the petitioner. On merits, the petitioner has reiterated that her wages had been disbursed after deduction of the contribution amount, payable to the ESIC, therefrom and that, if her employer did not deposit the said amount with the ESIC within time, she could not be prejudiced as a consequence thereof. The petitioner has questioned as to whether the respondent had taken any action, against her employer, for the default in furnishing the return, or of making the payment of ESI contribution within time, as permissible by Section 39 of the Act or Regulations 31A to 31C of the Regulations. In fine, the prayers in the writ petition have been reiterated.

20. This writ petition have come up for hearing, before a learned Single Judge of this Court, on 3rd July, 2018, on which date, after advancing lengthy arguments, the petitioner withdrew this writ petition. Thereafter, the petitioner moved Review Petition No.

282/2018, in the present writ petition, seeking review of the aforesaid order dated 3rd July, 2018, on the ground that, after the present writ petition had been dismissed as withdrawn on 3rd July, 2018, the petitioner had come across a notice, dated 19th July, 2017, issued by the ESIC, which substantially impacted the petitioner's case and, in fact, entitled her to the reliefs prayed for in the present writ petition. The said notice reads thus:

"**No. L-11/12/3/UG Adn./2017-18/MEC**

Dated : 19.07.2017

NOTICE

SUB: Eligibility for applying for "Ward of IP Certificate' in light of Writ Petitions allowed by the Hon'ble HC of Kerala – reg.

Reference captioned subject.

1. The Hon'ble High Court of Kerala has allowed Writ Petition Nos. as under :

Sl. No.	Details of the case
1	W.P.[C] No. 22018/2017- Insured Person, Jaya Krishna Kumar, IP No. 4703098992, Ward of IP, Karthik K.
2	W.P.[C] No. 22364/2017- Insured Person, Sherly Suresh, IP No. 4805317859, Ward of IP, Surya Gayathri
3	W.P.[C] No. 22399- Insured Person, Sindhu. S., IP No. 4805350858, Ward of IP, Silpa Vijayan
4	W.P.[C] No. 22439-Insured Person, Rema Shyju, IP No. 4707117439, Ward of IP, Shanya Shyju,
5	W.P.[C] No. 22444- Insured Person, Padnanabhan PP, IP No. 5402024578,

	Ward of IP, Aagna P.S.
6	W.P.[C] No. 22722- Insured Person, Prema Chandran K., IP No. 7204028887, Ward of IP, Sneha P. Nair
7	W.P.[C] No. 23118-Insured Person, N. Manoharan, IP No. 5402018549, Ward of IP, Midhun K.

2. Accordingly, it has been decided to allow admission based on provisional 'Ward of IP Certificate' issued as per directions of the Hon'ble HC of Kerala in the above cases.
3. Further, it has been decided that Insured Persons who went out of coverage from October, 2016 to December, 2016 on account of exceeding wage limit; and for whom contributions have been paid for the minimum required days in CP April, 2016 – September, 2016; and who came back under coverage of the scheme w.e.f. 01.01.2017, may be issued Ward of IP certificate under Group-I/II/III as applicable.

Dy. Med. Commissioner (ME-II)
ESIC HQ Office."

21. The aforesaid Review Petition No. 282/2018 was dismissed, by a learned Single Judge of this Court, on 25th July, 2018. Impugning the order, dated 3rd July, 2018 *supra*, passed in the present writ petition, as well as the order, dated 25th July, 2018 *supra*, dismissing Review Petition No. 282/2018, seeking review thereof, the petitioner moved the Division Bench of this Court by way of LPA No. 435/2018. It was pointed out, in the said LPA, that, apart from the aforesaid Notice, dated 19th July, 2017, issued by the ESIC, the High Court of Kerala had also, in its judgment dated 14th June, 2018 in

W.P. (C) No. 19035/2018 (***Balachandran Nair D. v. Employees State Insurance Corporation***), held that an insured person could not be deprived of the benefit of the quota available to her, or him, even if the contributions, in respect of such person, were not deposited by the employer, or were deposited late. It was also pointed out, in the LPA that, though, of the nine contribution periods applicable to her, the wages of the petitioner, for the period October 2013 to 31st March, 2014, was ₹ 1,02,883/–, which was in excess of the maximum limit of ₹ 90,000/–, the petitioner came back under the coverage of the scheme from the period April 2014 to September 2017 as, during the said period, her wages were less than ₹ 90,000/–.

22. By order dated 14th August, 2018, LPA No. 435/2018 was allowed by this Court, and the present writ petition was directed to be re-listed for hearing. While doing so, specific directions were issued, to the effect that the writ petition be reconsidered on merits "by considering the notification dated July 19, 2017 and the judgment of the Kerala High Court", referred to by the petitioner. As it was pointed out that the counselling process was due to start in two days, the Division Bench, while opining that it was not possible to allow the petitioner to participate in the counselling, till the present writ petition was decided, clarified that the counselling would be subject to the outcome of this writ petition.

23. This judgment would allude to these orders, in greater detail, presently.

24. Detailed arguments were advanced, before me, by Mr. K. C. Mittal, on behalf of the petitioner, and Mr. V.K. Singh on behalf of the ESIC.

25. Mr. Mittal has pointed out that there was no dispute regarding the petitioner having been an "employee" within the meaning of the Admission Policy, or to her having been in continuous insurable employment. This, he submits, qualified her to be regarded as an "Insured Person". There is no evidence, he points out, to indicate that the petitioner's income was more than ₹ 6 lakhs per month. Mr. Mittal has, in this context, drawn my attention to the income tax returns of the petitioner, which have been placed on record and which indicate that her income was in the range of ₹ 2.69 lakhs per annum, as well as to the income tax returns of her husband, Mr. Sunil Panwar, indicating his income to be ₹ 1.64 lakhs per annum. As such, Mr. Mittal would submit, even if the income of the petitioner and her husband were added, it would not work out to more than ₹ 6 lakhs per annum, being the maximum income permissible for being entitled to the benefit of the IP quota. He has also sought to submit that the petitioner was an employee of Jai Shree Radhey Enterprises from October, 2011 to September, 2014, and of Sumer Security from January, 2013 till September, 2017. The petitioner's husband, Mr. Sunil Panwar, he submits, was only an employee in the former establishment, and had nothing, whatsoever, to do with the latter. The petitioner joined M/s J. S. R. Facility Private limited, he points out, only in October, 2017, whereas the period in issue, in order to gauge the petitioner's entitlement to the benefits or by the was 1st October, 2013 to 30th

September, 2017. Mr. Mittal has also relied on the submissions, advanced by him in LPA No. 435/2018, the judgment in which constitutes the basis of this *de novo* hearing before me.

26. Arguing *per contra* on behalf of the ESIC, Mr. V.K. Singh first drew my attention to circular, dated 7th May, 2010, issued by the ESIC, whereby and whereunder the wage ceiling for coverage under the ESI Act was enhanced from ₹ 10,000/– to ₹ 15,000/–, w.e.f. 1st May, 2010, and sought to submit that the wages of the petitioner were in excess of ₹ 15,000/– per month. He also drew my attention, in this context, to the Income Tax return of the petitioner, which, according to him, reflected her monthly salary to be in the vicinity of ₹ 25,000/. He sought to point out that the contribution, for the periods in issue, had been realised only in 2018. Mr. Singh further pointed out that, on 3rd April, 2013, Sumer Security had written, to the ESIC, informing that it had employed ten employees, on salaries, since 1st March, 2013, and that the petitioner was not one among the said ten employees. Even so, he pointed out, contribution, in respect of the petitioner, had been paid by Sumer Security, for the month January 2013, thereby indicating that the payment of contribution was only in order to avail undue benefit of the IP scheme. In January, 2013, submitted Mr. Singh, Sumer Security was not even registered with the ESIC. Apart from these, Mr. Singh, reiterated the submissions contained in the counter-affidavit filed by the ESIC, to which allusion has already been made hereinabove. He placed reliance on the judgment of the High Court of Kerala in ***K. R. Balachandran v. Employees State Insurance Corporation, 2016 SCC Online Ker 28094*** and ***Cini Peter v. ESI***

Corporation, ***2017 SCC Online Ker 9215*** and of the High Court of Bombay in ***Samiksha v. Union of India, 2017 SCC Online Bom 9896***.

27. In rejoinder, Mr. Mittal submitted that no objection had ever been raised, by the ESIC, to the salary being drawn by the petitioner, on the ground that it was in excess of ₹ 90,000/– per month. He pointed out that, in working out the salary of the petitioner, the ESIC had added overtime (as was manifest from letter dated 25th August, 2018 from Sumer Security to the petitioner), which was in violation of the policy of the ESIC, as was reflected by information, provided by the ESIC to Sh. Nitish Sharma, Advocate, *vide* letter dated 20th September, 2018, wherein it was acknowledged that, if an employee got over time and incentive with monthly salary, due to which he has wages crossed the minimum wage limit, the ESIC contribution would be applicable and the employee would be entitled to all benefits. Mr. Mittal also sought to underscore the distinction between "income" and "salary", submitting that the income of the petitioner was no concern of the ESIC. He pointed out that, in para 12 of its counter-affidavit, the ESIC had acknowledged the factum of payment of the petitioner's contribution by Sumer Security, and sought to highlight the fact that the said firm had, in fact, generated the challan within time. He also drew attention to the various documents to indicate that the petitioner's name was present in the list of employees of Sumer Security. Finally, Mr. Mittal reiterated that the petitioner's entitlement, to admission of her ward in the hospital run by the ESIC,

under the IP category, had to be tested on the anvil of the Admission Policy, applying which her entitlement was apparent.

Analysis

28. Inasmuch as, though she had earlier withdrawn the present writ petition on 3rd July, 2018, and the proceedings stand revitalised by the order, dated 14th August, 2018, passed by the Division Bench of this Court, disposing of LPA No. 435/2018, it would be appropriate, first, to note the actual import of the said order. Before, however, adverting to the order dated 14th August, 2018, the order dated 3rd July, 2018, may be reproduced thus:

> " After lengthy arguments, Mr. Sanjoy Sharma, learned counsel appearing on behalf of the petitioner seeks leave to withdraw this petition.
>
> Leave granted.
>
> The petition is dismissed as be drawn and disposed of accordingly. Pending applications also stand disposed of."

Ordinarily, the matter should have listed here. A reading of the order reveals that the writ petition was disposed of, as withdrawn, "after lengthy arguments". Neither has any liberty been reserved, by the petitioner, to file a fresh writ petition, or to revive the writ petition which she was withdrawing, at some later stage, nor has any such liberty been granted by this Court in the order dated 3rd July, 2018. When, after arguing the matter at length, the petitioner seeks to withdraw the writ petition, and is permitted to do so, it would ordinarily signal the end of that litigation.

29. The petitioner, thereafter, moved this Court, once again, by way of W.P. (C) 7177/2018, which was also disposed of, by the following order, passed on 13th July, 2018:

> "Learned counsel appearing on behalf of the petitioner seeks leave to withdraw this petition with liberty to institute appropriate proceedings in accordance with law.
>
> Leave and liberty granted.
>
> The writ petition is dismissed as withdrawn.
>
> The pending applications shall also stand disposed of."

30. The petitioner, thereafter, moved Review Petition No. 282/2018, in the present writ petition, in which reliance was sought to be placed on the Notice, dated 19th July, 2017 *supra*, issued by the ESIC. Observing, however, that the Review Petition did not disclose when the petitioner became aware of the said notification dated 19th July, 2017, the Review Petition was dismissed, by the learned Single Judge of this Court, by order dated 25th July, 2018.

31. Against the said order, dated 25th July, 2018, passed by the learned Single Judge, dismissing Review Petition No. 282/2018, the petitioner preferred LPA No. 435/2018. Before the Division Bench, it was contended, by the petitioner, that the liberty granted, to the petitioner, by the learned Single Judge, in the order dated 13th July, 2018, to institute "appropriate proceedings", was so that the petitioner could move a review petition and that, therefore, the learned Single

Judge erred in dismissing the review petition filed by the petitioner, *vide* the order dated 25th July, 2018. It was pleaded, on merits, that the petitioner ought to be permitted to re-agitate the matter, as the notification, dated 19th July, 2017 *supra*, which was within the knowledge of the respondent but not within the knowledge of the petitioner, had been deliberately concealed, by the respondent, while the present writ petition was being argued. He contended that the said notification, dated 19th July, 2017, had come to his notice during the hearing of W.P. (C) No. 7177/2018 and that it was for this reason that he had sought liberty to withdraw the writ petition and institute fresh proceedings, incorporating the said notification dated 19th July, 2017. The Division Bench observed, and ruled, as under, in para 6 to 8 of its order, dated 14th August, 2018, while disposing of LPA No. 435/2018:

> "6. Having heard the learned counsel for the parties, no doubt that the first writ petition filed by the appellant was dismissed as withdrawn, but it is the case of the appellant that pursuant thereto notification dated July 19, 2017, which was not in her knowledge was referred to during the hearing of the second writ petition being W.P.(C) 7177/2018. The said writ petition was also withdrawn to enable the appellant file appropriate proceedings, which according to the learned counsel for the appellant was a review petition in the earlier petition being W.P.(C) 6657/2018.
>
> 7. The reliance placed by the appellant in the review petition was on notification dated July 19, 2017, which was not in the knowledge of the appellant at the time of hearing of the first petition being W.P.(C) 6657/2018. It is also not the case of the respondent that the notification was referred to in the first writ petition. Further, the learned counsel for the appellant relies on the judgment of the Kerala High Court, details of which are mentioned in the notification dated July 19, 2017 at Annexure P-3

(page 43 of the paper book). *As the effect of the said notification and the applicability of the judgment of the Kerala High Court, which according to the appellant favours her, has not been considered, we allow the appeal and set aside the orders dated July 25, 2018 and July 03, 2018 and restore W.P.(C) 6657/2018 to its original number and remand the matter to the learned Single Judge to hear the writ petition on merit by considering the notification dated July 19, 2017 and the judgment of the Kerala High Court as referred to by the appellant, as noted above.*

8. During the course of his submissions, learned counsel for the appellant submitted that counselling is due on August 16, 2018 and she be allowed to participate in the counselling. Such an order cannot be passed, till such time the issue is decided by the learned Single Judge. *Suffice to state that the counselling shall be subject to the outcome of the writ petition, to be decided by the learned Single Judge. The last candidate to be granted admission shall be notified in this respect.*"

(Emphasis supplied)

32. This writ petition having thus been given a fresh lease of life, by the above order, dated 14th August, 2018, of the Division Bench in LPA No. 435/2018, the following order came to be passed, by this Court, in the present *de novo* proceedings, on 17th August, 2018:

"3. The petitioner has filed the present petition, inter alia, praying that the petitioner be issued a "ward of insured persons certificate" in order for the petitioner to participate in the counselling for the Academic Session 2018- 19. It is stated that the counselling has commenced on 16.08.2018 and shall continue till 18.08.2018. The above captioned application was dismissed as withdrawn by an order dated 3.07.2018; however, the said order has been set aside by the Division Bench of this Court by an order dated 14.08.2018 passed in LPA No. 435/2018.

> 4. The petition is, thus, required to be heard on merits. The Division Bench has also granted an interim protection to the petitioner to the extent that the Counselling Session would be subject to the outcome of the writ petition and the last candidate, who has been granted admission would be notified in this context.
>
> 5. The petitioner's problem is that without registering and participating in the counselling, there would be no possibility for the petitioner to be accommodated, in case, the petitioner succeeds in the present petition.
>
> 6. *In the above circumstances, it is directed that the petitioner be permitted to register and participate in the counselling session. The petitioner's result shall not be declared. The petitioner would not be considered for admission either. In the event, the petitioner prevails in the present petition and is otherwise entitled for admission to the MBBS Course, the petitioner would be granted the seat that is granted to the last candidate, as is apparent from the order of the Division Bench.*
>
> 6. List for final hearing on 21.08.2018.
>
> 7. Order dasti under the signatures of the Court Master."
>
> (Emphasis supplied)

33. The afore-extracted order, dated 17th August, 2018, remains unaltered, till date. Presumably, therefore, the petitioner has participated in the counselling, which took place in August, 2018, though the result has not been declared till date.

34. I had some misgivings, while examining the record, as to whether the scope of the present *de novo* proceedings was restricted,

in any manner, by the order dated 14th August, 2018, or whether these proceedings were in the nature of an open remand. Specifically, my doubt was as to whether I had to limit my consideration to the notification dated 19th July, 2017 *supra* and the judgment of the High Court of Kerala, to which Review Petition No. 282/2018 made allusion, or whether I was to hear the matter afresh. A careful reading of the order, dated 14th August, 2018 *supra*, however, indicates that the Division Bench has, in the said order, not really corseted the manner in which I am to approach the matter, but has only directed that the writ petition be heard on merit by considering the notification dated 19th July, 2017 *supra* and the judgment of the High Court of Kerala. I am, therefore, required to reconsider the writ petition, taking into account, *inter alia*, the notification dated 19th July, 2017 and the judgment of the High Court of Kerala. The order dated 17th August, 2018 *supra*, passed by my predecessor Single Bench and extracted hereinabove, too, apparently, understands the order dated 14th August, 2018, as an order of open remand, and, both sides having accepted the order dated 17th August, 2018, I have endeavoured to re-appreciate the merits of the writ petition.

35. The recitation of facts, as contained in the writ petition, discloses that the petitioner had applied, on 26th May, 2018, for issuance, to her, of a WIP certificate, in favour of her daughter Ms. Ashi, and that, thereafter, despite the written communications, from her, to the ESIC, on 31st May, 2018 and 6th June, 2018, no information, regarding the status of her application, was communicated to her. The counter-affidavit of the ESIC, in response,

merely avers that “the petitioner vide letter dated 31.05.2018 and 06.06.2018 made a request for the grant of certificate for ward of IP but that could not be issued due to the discrepancy in the documents of the Petitioner and due to the above reasons”. It is not disputed, therefore, that no communication was addressed, by the respondent, to the petitioner, justifying the inaction on the petitioner’s application dated 26th May, 2018. It was only after the petitioner had applied for information, under the RTI act, on 8th June, 2018, that the respondent condescended, *vide* its response dated 12th June, 2018, to explain the non-issuance of the IP certificate, to the petitioner, favouring her daughter Ms. Ashi, on the ground that the return of contribution, as required under Section 44 of the DSE Act, read with Regulation 26(a) of the Regulations, had not been filed within 42 days of termination of the contribution period to which it related, during the 5 year period applicable to the petitioner.

36. This being the only ground communicated, by the ESIC, to the petitioner, justifying the inaction, on the part of the former, in processing the application, dated 26th May, 2018, submitted by the latter for issuance of WIP certificate, I see no justification, whatsoever, to allow the respondent to urge any other grounds, as have been urged by way of response to the submissions addressed, by Mr. K.C. Mittal, on behalf of the petitioner in the present writ petition, to justify its decision, which do not find place in any communication addressed, by the respondent, to the petitioner, prior to the filing of the writ petition. It is no answer for the respondent to contend that they decided to investigate the matter after the communication dated

12th June, 2018 *supra*. For the sake of completion of the present recital I have, hereinabove, set out the various contentions advanced by the respondent, in its counter-affidavit, regarding the perceived lack of *bona fides*, on the part of the petitioner, the liability of the income of the petitioner's husband to be added to the income of the petitioner, in order to assess the entitlement, of Ms. Ashi, to be treated as a WIP, and other such interrelated issues, but do not propose to adjudicate thereupon, especially as the response, of the petitioner, to these allegations, throw up various disputed issues of fact, which cannot be thrashed out and decided, for the first time, in proceedings under Article 226 of the Constitution of India.

37. The only justification provided, by the respondent, in its letter dated 12th June, 2018 *supra*, to the petitioner, to justify the non-issuance, to the petitioner, of the WIP certificate favouring Ms. Ashi, is that return of contribution had not been filed within 42 days of the termination of the contribution period to which it related, as required by Regulation 26(a) read with Section 44 of the ESI Act.

38. Section 44 of the ESI Act, and Regulation 26(1)(a) of the Regulations, stand reproduced in para 11 hereinabove. Section 44 of the ESI Act requires the employer to submit, to the ESIC, such returns, in such form and contain such particulars, relating to persons employed by him, as may be specified in the regulations made in this behalf. There is no dispute regarding the formal particulars of the returns submitted by the employers, with whom the petitioner had been employed. However, clause (a) of Regulation 26(1) of the

Regulations requires the employer to send the return of contributions, to the appropriate office, by registered post or messenger, in respect of all employees for whom contributions were payable in the contribution period, so as to reach the said office within 42 days of the termination of the contribution period to which it relates. The objection, of the ESIC, in its letter dated 12th June, 2018, is that the return of contribution, in the case of the petitioner, had not been submitted by her employer(s) within 42 days of the termination of the contribution period to which it related. At the same time, the said letter is silent regarding the exact return of contribution, which was belated.

39. Be that as it may, it is apparent, at first reading, that the Notice, dated 19th July, 2017, which was cited by the petitioner as one of the grounds on which the re-opening of the writ petition was sought, has nothing to do with the entitlement, to issuance of an Insured Person certificate, in the event of delay in submission, by the employer, of the return of contribution. The Notice dated 19th July, 2017 refers to seven writ petitions, decided by the High Court of Kerala, and there is no reference, in Review Petition No. 282/2018, to any of the said orders. A reading of the order, dated 14th August, 2018, passed by the Division Bench in LPA No. 435/2018, too, does not indicate that the attention of the Division Bench was invited to the judgment of the High Court of Kerala in any of the said writ petitions. Neither has any of the said decisions been brought to my notice, during arguments in these proceedings.

40. After referring to these orders, of the High Court of Kerala, the Notice, dated 19th July, 2017 states that it had been decided to allow admission, based on the provisional WIP certificates, issued as per directions of the High Court of Kerala in these cases. The facts of these cases are unknown; in any case, the present writ petition does not involve issuance of any provisional WIP certificate. In the absence of any details, regarding these writ petitions, being provided by learned counsel for the petitioner, or otherwise being forthcoming on the record, it is not possible for me to seek to parallelize the facts of the present case with those which obtained in the said seven writ petitions.

41. Thereafter, para 3 of the Notice, dated 19th July, 2017, states that a decision had been taken, to the effect that insured persons, who went out of coverage from October to December, 2016, on account of exceeding the wage limit, and for whom contributions had been paid for the minimum number of required days in the April to September, 2016 contribution period, and who came back under coverage of the scheme w.e.f. 1st July, 2017, would be issued WIP certificate. The communication, dated 12th June, 2018 *supra*, from the ESIC to the petitioner, makes no reference to any "exceeding", by the petitioner, of the prescribed wage limit, during any of the contribution periods applicable to the case. As such, this covenant, in the Notice dated 19th July, 2017, too, does not appear to be of any relevance, insofar as the legality, or otherwise, of the sole ground for rejecting the petitioners request, as contained in the communication dated 12th June, 2018 *supra*, from the ESIC to the petitioner, is concerned.

42. The precise ground, contained in the communication, dated 12th June, 2018 *supra*, on the basis of which the petitioner's application for issuance of WIP certificate, favouring her daughter Ms. Ashi, was rejected, is that return of contribution had not been filed, by her employer, within the period specified in Section 44 of the ESI Act read with clause (a) of Regulation 26 (1) of the Regulations. Clause 4.5 of Annexure-1 to the Admission Policy for MBBS/BDS admissions, for the academic session 2018-2019, as issued by the ESIC *vide* its Admission Notice dated 9th May, 2018 *supra*, requires the contribution, in respect of the applicant seeking WIP certificate, to have been paid/payable for not less than 78 days, in all nine contribution periods (in the case of the petitioner), immediately preceding 1st January, 2018. The letter, dated 12th June, 2018 *supra* does not allege that the petitioner was disentitled from getting a WIP certificate, in favour of her daughter, because she did not have, to her credit, "continuous insurable employment of 5 years", in the form of employment for which contribution was paid/payable for not less than 78 days in each of the nine contribution periods applicable to her (from 1st April, 2013 to 30th September, 2017). What is, instead, alleged, is that the return of contribution, for the contribution periods, was not submitted within time.

43. The requirement of submitting the return of contribution, within time, may be related to clause a) in para 8 of Annexure 1 *supra*, to the Admission Policy. The said clause incorporates a requirement, by way of a proviso, to the effect "that the return of contribution as provided

under Section 44 of the ESI Act read with Regulation 26(a) of the Regulations, be filed within 42 days of termination of contribution period to which it relates, during the 5/4/3 contribution period applicable to the applicant in question". The caveat that follows, thereafter, refers to a situation in which the insured person does not fulfil the requirement of minimum 78 days paid or payable contribution, on account of exigencies beyond her, or his, control, and would not, therefore, affect the present case, one way or the other, as there is no allegation that the petitioner did not fulfil the requirement of minimum 78 days of paid or payable contribution, during any of the contribution periods applicable to her, *vis-à-vis* her claim to issuance of a WIP certificate. Clause d) of the same para, on which the ESIC seeks to place reliance, stipulates that, in case there was "default or delay on the part of the employer in getting itself or the concerned employee covered under the Scheme", the ESIC would not be responsible therefor. There being no allegation, in the present case, of any of the employers, to whom the petitioner had worked during the period in question, having delayed getting itself, or the petitioner, covered under the Scheme, this clause, too, has no application.

44. The subsequent Notice, dated 31st May, 2018, issued by the ESIC, however, engrafted certain relaxations to the rigour of clause a) in para 8 of Annexure-1 to the Notice dated 9th May, 2018 *supra*, by providing that (i) in case the Insured Person did not satisfy the condition of filing of the return of contribution as per Section 44 of the ESI Act read with Regulation 26(a) of the Regulations, on account of delay by the employer, the status of days work/filing of

contribution would be considered with the two grace periods immediately preceding the first contribution period under consideration, for determining eligibility and (ii) the condition under Regulation 26(a) of the Regulations was relaxed if the 78 days contribution, paid or payable, had been filed (it appears that the appropriate expression should be "paid") by the due date of monthly contribution as per Regulation 31 of the Regulations. Regulation 31, it may be noted, requires the employer to pay contributions, in respect of its employees, within 21 days of the last day of the calendar month in which the contributions fall due. In other words, if the contributions are paid by the employer within 21 days of the expiry of the calendar months during which the contributions fall due, the requirement of filing of return of contributions, within 42 days of the termination of the contribution period, as contained in Regulation 26(a) of the Regulations and imported, by reference, into Clause 8 a) of the Admission Policy contained in Annexure R-1 to the Notice dated 9th May, 2018, stood relaxed. Clearly, therefore, default in filing the return of contribution within the period stipulated in Regulation 26(a) of the Regulations, was not fatal, and the delay, in compliance with the said stipulation, was condonable if the case came within Clause 1 or Clause 2 of the Notice dated 31st May, 2018 *supra*, issued by the ESIC.

45. There is no allegation, in any communication from the ESIC to the petitioner, to be found on record, or even in the counter-affidavit filed by the ESIC in response to the writ petition, to the effect that the contribution, for any of the nine contribution periods, from 1st April,

2013 to 30th September, 2017, remained unpaid. The responsibility to deposit the contribution, of the employer as well as the employee, is statutorily cast, by Section 40, as well as Section 42, of the ESI Act, on the employer. It would obviously be unreasonable to deny, to an employee, who otherwise satisfies the definition of "insured person" within the meaning of the ESI Act, the benefit of being issued a WIP certificate for her, or his, ward, merely because there has been delay, on the part of her, or his, employer, in filing the return of contribution, as required by Section 44 of the ESI Act read with Regulation 26 of the Regulations. It is obviously to provide for such an exigency that the Notice, dated 31st May, 2018, provided for relaxation from the rigour of this requirement, where the case fell within para 1, or para 2, of the said Notice. An expansive interpretation has necessarily to be accorded to the Notice dated 31st May, 2018 and, where the contributions, for all the nine contribution periods, stands paid, it would, in my opinion, be completely unreasonable to deny, to the ward of an insured person, the WIP certificate.

46. Several judicial authorities have been cited at the bar, and I have attempted to make faithful reference, thereto, in the preceding portion of this judgment. These authorities, however, do not directly address the issue of the effect of delay in filing return/returns of contribution, by the employer, or the right of the employee to issuance of a WIP in favour of her, or his, ward in such a case. Most of the authorities are concerned with non-payment of contributions, and the consequences thereof. The effect of delay in payment of contribution was, however, directly addressed, by a learned Single Judge of the

High Court of Kerala in ***Hari R. Nair v. Director General, ESI Corporation, 2018 SCC Online Ker 2537***. Paras 57 and 58 of the decision neatly encapsulate this issue, in the following words:

> "**57.** All the petitioners have been in continuous insurable employment for five/four/three years. They completed that period by the 1st January 2018. The contributions have been paid for not less than 78 days in all the nine/seven/five contribution periods. But, in most cases, this got fulfilled only when the two—(i) and (ii)—exigency periods (the extended one year) are added. But contributions, on occasions, have been paid late. The returns, too, were filed late. What should follow?
> **58.** *In all cases, the common theme is delayed filing of return. The employees do, however, fulfill the length of service and other criteria*. In WP (C) No. 19850 of 2008, besides delayed contribution, the registration too was delayed. So we will take this case first, before addressing the common issue: the delayed contribution and filing of returns."
>
> (Emphasis supplied)

47. Paras 74 to 82 of the report in ***Hari R. Nair (supra)*** explain, with commendable clarity, why the default, on the part of the employer, in filing returns of contributions in time cannot nullify the right of the employee to issuance of the WIP certificate, where she/he, otherwise, satisfies the definition of "insured person", as well as all other indicia of the Admission Policy applicable in that regard. They may, therefore, be reproduced, thus:

> "**74.** The Corporation further insists that, in all these cases, the employers did not file the returns on time. True, Section 44 of the Act, read with Regulation 26(a) of the ESI (General) Regulation, is unambiguous: the employer must file the return in 42 days after the termination of contribution period to which it relates.

75. Section 45, I may note, gives extensive powers to the Inspectors of the Corporation. These Inspectors can inspect any establishment falling within the sweep of the Act and ensure that the employer complies with the statutory mandates. Regulations 31, the Corporation, besides charging interest, may recover damages, too, as mandated under Regulation 31-C. The Corporation's Inspectors have enormous civil and police powers vis-avis the erring or lax establishments and employers.

76. Under Common Law dispensation, maxims are a source of law. The judge made law operated as the primary source of law for several hundred years before Parliament acquired legislative powers to create statutory law. It is important to understand that common law is the older and more traditional source of law, and legislative power is merely a layer applied on top of the older common law foundation. Since the 12th century, courts have had parallel and co-equal authority to make law.10 Sweeping as it may sound, it at least underlines that maxims, absent statutes, could be a source of law. Law, after all, under Article 13(3)(a), includes any Ordinance, order, byelaw, rule, regulation, notification, custom or usage having the force of law.

77. As the maxim pithily puts – *lex non cogit ad impossibilia* – the law compels no man to do that which he cannot possibly perform. The law itself and the administration of it, said Sir W. Scott, referring to an alleged infraction of the revenue laws, must yield to that to which everything must bend, to necessity; the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of laws must adopt that general exception in consideration of all particular cases. In other words, where the law creates a duty or change, and the party is disabled to perform it, with no default in her, and has no remedy over, the law will in general excuse her.

78. *Here, neither the contribution nor the filing of returns is in the employee's hands*. True, registration policy, tinkered with, may lead to abuse, as apprehended by the Corporation. But, here, we will confine ourselves to the delayed filing of returns. There is no gainsaying the fact that all the employees had their registration beyond five years. Corporation does not – rightly – insist on timely contributions, for they could be payable, too. Then what ails?

The Remedial Mechanism:

79. Finally, I may observe that *the Corporation cannot lay the blame at someone else's door*. The Regulations contain many safeguards against truant employers. Regulation 26 obliges the employer to send the returns of contributions in specific time frames: (a) within 42 days of the termination of contribution period to which it relates; (b) within 21 days of the date of permanent closure of the factory or establishment, as the case may be; and (c) within 7 days of the date of receipt of requisition in that behalf from the appropriate Office.

80. *As per Regulation 27, the employer must, on demand from the appropriate office, issue certificate of contributions paid or payable regarding an insured person in the from specified by the Director-General. An employer who is liable to pay contributions shall pay those contributions within 21 days of the last day of the calendar month in which the contributions fall due (Regulation 31).*

81. Regulation 31-A inflicts interest on contribution due, but not paid on time. Regulation 31-B prescribes the mode of recovery. Further, if an employer fails to contribute within the periods specified under Regulations 31, the Corporation, besides charging interest, may recover damages, too, as mandated under Regulation 31-C. The Corporation's Inspectors have enormous civil and police powers vis-a-vis the erring or lax establishments and employers. Corporation's power covers the entire

employer's conduct, including the contributions and returns. *For the Corporation's supervision failure, if at all; the employee cannot be left holding the baby, as if it were.*

Conclusion:

82. *So viewed from any perspective, the Corporation cannot deny the otherwise eligible Insured Person the Certificate on the premise the employer contributed or filed the returns late*. To that extent, Clause 8(a)(d) cannot be sustained."

48. The above-referred judgment, of the High Court of Kerala in ***Hari R. Nair (supra)***, has been followed by the High Court of Himachal Pradesh, in its judgment, dated 13th August, 2018 in C.W.P. 1500/2018 (***Gurjot Kaur v. Director General, ESIC, MANU/HP/1115/2018***).

49. I, too, express my respectful and complete concurrence with the view of the High Court of Kerala, as reflected in ***Hari R. Nair (supra)***.

50. As also observed, hereinabove, the counter-affidavit, filed by the ESIC, advances various submissions, over and above that contained in the communication dated 12th June, 2018, whereby the reason, for rejecting the petitioners request for issuance of WIP certificate, was transmitted to her. These allegations have been repelled by the petitioner, in her rejoinder to the said counter-affidavit. The petitioner has already lost one year of the MBBS/BDS course, and, given the fact that she was a meritorious student in the NEET

examination, and the fact that all allegations levelled are essentially against the petitioner's parents, not against the petitioner, it would not, in the interests of justice, be appropriate to allow any enquiry to be undertaken, at this stage, into the said allegations, especially as they find no place in the communication dated 12th June, 2018 *supra*, and figure, for the first time, in the counter-affidavit of the ESIC. I am guided, in adopting this course, by the following classic, and by now jurisprudentially fossilised, exposition of the law, as inimitably enunciated by Krishna Iyer, J., in ***Mohinder Singh Gill v. Chief Election Commissioner, (1978) 1 SCC 405***:

> "The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in ***Commr. of Police, Bombay v. Gordhandas Bhanji, AIR 1952 SC 16***:
>
> > "Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."
>
> Orders are not like old wine becoming better as they grow older."

51. This amnesty, however, is being extended in the special facts of this case, and keeping in mind the interests of the petitioner as a student, and is not intended to operate as a precedent for cases to follow.

52. The inevitable sequitur would be that the decision of the ESIC, not to issue WIP certificate to the petitioner, because the returns of contributions had been filed by her employer late, cannot sustain in law. That being the only ground communicated to the petitioner, on which her application for issuance of a WIP certificate had been rejected, the corollary would be that the petitioner would be entitled to issuance of the said certificate, and her daughter Ms. Ashi would, consequently, be entitled to the benefits flowing from such issuance.

53. As already observed and noted hereinabove, by order dated 17th August, 2018, passed in the present case, the petitioner's ward Ms. Ashi had been permitted to participate in the counselling process, for admission to the MBBS/BDS course, for the academic year 2018-2019, which was conducted in August, 2018. The result, thereof, was, however, directed not to be issued and it was observed that the result would abide by the outcome of these proceedings. The proceedings have continued, thereafter, and the 2018-19 section has come to an end. Counselling, for the 2019-20 session is also almost over; that, however, cannot affect the petitioner's case, as she was permitted, by interim order of this Court, to participate in the counselling for the 2018-19 academic session, which has, necessarily, in the facts of this case, to dovetail into the 2019-2020 session.

54. It is also observed that the order, dated 17th August, 2018 *supra*, which was an effective sequel to the order dated 14th August, 2018 *supra*, of the Division Bench, directed that the last candidate selected for admission, consequent counselling, would be notified regarding the pendency of these proceedings, and the interim order granted to the petitioner, and that, were the petitioner to succeed, she would be accommodated in the seat granted to the said last candidate. At this stage, however, it goes without saying that it would be completely unreasonable for this Court to unseat the said last candidate, who would have completed one year of her, or his, MBBS/BDS course by now.

55. Some balancing of equities becomes, in the circumstances, necessary.

56. Resultantly, this writ petition is allowed in the following terms:

(i) The decision, of the ESIC, to reject the petitioners application, for issuance of WIP certificate in favour of her daughter, as communicated to the petitioner *vide* the letter dated 12th June, 2018 *supra* (issued by way of a response under the Right to Information Act, 2005) is quashed and set aside.

(ii) The petitioner is declared as eligible for issuance of a WIP certificate, which shall, therefore, forthwith be issued to her.

(iii) The result of the petitioners counselling, for the 2018-2019 academic session, shall be announced, and the petitioner shall be granted admission, to the MBBS/BDS course, albeit for the 2019-2020 academic session, on the basis thereof. The shall, however, be without unseating any student who has already been granted admission. In case the college, to which the petitioner would be entitled to secure admission, as per the result of her counselling in August 2018, does not have any seat available, to accommodate the petitioner, the ESIC shall accommodate her in any other college, run by it, in which seats are available, for which the petitioner would be allowed the privilege of choice.

(iv) *Ex hypothesi*, should candidates have been admitted, already, to all seats in all colleges of the ESIC, the petitioner would be admitted, as per the result of her counselling in August 2018, if necessary by creating a supernumerary seat.

(v) At any rate, the ESIC would ensure that the petitioner is granted admission to the MBBS course, in one of the colleges run by it.

57. There shall be no order as to costs.

C. HARI SHANKAR, J

JULY 15, 2019
HJ