



fa.35.06.jud

1

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**NAGPUR BENCH, NAGPUR**

**FIRST APPEAL NO.35 OF 2006**

The Vidarbha Premier Co-operative  
Housing Society Limited,  
Gandhi Sagar, Nagpur through Chairman. .... Appellant

-- ***Versus*** --

The Joint Regional Director,  
Sub-Regional Office,  
Employees State Insurance Corporation,  
Panchdeep Bhavan, Ganeshpeth, Nagpur. .... Respondent

*Shri A.M. Ghare, Advocate for the Appellant.*  
*Mrs. B.P. Maldhure, Advocate for the Respondent.*

**CORAM : KUM. INDIRA JAIN, J.**

**DATE : SEPTEMBER 21, 2017.**

**ORAL JUDGMENT :-**

This appeal takes an exception to the order dated 19/08/2005 passed by the Employees' State Insurance Court Nagpur (for short, 'ESI Court') in E.S.I. Case No.5/1992. By the said order, ESI Court dismissed the application filed by applicant-Vidarbha Premier Co-operative Housing Society under section 77 (1) read with Section 75 (g) of the Employees' State Insurance Act, 1948 (for short, 'the ESI Act') read with Rule 13 of the Bombay Employees' Insurance Rules, 1959.

*fa.35.06.jud*

2

02] For the sake of convenience, appellant and respondent are referred in their original status as applicant and non-applicant as they were referred before the ESI Court.

03] This Court vide order dated 14/11/2006 and 18/09/2017 framed the following substantial questions of law :

- i. Whether the appellant Society can be said to be a shop covered under the Clause 3(iii) of the Schedule to the notification dated 19/11/1976 and in terms of the provisions of Section 1(5) of the Employees' State Insurance Act, 1948 ?
- ii. Whether principles of natural justice can be invoked in a case of applicability of notification issued under Section 1(5) of the Employees' State Insurance Act, 1948 ?

04] The factual backdrop of the case relevant for the purpose of disposing this appeal may be stated thus :

- (i) Applicant is a housing society. The main activities of the society are to extend loans to its members for acquiring, constructing houses, extension or repairs of

residential houses on no profit no loss basis. Applicant society is also constructing flats through contractors for allotment to its members. According to applicant, it is a registered cooperative housing society carrying on its activities since 20/03/1936.

- (ii) Non-applicant - Employees' State Insurance Corporation (for short, 'the Corporation') issued a notice dated 10/01/1992 to the applicant society informing that the society falls within the purview of Section 1 (5) of ESI Act with effect from 27.11.1976. By the said notice, society was asked to take immediate steps for payment of contribution from 24/11/1976, the date of coverage.
- (iii) Applicant made representation to the Corporation on 02/05/1992 and submitted that activities carried on by the society exclude the applicant from the categories of establishments covered by notification dated 19/11/1976. It was submitted that the society is not covered by said notification as it does not fall in the category of shop.

*fa.35.06.jud*

4

- (iv) Vide communication dated 09/06/1992, non-applicant informed the applicant that society is rendering the services for price and the activities carried on by the society make it clear that establishment of the society is covered as a shop within the meaning of notification dated 19.11.1976 and thereby reiterated its decision regarding the coverage of establishment of applicant under the ESI Act.
- (v) Before this communication could be sent by the Corporation, applicant on 14/05/1992 filed an application under section 77 (1) read with Section 75 (g) of the ESI Act, 1948 and Rule 13 of the Bombay Employees' Insurance Rules, 1959. By the said application, Society sought declaration to the effect that it is not a shop and prayed for quashing communication dated 10/01/1992 issued by the Corporation.
- (vi) Non-applicant vide written statement [Exh.9], resisted the application. According to Corporation, Society was rendering various services for a definite price by

charging commission at the rate of 2% in addition to the value of project. It was submitted that conduct of business and the various activities carried on by the applicant society would clearly indicate that society falls within the meaning of shop, as per the notification dated 19/11/1976. It was contended that ESI Act is a welfare legislation and notification issued thereunder needs to be liberally construed so as to achieve the purpose and object of the legislation rather than to allow the same to be frustrated and stultified. Non applicant placed reliance on the judgment of the Hon'ble Supreme Court in **M/s. International Ore and Fertilizers (India) Pvt. Ltd. vs. E.S.I. Corporation - [AIR 1988 SC 79]** in support of defence and submitted that the scope of definition of the term 'shop' has been extensively discussed by the Hon'ble Supreme Court which negatives the contention of applicant that it is not covered under the ESI Act. The corporation also placed reliance on notification dated 19/11/1976 and the relevant provisions of the ESI Act to indicate that

the applicant-society is covered as a shop by virtue of notification dated 19/11/1976. In sum and substance, it was submitted that application is misconceived and deserves to be dismissed with costs.

- (vii) On the rival pleadings of the parties, ESI Court formulated the following points for determination and recorded its findings thereon as under :

S.No.	Points	Findings
[1]	Whether the establishment of the applicant does fall or is covered within the meaning and definition of the term "shop" ?	Yes
[2]	Whether the letter issued by the non-applicant dated 10/01/1992 is legal ?	Yes
[3]	What order ?	As per final order

- (viii) To substantiate its case, applicant-society examined Vyankatesh Ramchandra Khisty, General Manager as a solitary witness and non-applicant examined Vinodkumar Jaiswal, ESI Inspector as a sole witness to support its defence. The parties also placed reliance

on the documentary evidence. On appreciation of evidence, ESI Court came to the conclusion that establishment of applicant-society is covered within the meaning and definition of term shop and communication dated 10/01/1992 issued by Corporation was legal and in accordance with the notification issued under section 1 (5) of the ESI Act. In consequence thereof, application preferred by the society came to be dismissed. Being aggrieved by the dismissal of application, society has preferred present appeal.

05] Shri A.M. Ghare, learned counsel appearing on behalf of appellant submits that ordinarily appellate court would not interfere on a question of fact in an appeal against the decision of ESI Court but appellate court would not mechanically accept the finding recorded by the ESI Court, if such findings are not supported by evidence. The submission is that finding of fact not based on evidence needs to be corrected in an appeal. In this connection, learned counsel pressed into service judgment of this court in **Employees' State Insurance Corporation vs.**

**Hindustan Sheet Metal Works - [1967 Mh.L.J. 211].**

Another submission on behalf of appellant is that communication dated 06/09/1991 [Exh.36] addressed to the Joint Regional Director clearly shows that coverage decision was to be taken by SRO and no coverage decision was taken by the inspector, who inspected the establishment of applicant society. It is submitted that the same officer prepared preliminary inspection report of the inspection carried on 14/08/1991 and opined that unit/society of the applicant does not come under the purview of ESI Act considering the nature of work of the society. It is submitted that decision at the level of SRO, if any, taken at any point of time was never placed on record. Copies of communications/reports dated 28/08/1991 and 06/09/1991 referred in the impugned communication dated 10/01/1992 were never made available to the applicant-society. A grievance is made that Inspector having come to the conclusion that society is not covered under the ESI Act within few days wrote to Joint Regional Director leaving the coverage decision to be taken by SRO. It is submitted that in the absence of decision by SRO and for want of reasons to change the report within couple of days would be enough to indicate that impugned communication is

*fa.35.06.jud*

9

unsustainable. The learned counsel submits that copy of preliminary inspection report dated 14/08/1991 was never supplied to applicant-society and had that report been made available society would not have issued further communication and would not have made representation as preliminary inspection report dated 14/08/1991 was favourable to applicant-society. It is submitted that by not supplying important documents opportunity was denied to applicant society and corporation thereby violated principles of natural justice.

06] The next contention raised on behalf of appellant is that in the absence of definition of 'shop' in the ESI Act and the notification issued under Section 1(5) of the said Act, meaning of 'shop' under Section 2(27) of the Bombay Shops and Establishments Act needs to be considered which does not include commercial establishment. The submission is that applicant-society is a commercial establishment and excluded from the purview of definition of 'shop' under Section 2(27) of the Bombay Shops and Establishments Act and thereby excluded from the coverage of the ESI Act as well as notification issued thereunder under Section 1(5) of the said Act.

*fa.35.06.jud*

10

07] In support of submissions, learned Counsel placed reliance on -

- i. Bharat heavy Electricals Ltd. vs. Employees' State Insurance Corporation - [(2008) 3 SCC 247].
- ii. Employees' State Insurance Corporation vs. Hindustan Sheet Metal Works - [1967 Mh.L.J. 211].
- iii. Judgment and order dated 16/09/2016 passed by learned Single Judge of this Court in Writ Petition No.3239/2015.
- iv. Aniket College of Social Work, Aniket Shikshan Sanstha, Dighori vs. Assistant Provident Fund Commissioner, Sub-Regional Office, Nagpur and another - [2017(5) Mh.L.J. 437].
- v. Regional Director, Employees' State Insurance Corporation vs. Kerala Electrical and Allied Engineering Co. Ltd. & Ors. - [2003 III CLR 546]

08] *Per contra*, learned Counsel appearing for respondent-Corporation submits that Government of Maharashtra by notification dated 19/11/1976 extended provisions of the ESI Act to the classes of establishments mentioned in the Schedule and

as per Clause 3 of the Schedule, if an establishment where 20 or more persons are employed for wages on any date of the preceding 12 months, said establishment would be covered. It is submitted that the witness examined on behalf of the society admitted that for the activities being carried out and the services being rendered, society is charging 2% commission in addition to the value of the project. Learned Counsel submits that while construing a welfare, legislation ESI notification issued thereunder should be liberally construed so that the purpose of legislature can be achieved in true sense. It is submitted that society is carrying on economic activities in a systematic way and, therefore, duly covered within the purview of 'shop' as per the notification issued under Section 1(5) of the ESI Act.

09] On the second contention raised on behalf of appellant regarding violation of principles of natural justice, the submission is that society never raised such pleadings before ESI Court. No submissions to that effect were ever made before ESI Court. Learned Counsel submits that in the absence of pleadings, evidence and the submissions, appellant cannot be allowed to raise such a grievance for the first time in appeal. Another

submission on behalf of the Corporation is that notification dated 19/11/1976 issued under Section 1(5) of the ESI Act clearly covers the establishment of appellant-society as a shop and it being the responsibility of the establishment to comply with the provisions of Section 2A read with regulation 10-B under the Act, question of violation of principles of natural justice would not arise. In support of submissions, learned Counsel relies upon the judgment, dated 31/07/2017 by the learned Single Judge of this Court in First Appeal No.562/2008 and of the Division Bench of Kerala High Court in **E.S.I. Corporation vs. Radhas Printers - [(1996) IILLJ 1105 Ker.]**.

10] Regarding applicability of notification to the society under the notification as a shop and legality of communication under challenge, learned Counsel for respondent pressed into service -

- i. M/s. Hindu Jea Band, Jaipur vs. Regional Director, Employees' State Insurance Corporation, Jaipur - [AIR 1987 SC 1166].
- ii. M/s. International Ore and Fertilizers (India) Pvt. Ltd. vs. State Insurance Corporation - [AIR 1988 SC 79].

- iii. M/s. Cochin Shipping Co. vs. E.S.I. Corporation - [(1992) 4 SCC 245].
- iv. Employees State Insurance Corporation vs. R.K. Swamy & Ors. Etc. - [1993 II CLR 1068].
- v. Sohan Lal Gupta [dead] Thr. L.Rs. & Ors. vs. Smt. Asha Devi Gupta & Ors. - [(2003) 7 SCC 492].
- vi. Poona Industrial Hotel Ltd. vs. I.C. Sarin - [1979 LawSuit (Bom) 269].
- vii. Regional Director, E.S.I. vs. T.V. Poulouse - [(1997) ILLJ 613 Ker].
- viii. Madras Government Servants Co-op. Society Ltd. vs. Employees' State Insurance Corporation - [1998 I CLR 1061 - Madras].
- ix. Southern Agencies, Rajahmundry vs. Andhra Pradesh Employees State Insurance Corporation - [1998 II CLR 79].
- x. Bal Chandra Agarwal and another vs. Union of India and others - [2002-III-LLJ 127].
- xi. Employees' State Insurance Corporation, Bangalore vs. Manipal Sowbhagya Nidhi Ltd., Manipal, Kakshina Kannada - [2007 II CLR 468].

11] Referring to the judgment of the Division Bench of Madras High Court in Madras Government Servants Co-op. Society Ltd. (*supra*), it is submitted by the learned Counsel for respondent that in an identical situation and in similar set of facts, it has been held that society rendering service and charging interest is the price for rendering the service and covered by notification issued under Section 1(5) of the ESI Act.

12] Upon hearing the learned Counsel for parties, *in extenso*, this Court finds it appropriate to take up the substantial question of law framed vide order dated 18/09/2017 first whereby grievance has been made by appellant regarding non-supply of documents and violation of principles of natural justice. It is no where in dispute that the contention regarding violation of principles of natural justice was not raised in the pleadings and the evidence before the ESI Court. According to the society, in the written notes of arguments, society submitted that copies of reports [Exh.35 and Exh.36] were not supplied and thereby an opportunity came to be denied. It is pertinent to note that submissions advanced on behalf of the parties have been considered by the ESI Court in its judgment. Even at the time of

making oral submissions, it appears that appellant-society did not bring to the notice of ESI Court that copies of reports were not supplied. Therefore, merely raising a ground in the written notes of arguments and not pursuing the same would clearly indicate that establishment did not press the grievance.

13] Looked at from another angle, this ground does not sustain. The learned Single Judge of this Court vide judgment and order, dated 31/07/2017 in First Appeal No.562/2008 while considering substantial question, whether Section 2A read with Regulation 10-B of the Employees State Insurance Act, 1948 is mandatory, observed in paragraph 19 thus :

“19. If one considers the laudable object of the Act and the entire scheme provided under the Act for the welfare of the employees in the moments of their difficulty, like sickness, medical problems etc., then it needs to be held that so far as Section 2A of the Act is concerned, which also contains the word “shall”. It is required to be held as mandatory. It enjoins the duty upon the factories or establishments to which this Act applies to be registered within such time and in such manner as may be required under the regulations. In view thereof, if this provision is not considered to be

mandatory, then every employer may get rid of the liability which is fastened on him under the Act to advance the laudable object of the Act.”

14] Even from the scheme of the ESI Act, it can be seen that initial responsibility to get registration is on the employer. In case of failure to comply with the provisions of Section 2A within stipulated time prescribed under Regulation 10-B, appropriate Regional Office of the Corporation under Regulation 10-B(c) may direct the employer to comply with the requirements of paragraph (a) of this regulation. In this connection, learned Counsel for appellant submitted that by introducing paragraphs (c) and (cc), legislature has diluted the provisions under Section 2A and Regulation 10-B(a). The submission is that the said provision cannot be held mandatory considering the paragraphs (c) and (cc) of the Regulation 10-B. Though the submission appears to be attractive, it has no force of law. The language of Section 2A of the ESI Act clearly shows that factories or establishments to which the Act applies are duty bound to get the registration and the time limit for the same is prescribed under Regulation 10-B(a). It is only in case of failure that the Corporation has to intervene and take appropriate steps

to see that the provisions of the ESI Act are applied in this respect.

15] In view of clear and unambiguous language of Section 2A and Regulation therein as referred above, this Court does not find any substance in the submission of the learned Counsel for the appellant that the provisions of registration are not mandatory.

16] Once the provisions of the ESI Act and Regulations framed thereunder cast a duty on the establishment to get the establishment registered, question of violation of principles of natural justice would not arise.

17] The next crucial question then needs to be addressed is, whether establishment of appellant society is covered by notification issued under Section 1(5) of the ESI Act. Before advertng to this issue, it would be appropriate here to see the scope and object of the Employees' State Insurance Act, 1948. Needless to state that this Act is a piece of legislation intended for social security. The Act is an outcome of a policy to provide remedy for the wide spread evils arising from the consequence

of national poverty. The Act was originally made applicable to factories. By virtue of provisions under Section 1(5), the appropriate Government may, in consultation with the Corporation and where the appropriate Government is a State Government, with the approval of the Central Government, after giving one month's notice of its intention of so doing by notification in the Official Gazette extend the provisions of this Act or any of them, to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise. It is in pursuance to Section 1(5), notification dated 19/11/1976 was issued in this case.

18] Paragraph 3 of the said notification extends the provisions of the Act to classes of establishments mentioned in Column 1 of the Schedule given therein situated within the limits of Corporation of City of Nagpur with effect from 27/11/1976. The relevant part of the Schedule is reproduced here for ready reference.

<b>Description of establishments</b>	<b>Areas in which the establishments are situated</b>
<b>1</b>	<b>2</b>
1. ....	.....
2. ....	.....

<p>3. The following establishments whereon twenty or more persons are employed, or were employed for wages on any day of the preceding twelve months, namely ---</p> <ul style="list-style-type: none"> <li>(i) hotels ;</li> <li>(ii) restaurants ;</li> <li>(iii) shops ;</li> <li>(iv) road motor transport establishments ;</li> <li>(v) cinemas including preview theatres; and</li> <li>(vi) newspapers establishments as defined in section 2(d) of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 (45 of 1955).</li> </ul>	<p>Nagpur - Limits of the Corporation of City of Nagpur</p>
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19] Appellant-employer examined Vyankatesh Ramchandra Khisty, its General Manager as a witness. He stated that 36 employees were engaged by the society in November, 1976 and 64 employees were engaged in 1991. In any case more than 20 employees were working with the society at the relevant time. So far as the services rendered by the employees are concerned, it is admitted that the society rendered services in the nature of (i) acquiring land for construction of houses; (ii) advancing loans to purchase houses (3) conducting repairs of

houses and apartments (4) to build and allot the houses to its members. There is an unequivocal admission on the part of the witness of the society that for rendering the services, society charges commission in addition at the rate of 2%.

20] With the above undisputed facts, question stills remains to be considered is whether establishment of appellant-society would fall within the definition of shop by virtue of notification dated 19/11/1976 issued under Section 1(5) of the ESI Act. "Shop" is not defined under the ESI Act or the notification issued thereunder. According to the appellant, in the absence of definition of shop in the Act and the notification, 'shop' defined under Section 2(27) of the Maharashtra Shops and Establishments Act will have to be looked into. The submission is that definition of shop under the Maharashtra Shops and Establishments Act excludes the commercial establishments and makes it clear that establishment of appellant-society is not covered under the definition of shop.

21] Whether definition of shop under Section 2(27) of the Maharashtra Shops and Establishments Act can be taken as

guiding factor in construing the provisions of the ESI Act and the notification issued therein is a moot question to be addressed to. In *M/s. Hindu Jea Band's* case (*supra*), the Hon'ble Apex Court held that a shop is a place where services are sold on retail basis. It was, therefore, held that making available on payment of the stipulated price, the service of musicians employed by the petitioner on wages made the petitioner's establishment a shop.

22] In the case of *M/s. International Ore & Fertilizers* (*supra*), the petitioner carried on the commercial activity facilitating the emergence of contracts of sale of goods between its foreign principals and the State Trading Corporation/Minerals and Metals Trading Corporation. It was arranging for unloading of such goods and their survey. Upon delivery, it collected the price payable and remitted it to its foreign principals. These were trading activities and although the goods imported from abroad were not actually brought to petitioner's premises and delivered to purchaser, the premises were held to be a shop because the trading activities related to sale of goods.

23] Both these judgments were followed by the Hon'ble Apex Court in M/s. Cochin Shipping Co. (referred above), which catered to the needs of exporters and importers and others who wanted to carry the goods to the appellant's premises, where systematic economic or commercial activity was carried out.

24] Later on above referred three decisions were referred by the Hon'ble Supreme Court in Employees State Insurance Corporation vs. R.K. Swamy & Ors. (supra) in which it was held that the premises of an advertising agency would fall within the notification and is a shop. This view has been consistently followed in the catena of decisions.

25] The Division Bench of Madras High Court had an occasion to consider similar question in case of Madras Government Servants Co-op. Society Ltd. (referred above). In this case, Corporation issued a notification on 15/07/1976 and brought into its coverages establishment of appellant-society as a shop. A notice was issued to the employer for implementing the notification. A reply was sent and since same did not satisfy, Corporation had issued a notice on 09/06/1983 that in case the

Act is not implemented and contributions thereunder are not paid, coercive steps will be initiated. Being aggrieved, society filed original petition before the City Civil Court, Madras for declaration that the provisions of the ESI Act are not applicable to the society and the notification issued thereunder is not binding on the society.

26] Taking into consideration the pleadings of the parties and the evidence, ESI Court came to the conclusion that petitioner-society is neither a shop nor an establishment and, therefore, notification has no application. Against the order of ESI Court, matter went before the learned Single Judge of the High Court in an appeal. Appeal was allowed and original petition was dismissed. Against the said judgment of the learned Single Judge, L.P.A. was filed and in this way the matter went before the Division Bench. Considering the aims and object of the ESI Act, statutory construction of welfare legislations, judgments of the Hon'ble Supreme Court as to how the ESI Act has to be interpreted and on the definition of shop, in paragraphs 19 to 21 of the judgment, the Division Bench of Madras High Court observed thus :

“19. On the above principles of law, we have to consider whether the petitioner/Society is a 'shop' and whether the notice issued by the respondent is in any way invalid. In view of the decision in Senior Electric Inspector's case (supra) the court has to interpret a Statute taking into consideration the new factual situation and also taking into consideration the social, economic, political and scientific advancement in society. Probably that may be the reason why in this Statute, there is no definition for the word 'shop' or 'establishment', since the Legislature did not want to restrict the scope of its applicability to changed situations. The definition of 'shop' which is meant as a house or building where s goods are made or prepared for sale and sold has now undergone a great change. In the present legal sense, it is not necessary that there should be building or land for conducting a shop, nor is it is necessary that in the premises there should be buying or selling. Once an ordinary occupation is carried on, if there is a systematic economic or commercial activity, that will be sufficient to bring that place within its sphere.

20. Even services which are sold for a price will amount to a 'shop'. The learned Judge has taken into consideration the above facts and has correctly interpreted the scope of the Notification. Giving loan to the members of the Society is a 'service' and the

word 'price' has also been given a wider connotation. The learned Judge has held :

"... The word 'price' should not be taken as a price paid for a product or a particular article ....."

21. The charging of interest and sharing the profits among the various members will be sufficient to bring the impugned notification within the ambit of the Act, the interest charged by the petitioner/Society is the price for rendering services. We are in agreement with the finding of the learned Judge that the petitioner cannot impeach the Notification. It is in evidence of P.W. 1 and can also be seen from the averments in the petition that the petitioner is doing money-lending business and interest is also charged from the debtors. By self imposed restrictions, the facility is extended only to its members and not to the public at large. But it cannot be disputed that what the petitioner is doing is systematic commercial or economic activity, and it is one of its 'ordinary occupations'."

27] In the case on hand, Mr. Vyankatesh Khisty, General Manager of the Society stated in cross-examination that business of society is to provide loans to its members and collect interest

from them. He admits that they also charge processing fees from the customers. From the evidence of this witness, it can be seen that the society acquires the lands for construction work. Lands are owned and purchased by the society. For construction work, designs are prepared by Architect, tenders are called from Builders. They include commission while deciding the cost of the flat. It is also admitted by the witness that members of the society are holding the shares of the society and they are paid dividends on shares. While giving dividends to members, aggregate profit of the society is considered.

28] Considering the evidence, intention of the legislature enacting the ESI Act, its scheme and objects, well settled propositions of law regarding applicability of the provisions of the ESI Act and the notification issued thereunder ESI Court came to the conclusion that notification dated 19/11/1976 does cover establishment of society under the notification. Since it is not in dispute that the society is giving loans to its members, constructing the houses, allotting the same to the members of the society and charging 2% commission for the services rendered to its members, this Court is of the view that the

*fa.35.06.jud*

27

services are sold for a price and the word 'price' has to be given a wider connotation which would bring the establishment of appellant-society within a coverage of notification. It is apparent from the undisputed facts and the evidence that appellant-society is doing a systematic commercial activity and since the employees are more than 20 in number, it would squarely bring the establishment of society within the purview of notification issued under Section 1(5) of the said Act. In the above premise, substantial questions of law are answered accordingly.

First Appeal No.35/2006 is dismissed. There shall be no order as to costs.

**(Kum. Indira Jain, J)**

At this stage, learned Counsel for appellant prays for continuation of *ad interim* stay granted vide order dated 13/06/2006, for a period of four weeks.

Learned Counsel for the respondent objects the same.

Considering the nature of controversy and to avoid denial of an opportunity, *ad interim* stay as prayed to continue for a further period of four weeks.

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**(Kum. Indira Jain, J)**