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

+ W.P.(C)No.11837/2015, CM Nos. 31446/2015, 5331/2016, 43454/2016 17381/2016, 43435/2016, 46077/2016 & 17519/2016

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Reserved on : 28th August, 2017
Date of decision : 12th October 2017

BALARAJ JADHAV & ORS.

..... Petitioners

*Through: Mr. Colin Gonsalves,
Sr. Adv. with Mr.
Govind Jee and Mr.
Devesh Kumar
Agnihotri, Advs.*

versus

UNION OF INDIA & ORS.

..... Respondent

*Through: Mr. Akshay Makhija,
CGSC for UOI with
Ms. Seerat Singh and
Mr. Aditya Goyal,
Advs. for R-1/UOI.
Mr. Yakesh Anand
and Mr. Nimit
Mathur, Advs. for R-
2/ESIC.
Ms. Rajdipa Behura,
SPP with Mr.
Philomon Kani, Ms.
Kriti Handa and Mr.
Vignaraj Pasayat,
Advs. for R3/CBI.
Mr. T.Singhdev, Mr.
Tarun Verma and Ms.
Biakthansangi, Advs.
for R-4/MCI.*

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT

GITA MITTAL, ACTING CHIEF JUSTICE

1. The present writ petition, has been instituted in public interest, under Article 226 of the Constitution of India to ensure compliance by the authorities with the mandate of the Employees' State Insurance Act, 1948 (hereafter the 'ESI Act') as also seeking the following prayers:

- “(a) Issue a writ of mandamus directing the Respondent No. 2 to comply with its statutory obligation contained in Section 59B of the ESI Act.*
- (b) Issue an appropriate Writ order or direction for quashing the impugned Memorandum dated 05.01.2015 issued by the Respondent No. 2;*
- (c) Issue an appropriate Writ of Mandamus to the ESIC to implement the recommendations contained in the Performance Audit Report of the CAG;*
- (d) Issue an appropriate Writ order or direction to the Respondent No. 2 to investigate the issue of misappropriation of funds by ESIC (including as identified in the Performance Audit by the CAG), and initiate appropriate legal proceedings against the officials of ESIC who are responsible for such actions on accounts of the strictures passed by the Respondent No. 5 in its Report No. 30 of 2014;*

- (e) *Issue an appropriate Writ order of direction to Respondent No. 2 to take steps to ensure the operation of the Medical Colleges in accordance with the norms of the Medical Council of India;*
- (f) *Issue an appropriate writ to handover the administration of all ESIC Medical Colleges to Senior Medical Teachers by appointing Senior Medical Teachers as Medical Commissioner and Deputy Medical Commissioner at Central level or in the alternate establish a separate Medical Education Commissionerate for efficient administration of ESIC Medical Colleges and also a full time Dean should be appointed in all ESIC Medical Colleges at the local level;”*

2. With the object of providing benefits to the employees in case of sickness, maternity and employment injury and to make provisions for matters in relation thereto, the Legislature enacted the Employees’ State Insurance Act, 1948 on the 19th of April 1948.

3. In order to effectuate administration of the purposes of the Act, the Central Government has established the Employees State Insurance Corporation (“ESIC” hereafter) in accordance with Section 3 of the Act. This corporation is a body corporate by the name of the Employees State Insurance Corporation having perpetual succession and a common seal.

4. The present petition alleges breach of Section 59B of the Act. In keeping with the spirit, intendment, purpose and scheme of the statute, the funds of the ESIC are derived primarily from

contributions made by employers as well as the employees under the Act.

5. As per the writ petitioners, the ESIC has been able to provide extensive coverage to several workmen. The petitioner further avers that from data obtained from the website of the ESIC, as on 31st March, 2014, the insurance cover under the provisions of the Act has been provided to the following:

<i>No. of Insured Person family units</i>	<i>1.95 Crores</i>
<i>No. of Employees</i>	<i>1.74 Crores</i>
<i>Total No. of Beneficiaries</i>	<i>7.58 Crores</i>
<i>No. of Insured women</i>	<i>0.29 Crores</i>
<i>No. of Employers, etc.</i>	<i>6.69 Lacs</i>

6. Both sides rely on the legislative scheme in support of their contentions. The same consequently deserves to be considered in some detail.

7. Our attention has been drawn to the following provisions of the statute which for expediency are extracted hereunder :

“2. Definitions.- *In this Act, unless there is anything repugnant in the subject or context,-*

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(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;

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8. Constitution of Standing Committee.—

A Standing Committee of the Corporation shall be constituted from among its members, consisting of—

- (a) a Chairman, appointed by the Central Government;*
- (b) three members of the Corporation, appointed by the Central Government;*
- (bb) three members of the Corporation representing such three State Governments thereon as the Central Government may, by notification in the Official Gazette, specify from time to time;*
- (c) eight members elected by the Corporation as follows:—*
 - (i) omitted*
 - (ii) three members from among the members of the Corporation representing employers;*
 - (iii) three members from among the members of the Corporation representing employees;*
 - (iv) one member from among the members of the Corporation representing the medical profession; and*
 - (v) one member from among the members of the Corporation elected by Parliament;*
- (d) the Director-General of the Corporation, ex officio.*

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18. Powers of the Standing Committee.—

(1) *Subject to the general superintendence and control of the Corporation, the Standing Committee shall administer the affairs of the Corporation and may exercise any of the powers and perform any of the functions of the Corporation.*

(2) *The Standing Committee shall submit for the consideration and decision of the Corporation all such cases and matters as may be specified in the regulations made in this behalf.*

(3) *The Standing Committee may, in its discretion, submit any other case or matter for the decision of the Corporation.*

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26. Employees' State Insurance Fund.—

(1) *All contributions paid under this Act and all other moneys received on behalf of the Corporation shall be paid into a Fund called the Employees' State Insurance Fund which shall be held and administered by the Corporation for the purposes of this Act.*

(2) *The Corporation may accept grants, donations and gifts from the Central or any State Government, local authority, or any individual or body whether incorporated or not, for all or any of the purposes of this Act.*

(3) *Subject to the other provisions contained in this Act and to any rules or regulations made in this behalf, all moneys accruing or payable to the said Fund shall be paid into the Reserve Bank of India or such other bank as may be approved by the Central Government to the credit of an account styled the account of the Employees' State Insurance Fund.*

(4) *Such account shall be operated on by such officers as may be authorised by the Standing Committee with the approval of the Corporation.*

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28. Purposes for which the Fund may be expended.—

*Subject to the provisions of this Act and of any rules made by the Central Government in that behalf, the **Employees' State Insurance Fund** shall be expended only for the following purposes, namely—*

*(i) **payment of benefits and provision** of medical treatment and attendance to **insured persons** and, where the medical benefit is extended to **their families**, the provision of such medical benefit to their families, in accordance with the provisions of this Act and defraying the charges and costs in connection therewith;*

*(ii) **payment of fees and allowances to members of the Corporation, the Standing Committee and the Medical Benefit Council, the Regional Boards, Local Committees and Regional and Local Medical Benefit Councils;***

*(iii) **payment of salaries, leave and joining time allowances, travelling and compensatory allowances, gratuities and compassionate allowances, pensions, contributions to provident or other benefit fund of officers and servants of the Corporation and meeting the expenditure in respect of officers and other services set up for the purpose of giving effect to the provisions of this Act;***

*(iv) **establishment and maintenance of hospitals, dispensaries and other institutions and the provision of medical and other ancillary services for the benefit of insured persons** and, where the*

*medical benefit is extended to their families, **their families**;*

*(v) **payment of contributions to any State Government, local authority or any private body or individual, towards the cost of medical treatment and attendance provided to insured persons and, where the medical benefit is extended to their families, their families including the cost of any building and equipment, in accordance with any agreement entered into by the Corporation.***

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38. All employees to be insured.—

*Subject to the provisions of the Act, **all the employees in factories or establishments to which this Act applies shall be insured in the manner provided by this Act.***

39. Contributions.—

*(1) **The contribution payable under this Act in respect of an employee shall comprise contribution payable by the employer (hereinafter referred to as the employer's contribution) and contribution payable by the employee (hereinafter referred to as the employee's contribution) and shall be paid to the Corporation.***

*(2) **The contributions shall be paid at such rates as may be prescribed by the Central Government:***

Provided that the rates so prescribed shall not be more than the rates which were in force immediately before the commencement of the Employees' State Insurance (Amendment) Act, 1989.]

*(3) **The wage period in relation to an employee shall be the unit in respect of which all contributions shall be payable under this Act.]***

(4) The contributions payable in respect of each wage period shall ordinarily fall due on the last day of the wage period, and where an employee is employed for part of the wage period, or is employed under two or more employers during the same wage period, the contributions shall fall due on such days as may be specified in the regulations.

(5)(a) If any contribution payable under this Act is not paid by the principal employer on the date on which such contribution has become due, he shall be liable to pay simple interest at the rate of twelve per cent per annum or at such higher rate as may be specified in the regulations till the date of its actual payment:

Provided that higher interest specified in the regulations shall not exceed the lending rate of interest charged by any scheduled bank.

(b) Any interest recoverable under clause (a) may be recovered as an arrear of land revenue or under Section 45-C to Section 45-I.

Explanation.—In this sub-section, “scheduled bank” means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934.

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46. Benefits.—

*(1) Subject to the provisions of this Act, **the insured persons [their dependants or the persons hereinafter mentioned, as the case may be,]** shall be entitled to the following benefits, namely—*

*(a) periodical payments **to any insured person** in case of his sickness certified by a duly appointed*

medical practitioner or by any other person possessing such qualifications and experience as the Corporation may, by regulations, specify in this behalf] (hereinafter referred to as sickness benefit);

*(b) periodical payments to an insured woman in case of confinement or miscarriage or sickness arising out of pregnancy, confinement, premature birth of child or miscarriage, such woman being certified to be **eligible for such payments** by an authority specified in this behalf by the regulations (hereinafter referred to as maternity benefit);*

*(c) periodical payments to an insured person suffering from disablement as a result of an employment injury sustained as an employee under this Act and certified to be **eligible for such payments** by an authority specified in this behalf by the regulations (hereinafter referred to as disablement benefit);*

*(d) periodical payments to such dependants of an insured person who dies as a result of an employment injury sustained as an employee under this Act, as are **entitled to compensation** under this Act (hereinafter referred to as dependants' benefit);*

(e) medical treatment for and attendance on insured persons (hereinafter referred to as medical benefit); and

(f) payment to the eldest surviving member of the family of an insured person who has died, towards the expenditure on the funeral of the deceased insured person, or, where the insured person did not have a family or was not living with his family at the time of his death, to the person who actually incurs

the expenditure on the funeral of the deceased insured person (to be known as funeral expenses):

*Provided that the amount of such payment shall not exceed such amount as may be prescribed by the Central Government and the claim for such payment shall be made within three months of the death of the **insured person** or within such extended period as the Corporation or any officer or authority authorised by it in this behalf may allow.*

*(2) The Corporation may, at the request of the appropriate Government, and subject to such conditions as may be laid down in the regulations, **extend the medical benefits to the family of an insured person.***

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59. Establishment and maintenance of hospitals, etc., by Corporation.—

*The Corporation may, with the approval of the State Government, **establish and maintain in a State such hospitals, dispensaries and other medical and surgical services as it may think fit for the benefit of insured persons and (where such medical benefit is extended to their families) their families.***

*(2) The Corporation may enter into agreement with any local authority, private body or individual in regard to the provision of medical treatment and attendance **for insured persons and (where such medical benefit is extended to their families) their families, in any area and sharing the cost thereof.***

(3) The Corporation may also enter into agreement with any local authority, local body or private body for commissioning and running Employees' State Insurance hospitals through third party participation for providing

medical treatment and attendance to insured persons and where such medical benefit has been extended to their families, to their families.

59A. Provision of medical benefit by the Corporation in lieu of State Government.-

(1) Notwithstanding anything contained in any other provision of this Act, the Corporation may, in consultation with the State Government, undertake the responsibility for providing medical benefit to insured persons and where such medical benefit is extended to their families, to the families of such insured persons in the State subject to the condition that the State Government shall share the cost of such medical benefit in such proportion as may be agreed upon between the State Government and the Corporation.

(2) In the event of the Corporation exercising its power under sub-section (1), the provisions relating to medical benefit under this Act shall apply, so far as may be, as if a reference therein to the State Government were a reference to the Corporation.”

(Emphasis supplied)

8. In the year 2009, based on the recommendations of the ESIC, the Ministry of Labour and Employment, Government of India formulated proposals for comprehensive amendments to the ESI Act and introduced the Employees’ State Insurance (Amendment) Bill, 2009 which along with further amendments as suggested by the Standing Committee was passed by both houses of the Parliament and received the assent of the President of India and was enacted as the Employees State Insurance (Amendment) Act, 2010 which came into effect from 1st June, 2010. Section 17 of the Amending Act reads as follows:

“17. After Section 59A of the principal Act, the following section shall be inserted, namely:-

“59B. The Corporation may establish medical colleges, nursing colleges and training institutes for its para-medical staff and other employees with a view to improve the quality of services provided under the Employees’ State Insurance Scheme.””

(Emphasis supplied)

9. In compliance with the statutory mandate contained in Section 59B of the ESI Act (*inserted in 2010*), the ESIC started taking steps for establishment of medical, dental and nursing colleges all over India. It is averred in the writ petition, that the monies invested in these medical colleges are to the tune of Rs.10,000 Crores, the source of which were the funds of the ESIC and therefore were comprised of contributions by the insured persons under the ESI Act.

10. It is further averred that some of these medical colleges were already in operation while some were ready for operation. At the time of filing of the writ petition, there were approximately 1400 undergraduate medical students (*MBBS, BDS and Nursing*) and about 250 postgraduate students already studying the in 10 medical colleges, which had been set-up and were already in operation, while more than 5400 teaching staff, who were experienced doctors having specialization in different fields and equivalent or more number of non-teaching staff were employed in these colleges.

11. The students studying in these ESI Colleges were required to execute a bond, undertaking to work in ESIC hospitals or

dispensaries for a period of five years after completion of their education.

12. The writ petition makes a grievance that in addition to gross mismanagement of the funds of the ESIC, as noted in the report of the statutory audit conducted by the Comptroller and Auditor General (CAG) under Section 34 of the enactment, the ESIC is not complying with the statutory mandate of Section 59B of the act as the infrastructure of the colleges and the appointment of the faculty is not in accordance with the provisions of the Indian Medical Council Act, 1956 and regulations framed thereunder.

13. The prime grievance raised by the writ petitioner is that the ESIC has taken steps to defeat the legislative mandate contained in Section 59B of the ESI Act by transferring medical colleges established by it to State governments who were willing for such transfer.

14. The foundation for this decision is espoused in the 163rd Meeting of the ESIC held on 4th December, 2014 wherein it was *inter alia* resolved thus:

- “a. ESIC should exit the field of medical education entirely as it is not the core function of the ESIC and the objective of section 59B of the Act is unlikely to be met.***
- b. Hand over on-going medical colleges and other Medical Education Institutions having separate infrastructure to State governments willing for such transfer.***
- c. ESIC may neither undertake further admissions in***

the medical colleges and other Medical Education institutions (PG, Nursing, Para-medical & Dental, including Dental College, Rohini) nor start new medical colleges. All ongoing Medical Education programs may continue till the admitted students pass out or (they) are adjusted as per provisions of the Essentiality Certificate issued by the State Government, whichever is earlier”

(Emphasis supplied)

15. Accordingly, on 5th January, 2015 the ESIC issued the impugned memorandum requiring the Deans/Medical Superintendents of all the ESIC Medical Colleges/Dental Colleges/PGIMSRs (Postgraduate Institutes of Medical Science and Research)/Nursing Colleges and Para-medical Institutes to be guided by the above and to take the necessary action in related matters with regard to their respective institutions.

16. Some objections were expressed with regard to the decisions taken at the 163rd Meeting of the ESIC at its 164th Meeting held on 18th February, 2015. Reservations were expressed by the members who observed that State Governments were unable to even run the hospitals functioning under their control and it was queried as to how they would run the ESI medical institutions as well. The members advocated formation of an Expert Committee to examine the issue on merits. It is most significant to take note of the valuable suggestion which was mooted that an amendment in the ESI Act would be necessary for exiting from medical education.

17. The agenda of “*continuation of otherwise all medical education projects in ESIC*” was taken as Item No.2 in the 164th Meeting and it was *inter alia* decided as follows :

“3) *The matter came up for discussion again in the 164th meeting of the ESI Corporation held on 18th February, 2015 during the confirmation of the Minutes of the 163rd meeting. The Members raised concerns about the uncertainty regarding the future of students and faculty at these institutions, in the event of discontinuance of admissions. Several representations from existing students and other were also received requesting continuation of admissions.*

4) *In the interest of the students, the matter was considered again and it was decided, with the approval of the Chairman, **ESIC that admissions to ongoing MBBS/BDS/PG courses at ESIC Medical Education Institutions shall be continued. It is being Reported at Annexure-II.***

5) *The approach of the ESIC to the 12 medical colleges under construction was considered, location-wise, taking into account the interest of IPs and students and suggestions received from various stakeholders and the State Governments. The decisions taken, with the approval of the Chairman, ESIC, based on this approach are being **Reported at Annexure-III.***”

(Emphasis by us)

18. The minutes placed before this court thus shows that members advocated for maintenance of a *status quo* on medical education till a concrete decision was taken. The minutes of the 164th Meeting note the representations received from existing students and others requested for continuation of admissions. In the interest of the students, the matter was reconsidered and it was

decided that admissions to ongoing MBBS/BDS/P.G. courses at ESI medical institutions shall be continued. However, it was noted that the admissions to the nursing college for the academic session 2014-15 were not undertaken as per the decision taken in the 162nd Meeting as running of nursing colleges may not have been consistent with the objective of setting up such colleges as per Section 59B of the ESI Act and that it may also not have been cost effective. The decision noted at Sr.No.(c) of the 163rd Meeting held on 4th December, 2014 was decided to be implemented.

19. However, notwithstanding the deliberations at the 164th Meeting, the ESIC at its 165th meeting, continued the process of transfer of the medical colleges. It is complained that the decision of the Corporation to exit from the field of Medical education would seriously prejudice the interest of the beneficiaries of the ESI Scheme that is the insured persons.

20. The present writ petition was filed on or about 8th of December, 2015. Notice was issued on the writ petition by the order dated 18th December, 2015 and vide order dated 16th February, 2016 *status quo* was ordered regarding the medical colleges established under Section 59B of the ESI Act.

21. The respondents have submitted that subsequent to the meeting held on 18th February, 2015, a decision was taken by the respondent no.2 vide a Memorandum dated 18th March, 2015 to continue the ongoing MBBS/BDS/P.G. courses at the ESIC medical education institutions. It has been submitted by Mr.

Yakesh Anand, Id. counsel for the respondents that therefore, no effect was given to the decision taken in the 163rd Meeting of the respondent no.2 held on 4th December, 2014 which had formed the basis of the letter dated 5th January, 2015. As per the statement contained in the counter affidavit dated 21st March, 2016 of the respondents, all existing medical and dental colleges, PG courses at ESIC medical institutions are continuing to impart medical education to the ongoing MBBS/BDS/PG courses at the ESIC medical institutions. The respondents assert that as the courses shall be continued, the grievance of the petitioners in the writ petition stands satisfied and therefore, the writ petition rendered infructuous and liable to be dismissed.

22. The respondents also submit that the decision to stop imparting the medical education by the ESIC and for transfer of some of the existing medical colleges and hospital to a State Government or to State Government undertaking was taken by the respondent no.2 in the interest of proper functioning and management of the medical and dental colleges run by it.

23. On the 23rd of March 2015, the ESIC had also issued a press release, announcing the decision of the Minister of State for Labour and Employment (I/C), Government of India that the ESIC would continue with the already running three medical colleges at Rajajinagar, Bangalore, Karnataka; K.K. Nagar, Chennai, Tamil Nadu; Joka, Kolkata, West Bengal and one dental college at Rohini, Delhi; that the ongoing PG courses would also continue on

similar lines; that the ESIC would not undertake any more medical education projects. This press release notes that ESIC was running four medical colleges and one dental college besides eight more medical colleges which were under construction. The press note points out that the core function of ESIC was to provide social security i.e. cash benefit and medical benefit to the *insured persons* under the ESI Scheme and that it would help ESIC in concentrating on its core function if the ESIC exited from the field of medical education. For this reason, the decision was taken in the 163rd Meeting to exit from medical education. However, because of apprehensions of students and other persons, after the 164th Meeting, a revised circular was issued to the effect that ESIC would continue to admit students at its already running four medical colleges and one dental college. The press note however, points out that the ESIC was continuing with its efforts to transfer other medical college projects to State governments concerned.

24. On the other hand, the petitioners have placed before us the decision taken by the ESIC in its 165th Meeting held on the 7th of April 2015. In this meeting, the Chairperson of the ESIC had mentioned that medical education was not the core activity of the ESIC; that the ESIC corpus belonged to employees and all efforts will be made to ensure that investments made from out of contributions of employees do not go waste but is utilized gainfully. It was also noted that each medical college would require a specific decision. The ESIC reiterated the decision that it

would neither set-up another medical college nor any other new medical institutions in the future.

25. In the present proceedings, on the 25th of July 2016, the ESIC filed an application being CM No.27823/2016 seeking recall and vacation of the *ad interim* order passed by this court on the 16th of February, 2016. The application was premised on the submission that on 18th September, 2015, a writ petition bearing **CWP No.3985/2015** stood filed before the High Court of Himachal Pradesh at Shimla by one Sh. Yogesh Kumar Chandel against the Union of India and the ESIC (*impleaded therein as respondent no.5*) with regard to running of the ESI Medical College and Hospital at Mandi, Himachal Pradesh. It was stated by the applicant that on the 26th of April 2016, the High Court of Himachal Pradesh had passed the following orders :

“In terms of orders, dated 12th April, 2016 and 20th April, 2016, passed by this Court, respondents No.5 and 6 were to file response, have not done the needful so far. The learned counsel for the said respondents, under instructions, stated that respondents No.5 and 6 have already sent a proposal to respondent No.2 in February, 2016, and the matter is now pending with respondent No.2.

Keeping in view the fact that the issue involved is of greater public importance and is in the interest of entire State of Himachal Pradesh, we direct the Director General of Employees State Insurance Corporation, Panchdeep Bhawan, New Delhi, as also respondent No.3 i.e. Principal Secretary (Health), to the Government of Himachal

Pradesh, Shimla, to remain present in person before this Court on the next date of hearing.

Mr.Ashok Sharma, learned Assistant Solicitor General of India, also to seek instructions from respondent No.2 qua the proposal sent by respondents No.5 and 6, referred to supra. In default, respondent No.2 also to appear in person before this Court on the next date of hearing.”

26. In the order dated 27th April, 2016, the High Court of Himachal Pradesh had noted that the issue involved was of greater public importance and was in the interest of entire State of Himachal Pradesh. In this background, the Director General of the ESIC as well as the Principal Secretary (Health), Government of Himachal Pradesh, Shimla were directed to remain present on the next date.

27. On the 11th of May 2016, the High Court of Himachal Pradesh reiterated the direction for personal appearance of the officials. In para 9 of the application filed before this court, the ESIC has also extracted the order dated 19th May, 2016 passed by the High Court of Himachal Pradesh in **CWP No.3985/2015** which reads as follows :

*“Mr. Ashok Sharma, the learned Assistant Solicitor General of India has produced the communication dated 17th May, 2016 across the Board, made part of the file, whereby it has been approved to transfer **the ESIC Medical College, Ner Chowk, Mandi to the State Government. It contains some conditions, which are to be followed by ESIC before handing over the College to the***

State Government. The State Government has also to take steps in terms of the conditions contained in item Nos. 2 to 6.

At this stage, the learned Advocate General stated at the Bar that they have taken the steps.

Mr. Sumit Raj Sharma, Advocate, for respondents No. 5 and 6 stated that the College will be finally handed over to the State Government in the end of July, 2016, in terms of the condition contained in Item No.1.

Respondents No. 5 and 6 to file compliance report in the first week of August, 2016. List on 4th August, 2016.”

(Emphasis by us)

28. In the application, it was contended by ESIC, that the arrangement between the ESIC and the concerned State Government had been done under the supervision of the High Court of Himachal Pradesh and that pursuant to the direction of the High Court of Himachal Pradesh, the Memorandum of Understanding dated 4th of July 2016 stood executed between the ESIC and the Government of Himachal Pradesh whereby in consideration of “*reimbursement of some balance liability of Rs.285.82 crores in five equal annual interest free installment, the State Government will run the Medical Colleges and Hospitals of ESI Corporation for a period of 99 years commencing on the date of signing of MoU*” (page 542).

29. Yet another application being CM No.32984/2016 was filed by the ESIC in these proceedings on the 5th of September 2016,

seeking permission to hand over the ESIC Hospital/Medical College, Coimbatore to the Government of Tamil Nadu contending that if it was not permitted to hand over the building, the same would prejudice the future of MBBS students who had taken admission to the ESIC college. It was pointed out that the college in Coimbatore was inaugurated on the 5th of August 2016 and that 63 students had so far joined the college and that classes were to commence from 8th of August 2016.

30. The above CM Nos.27823/2016 and 32984/2016 were disposed of by this court by the order dated 16th September, 2016 modifying the order of *status quo* dated 16th February, 2016 permitting transfer of the colleges at Coimbatore noting that further steps shall be subject to the result of the writ petition. The court had noted the larger issue with regard to the validity of the action taken by the respondents in view of Section 59B of the ESI Act, 1948.

31. On the 30th of September 2016, this court passed orders on CM No.36319/2016 (filed on 26th September, 2016) and a similar application being CM No.36352/2016 (filed on 22nd September, 2016), modifying the interim order of *status quo* dated 16th February, 2016 granting liberty to the ESIC to proceed further in terms of the orders passed by the High Court of Himachal Pradesh and Kerala High Court so far as the ESIC colleges at Mandi, Himachal Pradesh and Parippally, Kollam were concerned.

32. We may note that two more applications were filed by the ESIC, first being CM No.43454/2016 dated 2nd November, 2016 seeking permission to execute the MoU with State Government of Rajasthan and continue the process for handing over of proposed ESIC Medical College and Hospitals Building at Alwar. The second application being CM No.43435/2016 was filed seeking permission to execute a MoU with the State Government of Bihar and continue the process for handing over of proposed ESIC Medical College and Hospitals Building at Bihta, Patna.

33. We may also note that at this stage, on the 8th of December, 2016, the writ petitioners filed CM No.46077/2016 making a prayer for amendment of the writ petition challenging the Memorandum of Understandings entered into by the ESIC with the State governments, as noted above, pointing out that the same was in the gross violation of the statutory provisions. The writ petitioners sought leave to add additional grounds in support of the challenge and insertion of the following prayers :

“ff. Issue an appropriate, writ, order or direction declaring that the Respondent ESIC lacks legislative competence to enter into memorandum of understanding (MoU) with state governments concerned;

fff. Issue an appropriate writ, order or direction declaring the memorandum of understanding (MoUs) executed between the Respondent ESIC, with the state government concerned, and direct the Respondent to discharge its statutory duty as enumerated in the Act and Regulations made thereunder”

34. Inasmuch the issue pressed before this court was within a narrow domain and the matter involved transfer of medical colleges and the interest of lacs of persons insured under the Employees State Insurance Scheme, we were of the opinion that the main writ petition required to be taken up and heard expeditiously.

35. We have consequently, heard Id. counsel for the parties at great length. We have also carefully examined the scheme of the ESI Act, relevant provisions whereof have been extracted above.

36. It is an undisputed position and needs no elaboration that the source of funds of the ESIC in accordance with Section 26 of the enactment are the contributions of the employers and the employees who form “insured persons” under the Act. Under Section 28 of the statute, the funds of the ESIC can be expended only for the purposes of the benefits of and provisions of medical treatment and assistance to insured persons and if statute permits, to their families (*Section 28(i)*); payment of fees and allowances to members of the ESIC, the Standing Committee and the Medical Benefit Council, the Regional Boards, Local Committees and Regional and Local Medical Benefit Councils (*Section 28(ii)*); for payment of salaries etc. to officers and servants of the ESIC and meeting the expenditure in respect of offices and other services set up for the purpose of giving effect to the statute (*Section 28(iii)*); establishment of maintenance of hospitals, dispensaries and other institutions etc. (*Section 28(iv)*).; payment of contributions to any

State Government, local authority etc. towards the cost of medical treatment and attendants and, where extended, to their families and such expenses (*Section 28(v)*).

37. Section 46 enumerates the benefits which insured persons or their dependents or persons mentioned in the statute are entitled to. Section 58 enumerates the provision of medical treatment by the State Government for insured persons. Section 59 provides for establishment and maintenance of hospitals and other medical and surgical services as the ESIC may maintain, for the benefit of insured persons and where extended, to their families.

38. So far as the establishment of medical colleges, nursing colleges and treating institutions are concerned, Section 59B enables the ESIC to establish such colleges and institutions “*for its para-medical staff and other employees*” with a view to “*improve the quality of service provided under the ESIC Scheme*”. The statutory mandate thus is quite clear and it unequivocally declares that the establishment of all facilities including medical colleges, nursing colleges and treating institutions under the ESI Act is strictly for the benefit of insured persons, and if extended, for their families.

39. Before us, Mr. Yakesh Anand, Id. counsel for the respondent no.2 has vehemently contended that providing medical education is not a core function of the ESIC. It has further been contended that under the provisions of the Indian Medical Council Act, medical colleges cannot be run without a hospital. Mr. Yakesh Anand

places reliance on Section 10A of the Medical Council of India Act which provides for permission for establishment of a new medical college. Reference is also made to the Regulations of 1993 as well as those of 1999, framed in exercise of powers under the Medical Council of India Act which provide for the requirement of an existing hospital for commencing a medical college.

40. Mr. Anand has also placed reliance on the orders passed by the High Court of Himachal Pradesh, extracted above, as well as the MOU dated 4th of July 2016 with the Government of Himachal Pradesh. It is submitted that the transfer of the medical college to the State Government is with the intention of giving people better medical services. It is contended that the MOU proposed to be entered into with the Government of Rajasthan for handing over the medical college at Alwar is for the reason that no catchment population is available and the facilities created remain unutilized.

41. Mr. Colin Gonsalves, Id. Senior Counsel for the petitioners, however, has vehemently contended that the ESIC has no jurisdiction under any provision of the ESI Act, 1948 to transfer the medical colleges and institutions to the State Governments or further to enter into public private partnerships for their running and maintenance.

42. Having given our considered thought to the submissions made before us, we are of the view that given the fact that the ESIC, a creation of statute, is performing functions statutorily enjoined upon it and is dealing with funds statutorily created out of

the contributions of the employees who are the insured persons under the statute. ESIC is therefore, bound to strictly abide by the legislative mandate.

43. Despite a prolonged examination of the statutory provisions and the scheme, Mr. Yakesh Anand, Id. counsel for the respondent no.2 could not source the power to transfer the medical institutions to any statutory provisions or any provision of delegated legislation. Reliance was placed by ESIC only on MOUs entered by the ESIC.

44. Undisputed before us, is the fact that the medical colleges other than establishment of the medical colleges have entailed investment of funds by the ESIC in excess of Rs.10,000/- crores. It is also an undisputed before us that this amount includes contributions of the employees, i.e. the insured persons.

45. The petitioners have placed before us a report of the Comptroller and Auditor General of India dated March, 2013 which *inter alia* notes as follows :

“2.1 Income and expenditure

As per Rule 51 of ESI (Central) Rules, 1950, the contribution is to be collected at rate of 1.75 per cent of wages from employee and 4.75 per cent of wages from employer. It was the main source of income to the ESIC and contributed 76 to 84 per cent of its total income. In addition, the other sources of income were interest on investments (14 to 22 per cent) and rent/rate/taxes (0.60 per cent to 1.48 per cent) of the buildings constructed by ESIC and handed over to state governments to run the scheme, etc.

Expenditure of ESIC was mainly towards providing medical benefits (54 to 64 per cent of total expenditure), cash benefits (11 to 18 percent), administrative expenses (12 to 20 per cent), etc.”

“Spending less on providing core services (medical benefits and cash benefits) for which ESIC was created and using accumulated surplus for medical education (construction of medical colleges) is an issue of concern”

*“From the above, it may be seen that while the **number of IPs increased by 56.44 lakh (44 per cent), the number of beds actually decreased by 488 (2.11 per cent) from 2008-09 to 2012-13.** Further, although the capital expenditure on construction of hospitals, dispensaries, medical/para-medical/nursing college, etc. had increased from Rs. 213.80 crore to Rs. 1671.44 crore (7.82 times) during 2008-09 to 2012-13, **shortage of beds against the requirement increased from 55.39 per cent in 2008-09 to approximately 70 per cent in 2012-13.***

ESIC stated (May 2014) that the above calculation was not based on factual norms. The demand for new hospitals was promptly considered and approved depending on the hospitals’ qualifying the eligibility criteria for opening of new hospital and actual workload. Further, many new hospitals were approved and were at various stages of completion.

The reply of ESIC is not acceptable as the shortage had been calculated based on the figures of beds required and available as given in Financial Estimates and Performance Budget for respective years.”

“4.2.3.2 In ESI hospital Okhla also in-patient facilities in various wards were not of desirable standard as two or three patients were being admitted on single bed. During 2012-13, bed occupancy in various wards ranged between

61 to 205 per cent. In maternity ward, audit observed multiple cases of fresh delivery on a single bed posing health hazard to the infant and the mother.”

(Emphasis supplied)

46. The petitioners have contended that in respect of strengthening the core activity, prescribed by the ESI Act, the respondents are bent on eroding the core issues and functions of the ESIC.

47. We have extracted above the concerns pointed out by the members in the 164th and 165th Meetings of the Standing Committee of the ESIC wherein the members questioned the wisdom of medical colleges and institutions being transferred to State governments as the later could not even appropriately run their own medical colleges and hospitals. There is substance in the petitioner's contention that instead of addressing the several concerns pointed out by the members in the 164th Meeting, *ad hoc* decision to transfer even proposed medical colleges was being taken. There is strength in the petitioner's contention that there was nothing on record to show that any case by case evaluation of either the need or the efficacy of such transfer was conducted prior to the same being effected.

48. The respondent no.2 has placed on record the MoU dated 11th January, 2016 entered into by the ESIC with the Government of Tamil Nadu which provides that the Government of Tamil Nadu “*shall run the hospital exclusively for the benefit of the insured*

persons under the Act". The same MoU thereafter however, states that the ESIC "*will not determine the quantum or structure of the building and other charges due from the medical students and hospital charges during the period of the lease*". So far as the amounts spent by the ESIC on the hospital is concerned, the agreement further provides that "*fund for running the hospitals would be available to the state government under the ESI Scheme...fund for maintenance of the hospital would be available to the state government as per existing policy of the ESIC for ESI hospitals*".

49. Similarly, the MOU dated 25th July, 2016 with the State of Madhya Pradesh in Clause 4 stipulates that the State Government would provide free services to the insured persons. However, in Clause (f), the ESIC has agreed that "*it will not determine the quantum or structure of fee and other charges due from the medical student and hospital charges during the period of lease*".

50. The MOU with the Kerala Government of September, 2016 placed with CM No.36352/2016 provides that "*hospital would run as a State General Hospital*". Clause 4 provides that free service would be provided to the insured persons. However, the MoU includes as Clause (e), the stipulation that "*the Corporation further agrees that it will not determine the quantum of structure of fee and other charges due from the medical students and hospital charges during the period of lease*". These stipulations manifest

that the interest of the insured persons would be compromised and that the ESIC is losing all control over the facilities.

51. The position brought out in CM No.43454/2016 dated 2nd November, 2016 is even more *ad hoc*. While the ESIC makes a prayer for permission to execute an MOU with the State of Rajasthan, in the body of the application, it is stated that the “Ministry of Labour & Employment (MoL&E) may explore some alternatives with respect to presently sanctioned medical colleges of ESIC. These alternatives will inter alia including running of these institutions by respective State Governments, running these institutions in **Public Private Partnership** mode and exploring the option of outright sale for recovering the cost of investment made by ESIC”. The object of the proposed MOU between the ESIC and the Government of Rajasthan thus envisages entering into public private partnerships mode and even outright sale to recover the cost of investment made by the ESIC. Similar is the position in CM No.43435/2016 whereby ESIC has sought permission for handing over the ESIC medical college and hospital at Bihta, Patna to the State government. The application also refers to the State Government entering into a public private partnership and even exploring outright sale of the institution. Clearly, the interest of the insured persons who have contributed the funds for creation of these medical colleges and hospitals would be compromised if such MOUs were given a go ahead.

52. We may also note that the respondents are unable to explain any element of public interest in the proposed transfers. Nothing has been placed before us which would enable this court to take a view that the transfers were in any way for the benefit of the insured persons for whose sole benefit the legislature has enacted the ESI Act which includes the provision of Section 59B of the statute.

53. We may usefully advert also to the judicial pronouncement rendered by the Supreme Court of India, reported at (2003) 7 SCC 532, *Centre for Public Interest Litigation v. Union of India & Anr.* whereby two writ petitions, filed in public interest, were decided. In these writ petitions, the petitioners had called in question, the decision of the Government of India to sell majority shares in the Hindustan Petroleum Corporation Ltd. (HPCL) and Bharat Petroleum Corporation Ltd. (BPCL) to private parties without parliamentary approval or sanction as contrary to and violative of the provisions of the ESSO (Acquisition of Undertakings in India) Act, 1974; the Burmah Shell (Acquisition of Undertakings in India) Act, 1976 and Caltex [Acquisition of Shares of Caltex Oil Refining (India) Limited and of the Undertakings in India of Caltex (India) Limited] Act, 1977. The petitioners had contended that in the Preamble to the enactments, it was provided that oil distribution business be vested in the State so that the distribution subserves the common general good; that, further, the enactments mandate that the assets and the oil

distribution business must vest in the State or in government companies; that, they are not opposed to the policy of disinvestment but they are only challenging the manner in which the policy of disinvestment is being given effect to in respect of HPCL and BPCL; that, unless the enactments are repealed or amended appropriately, the government should be restrained from proceeding with the disinvestment resulting in HPCL and BPCL ceasing to be government companies. It was also urged that the State losing control over their assets and oil distribution of these companies would be contrary to the object of the enactments. The court considered the legislative scheme at length and held as follows:

“12. In order to interpret the enactments in question it is necessary to look at the preamble to the Act. The preamble to the Act clearly stated that acquisition is done.

“in order to ensure that the ownership and control of the petroleum products distributed and marketed in India by the said company are vested in the State and thereby so distributed as best to subserve the common good”.

(emphasis supplied)

Preamble, though does not control the statute, is an admissible aid to construction thereof. The Act sets out that the assets of the undertaking shall vest in the Government as provided under Section 3 of the Act. However, Section 7 of the Act enables the Government to transfer the undertaking to a government company as defined under Section 617 of the Companies Act, 1956. If

*the Act intended that the undertaking so vested in the government company can be transferred, wholly or partly, to any company other than a government company, there certainly would have been an indication to that effect in the Act itself. The question, therefore, is whether absence of specific provision as contained in the Banking Companies (Acquisition and Transfer of Undertakings) Act or in the Coal Mines Nationalisation Act, 1973 that the shareholding shall always be held by the Government, will give a different complexion to these provisions. **When the provisions of the Act provide for vesting of the property of the undertaking in the Government or a government company, it cannot mean that it enables the same being held by any other person, particularly in the context that the object of the Act is that the ownership and control of the petroleum products is distributed and marketed in India by the State or a government company and that products thereby so distributed as best to subserve the common good.** The argument that there is no specific provision in the Act as contained in the Banking Companies (Acquisition and Transfer of Undertakings) Act or in the Coal Mines Nationalisation Act, 1973 does not carry the matter any further because the idea embedded in those provisions are implicit in the provisions of this enactment, as explained earlier. If disinvestment takes place and the company ceases to be a government company as defined under Section 617 of the Companies Act, to say that it is still a government company as contemplated under Section 7 of the Act will be a fallacy. What is contemplated under Section 7 of the Act is only a government company and no other. In relation to a government company Sections 224 to 233 are substituted and the audit of the company takes place under the supervision and control of the Comptroller and Auditor General of India who shall give effect to Section 224(1-B) and (1-C). The Auditors shall submit a report to the Comptroller and Auditor General of India and even when*

audit takes place, subject to his instructions, the Comptroller and Auditor General of India may also conduct supplementary audit and a test audit. Under Section 19(1) of the Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971 audit of companies is to be conducted by him in terms of the Companies Act. Annual reports on the working of affairs of the company are laid before Parliament under Section 619-A(1)(b) of the Companies Act. Such control will be lost if a company ceases to be a government company.”

(emphasis supplied)

54. The scheme of the ESI Act, 1948, especially Sections 59A and 59B of the statute do not enable the ESIC to transfer any of its assets to any other person, including the State Governments. There is no provision in the statute which enables the ESIC to do so. In the 164th Meeting, the members of the Standing Committee had pointed out that an amendment to the statutory scheme would be necessary if the ESIC was to effectuate the policy of transferring the medical colleges and institutions to the State governments. Given the legislative mandate, we therefore, hold that the action of the respondent no.2 in transferring the medical colleges and institutions to the State governments is without jurisdiction, contrary to law and is illegal.

55. Repeated emphasis was placed by Mr. Yakesh Anand, Id. Counsel for the respondent no.2 on the submission that, as the State Government was also contributing to the establishment and upkeep of the hospitals, the ESIC could not limit the availability of the facilities at the hospitals, to employees of the ESIC alone. We are

unable to accept this submission. The Act contains nothing to indicate that funding by the State Government would entail, as necessary and inexorable sequitur, throwing open the hospitals to the general public. If anything, the statutory intention, as manifests by Sections 59, 59A and 59B appears to be to the contrary, as the said provisions, even while envisaging contribution by the State Government, ordain nevertheless, that the benefit of the hospitals would ensure to insured persons or their families. Funding by the State Government cannot therefore, be cited as a justification to infract the statute, and the mandate thereof.

56. Mr. Yakesh Anand, Id. counsel for the respondent no.2 also sought to submit that, as the facilities at the ESI hospitals were being made available to insured persons, as required by the Act, no statutory infraction could be laid at his clients door. No prejudice, it was sought to be contended, could be said to result merely because the general public were also being extended the same facility. This submission, in our considered opinion, effectively misses the wood for the trees. The courts cannot shut their eyes to well known ground realities. the legitimacy of the desire, of the contributing “*insured person*”, to have a hospital, and medical facilities available therein, dedicated to him and his “*insured*” brethren, to the exclusion of the multitude constituting the general populace, cannot be discountenanced. If, by virtue of their being contributing employees of the ESI, and, per definition therefore, “*insured persons*”, the petitioner and others like him have a statutorily fossilized right to exclusive enjoyment of the facilities at

the ESI hospitals, the court has a duty to zealously protect and preserve that right.

57. As noted above, the petitioners have only pressed prayer (a) before us seeking a direction to the respondent no.2 to comply with its statutory obligation contained in Section 59B of the ESI Act. We have held that the respondents are statutorily obligated to strictly comply with the prescription contained in the provisions of the ESI Act.

58. It has also been held that the actions of and the further efforts by the ESI in transferring the ESI medical institutions/colleges to State Governments as well as the proposal to further transfer them by way of public private partnerships is *de hors* the statutory provisions and are legally impermissible.

Result

59. In view of the above, it is directed that the respondent no.2 is bound to and shall strictly comply with the mandate of Section 59B and other provisions of the Employees' State Insurance Act, 1948.

60. The writ petition is allowed in these terms. All pending applications are accordingly disposed of.

ACTING CHIEF JUSTICE

OCTOBER 12, 2017/aj

C.HARI SHANKAR, J