

(2017) 08 CAL CK 0022
In the Calcutta High Court
Case No : 14039 (W) of 2017

Dr. Md. Rezaul Karim & Ors.

APPELLANT

Vs

The State of West Bengal & Ors.

RESPONDENT

Date of Decision : 17-08-2017

Acts Referred:

Constitution of India, Article 14, Article 21, Article 226, Article 19(1)(g) - Appointment of Commission to inquire into and report on the administration

Citation : (2017) 08 CAL CK 0022

Hon'ble Judges : Debangsu Basak

Bench : SINGLE BENCH

Advocate : Bikash Ranjan Bhattacharya, Soumya Majumdar, Amitava Deb, Gargi Goswami, Kishore Dutta, Abhratosh Majumdar, Sirsanya Bandyopadhyay, Prithu Dudheria, Soumitra Mukherjee, Avra Majumdar, Saibalendu Bhowmik, Sougata Bhattacharya

Final Decision : Dismissed

Judgement

1. The petitioners have challenged the vires of West Bengal Clinical Establishments (Registration, Regulation and Transparency) Act, 2017.
2. Learned Senior Advocate appearing for the petitioners has submitted that, various provisions of the Act of 2017 fail the test of Article 14 of the Constitution of India. He has drawn the attention of the Court to Sections 2(c)(ii), 7(3)(i), 7(3)(l) to (t), 7(3)(p), 7(3)(s), 27, 29, 30, 33(1), 33(2), 36, 38(1)(iii), 38(1)(ix) and Section 42 of the Act of 2017 in this regard. He has submitted that, the various provisions of the Act of 2017 are arbitrary, unreasonable and irrational. They infringe upon the fundamental right to practice one's profession guaranteed under Article 19(1)(g) of the Constitution of India.
3. Referring to Section 2(c) of the Act of 2017, Learned Senior Advocate for the petitioners has submitted that, the 2nd explanation to the definition of "clinical

establishment" allows an individual medical practitioner to be treated as operating in any establishment within the meaning of the Act of 2017, in the event, such individual medical practitioner, in the discharge of his duties and attending to his patients, require a medicine to be administered to the patient visiting his chamber in view of the emergent medical condition of such patient. Then such individual medical practitioner does not remain out of the purview of the Act of 2017. The various provisions of the Act of 2017 are onerous for an individual medical practitioner to comply with. He has referred to the statement of objects and reasons of the Act of 2017 and submitted that, the stated objective of the Act of 2017 is to regulate the affairs of large nursing homes and in effect it has brought an individual medical practitioner into its fold. The Act of 2017 has the effect of impeding the professional judgment of an individual medical practitioner. Such an effect of the Act of 2017 is neither desirable nor should be permitted. Such an effect will impede the discharge of professional duties of an individual medical practitioner, will affect the public interest and in fact will deprive the public from receiving the best medical treatment available. Requiring an individual medical practitioner to comply with the rigours of the Act of 2017 is unreasonable, impracticable and not desirable. An individual medical practitioner will have to obtain a registration under the Act of 2017 to avoid any prosecution. Such a medical practitioner will have to maintain records in the electronic form, provide for a complaint redressal mechanism to the patient party, amongst others. An individual medical practitioner, if he chooses to stand out of the Act of 2017, then he would not be able to administer any emergency medicine to any patient requiring such procedure. As an example, a cardiologist would not be able to conduct an ECG or administer a lifesaving medicine to a patient who may have come with severe medical conditions to him for treatment and in his judgment, the patient requires the life-saving medicine to be administered immediately to save the life of the patient. If a medical practitioner, does not administer the requisite life-saving medicine to a patient brought to him, he would be violating the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002. The Act of 2017 cannot require a medical practitioner to act in breach of the Regulations of 2002.

4. Referring to Section 7(3)(i) of the Act of 2017, learned Senior Advocate for the petitioners has submitted that, the Sub-Section cast a duty upon a medical practitioner to provide immediate medical treatment to a victim of an accident, injury or trauma before reporting to the police station. He has submitted that, the Act of 2017, while laying down such a provision, does not provide for the fact that, there are different branches of practice of medicine and that, one branch may not have the requisite expertise to handle a situation requiring a different branch of medicine to look into the issue. As the provisions of the Act of 2017 stands, every medical practitioner irrespective of the nature or the branch of his practice, is required to attend to a victim of an accident, injury or trauma. This requirement would be counterproductive to the public at large. The public instead of taking the patient to an appropriate place for proper treatment, would be

looking at the first available medical practitioner in the vicinity, to provide the requisite medical treatment. The first available medical practitioner, may not be the appropriate person to administer the requisite medical help. In that process, the interest of the patient stands to suffer. Moreover such a provision is opposed to Regulation 2.1 of the Regulations of 2002.

5. Referring to Section 7(3)(l) and (m) of the Act of 2017, Learned Senior Advocate for the petitioners has submitted that, the requirement of maintenance of a public grievance cell and a help desk is neither feasible nor practicable for a medical practitioner, at any level, more so at the rural area. It is also not practicable for a medical practitioner to have such an elaborate setup at an urban area. In any event, if a medical practitioner is forced to undertake such an exercise, then the same would result in extra financial burden on the patient party. Maintenance of records in electronic form as required under Section 7(3)(n) of the Act of 2017 is impracticable, in the given context with regard to individual doctors practising at the rural area.

6. According to the Learned Senior Advocate for the petitioners, Section 7(3)(p) of the Act of 2017 would create mistrust between the patient and the treating doctor. Examination and diagnosis of a patient requires skill, observation and experience. These cannot be had in water tight compartments as sought to be suggested by the Act of 2017.

7. Referring to Section 7(3)(s) of the Act of 2017, learned Senior Advocate for the petitioners has submitted that, the requirement of discharge of corporate social responsibility is arbitrary and oppressive so far as the doctors who would choose to form a juristic entity. Moreover, the statutory provisions toward the ban on insistence of professions fees or treatment cost would impede recovery of the same and would generate mistrust and ill-will between the doctor and the patient. The ban on insistence of recovery of professional fees and treatment costs infringes Article 19(1)(g) and 21 of the Constitution of India. It also impedes the provisions of Regulation 1.8 of the Regulations of 2002. Sections 27, 29 and 30 of the Act of 2017 abnormally enhance the penalty that may be imposed. According to the petitioners, the Act of 2017 lays down various restrictive guidelines, the cumulative effect of which would restrict the making of judgment, will impede the growth of medical science and will prevent, if not impede, the doctors from taking risks and spot decisions for the benefit of the patient. These are the factors which are contrary to the spirit of Regulation 3.5 of the Regulation of 2002. Referring to Section 33(1) of the Act of 2017, learned Senior Advocate for the petitioners has submitted that, the power of the Commission to penalize the doctors for negligence and deficiency of not providing service is not in conformity with the existing law. The professional negligence of a doctor is to be looked at by the State Medical Council to which the doctor is registered. There is a conflict between two statutory provisions. Moreover, the Act of 2017 provides a time limit for awarding a relief and compensation. This provision will lead the Commission to arrive at a decision on

the so-called misconduct. The Commission acting purportedly under Sections 36 and 37 would award an interim compensation and impose penalty as the case may be. This would be in conflict with the provisions of Regulation 8.2 of the Regulations of 2002.

8. Referring to the mechanism for adjudication of complaints against the doctors covered under the Act of 2017, learned Senior Advocate for the petitioners has submitted that, the Commission is the appellate authority. He has referred to Section 35 and has submitted that, nonmedical persons would constitute an adjudicating authority. He has referred to Section 36 of the Act of 2017 and submitted that, the composition of the Commission and the quorum of the Commission for the purpose of adjudicating a dispute in an appeal would allow such Commission to take a decision without any medical person being on Board. Therefore, the interests of the doctors would stand prejudiced as a non-doctor would be considering an issue as to whether or not there was medical negligence when such adjudicating authority and the appellate authority may not have the expertise to decide such a complex issue. This would lead to miscarriage of justice. He has referred to Section 33(2) of the Act of 2017 and submitted that, the power of the Commission to publish names of persons held guilty of an offence under the Act of 2017 is counterproductive. It would impede a doctor from taking a professional decision. The fear of penalty and publication will not allow a doctor to make a decision at a critical moment of the medical treatment of a patient leading to the patient suffering. This also is contrary to Regulations 1.1.2, 1.2, 2.1 and 8.2 of the Regulations of 2002. Referring to Section 38(1)(ix) of the Act of 2017, learned Senior Advocate for the petitioners has submitted that, the same is in conflict with Section 27 of the Consumer Protection Act, 1986. He has submitted that, the Act of 1986 already occupies the field of compensation and that, there is no requirement for any other body to look into the aspect of compensation, by reason of medical negligence or otherwise. The Act of 2017 allows two parallel forai to look into the same issue. This will expose the doctors to double jeopardy. He has referred to Entry 2 of List III of the Constitution and has submitted that, the legal medical and other professions come within the purview. Therefore, the Regulations of 2002 will apply with regard to the medical profession. The Act of 2017, therefore, is to that extent, beyond the legislative competence of the State Legislature. According to him, there is no provision of appeal from the order of the Commission, as a matter of right. Two tier adjudication machinery provided under the Act of 2010, has been taken away. The judicial review provided under the Act of 2017, may not be sufficient, as a doctor would be losing a two tier fact finding adjudicating authority. The power of judicial review under Article 226 of the Constitution is confined and restricted to the judicially recognized area of intervention. The same does not allow a Court exercising jurisdiction under Article 226 of the Constitution of India to look into the issue as an appellate authority, reappraise the evidence and substitute its own finding with that arrived at by the impugned order. Therefore, the mechanism provided in the Act of 2017 should be struck

down.

9. Learned Senior Advocate for the petitioners has compared the provisions of the West Bengal Clinical Establishments (Registration, Regulation) Act, 2010 with that of the provisions of the Act of 2017. He has submitted that, the Act of 2010 was more than sufficient to take care of the situation sought to be addressed by the new Act of 2017. The old Act of 2010 did not impede a judgment being made, a decision or a risk being taken by a doctor in the interest of the patient.

10. Relying upon 2002 Volume 8 Supreme Court Cases page 481 (T.M.A. Pai Foundation & Ors. v. State of Karnataka & Ors.) learned Senior Advocate for the petitioners has submitted that, the State cannot encroach into the functioning of a private institution. The Act of 2017 is replete with provisions regarding regulation of a private institution. He has referred to 1981 Volume 1 Supreme Court Cases page 722 (Ajay Hasia & Ors. v. Khalid Mujib Sehravardi & Ors.) and 2011 Volume 9 Supreme Court Cases page 286 (Andhra Pradesh Dairy Development Corporation Federation v. B. Narasimha Reddy & Ors.) and has submitted that, an Act of the State Legislature has to pass the test of Article 14 of the Constitution of India. The various provisions of the Act of 2017 referred to by him, do not pass such test. Therefore, such sections ought to be set aside. Relying upon 2011 Volume 9 Supreme Court Cases page 1 (K.T. Plantation (P) Ltd. v. State of Karnataka) learned Senior Advocate for the petitioners has submitted that, the dominant intention of the two legislations are to be looked at and that, since it covers the same subject, the Central legislation should prevail over Act of 2017. The Consumer Protection Act, 1986 and the Regulations of 2002 will prevail over the Act of 2017. Commenting upon the classification amongst doctors sought to be introduced under the Act of 2017, learned Senior Advocate for the petitioners has submitted that, the Government doctors and Government medical facilities have been kept out of the purview of the Act of 2017. The Act of 2017 is directed towards private practitioners and private medical institutions. This classification is unreasonable. He has referred to 1996 Volume 1 Supreme Court Cases page 1 (Harbilas Rai Bansal v. State of Punjab & Anr.) in support of such contention.

11. Referring to 2011 Volume 8 Supreme Court Cases page 737 (State of Tamil Nadu & Ors. v. K. Shyam Sunder & Ors.) learned Senior Advocate for the petitioners has submitted that, the history of the legislation under challenge has to be looked into. The veil has to be lifted. The legislative competence is required to be considered. According to him, the State Legislature does not have the legislative competence to enact the Act of 2017. Relying upon 2013 Volume 1 Supreme Court Cases page 745 (Namt Sharma v. Union of India) learned Senior Advocate for the petitioners has submitted that, the constitutionality of the Act depends upon the Act under challenge or the provisions of such Act, passing the test of rationality. The petitioners assailing an act on the ground of ultra vires need not establish any prejudice, when the petitioners complain of violation of fundamental rights. Learned Senior Advocate for the petitioners has relied upon

All India Reporter 2017 Supreme Court page 2078 (Dr. Sou Jayshree Ujwal Ingole v. State of Maharashtra & Anr.) in support of the contention that, the medical profession encourages a doctor to take risks, in order to save life. A doctor is required to exercise discretion in the treatment of a patient. The discretion should be allowed to be exercised in a free and fair atmosphere, without any threat of punitive action. The Act of 2017 has the potentiality of putting fear into the mind of a doctor, therefore, impeding the exercise of discretion for the benefit of a patient. According to him, the various provisions of the Act ought to be struck down. The cumulative effect of the provisions under challenge makes the entire Act of 2017 unworkable, infeasible, impracticable, irrational and, therefore, the entirety of the Act of 2017 ought to be struck down.

12. The writ petition has been opposed by the State, Medical Council of India and West Bengal Medical Council. Learned Advocate General appearing for the State has submitted that, the petition as framed is not maintainable. He has drawn the attention of the Court to the prayers made in the writ petition. He has submitted that, the various provisions of the Act of 2017 alluded to by the learned Senior Advocate for the petitioners, are not under challenge in the writ petition. In support of such contention, he has referred to the prayers made in the writ petition. Only Section 14 of the Act of 2017 is under challenge in the prayer of the writ petition. Such section requires a doctor to take a registration under the Act of 2017. None of the petitioners before the Court have pleaded that, they have a registration under Section 14 of the Act of 2017. Therefore, none of the petitioners have any cause of action to move the Writ Court. Existence of a cause of action is an essential ingredient for maintaining an action under Article 226 of the Constitution of India. In support of such contention, he has relied upon 2004 Volume 6 Supreme Court Cases page 254 (Kusum Ingots & Alloys Ltd. v. Union of India & Anr.). He has relied upon 2007 Volume 10 Supreme Court Cases page 712 (Union of India & Ors. v. Jai Prakash Singh & Anr.) and 2010 Volume 11 Supreme Court Cases page 557 (Manohar Lal v. Ugrasen & Ors.) for the proposition that, a writ petition without specific prayers assailing a provision of an Act ought not to be entertained.

13. Without prejudice to his contentions that, the writ petition as framed is not maintainable, learned Advocate General has proceeded to address the Court on the merits of the other contentions raised by the petitioners.

14. Learned Advocate General has referred to the statement of objects of the Act of 2017 and its preamble. He has referred to the various provisions of the Act and has submitted that, the Act has come into being in order to maintain the standards of medical health in the State. The contentions of the petitioners if accepted, will permit loopholes to appear in the Act of 2017 which would permit unscrupulous health service providers with tools to manipulate and exploit the public at large. The doctors have social obligations. They are to serve the society. Monetary consideration for them comes later than their social obligations. He has referred to the various provisions of the Ethics Regulations and compared the

same with the provisions of the Act of 2017 and has submitted that, the various provisions of the Act of 2017 are in consonance with, and in fact, advances the provisions of Ethics Regulations. None of the provisions of the Act of 2017 can be said to be or construed to contradict any of the Ethics Regulations. In fact, according to him, the contentions of the petitioners if accepted, will militate against the existing laws. He has referred to the Drugs and Cosmetics Act, 1940 and has submitted that, a child specialist administering a course of immunization of a child is required to obtain appropriate licence under the provisions of Sections 2(b), 18 and 27 of the Drugs and Cosmetics Act, 1940. He has submitted that, Drugs and Cosmetics Rules, 1945 require a medical practitioner to obtain valid licence which according to him, a medical practitioner usually does not do so. In this regard, he has referred to Rules 2(f), 59(2), 65(2), (3), (4) and 9(a) and (b) along with Form 20, 20B, 20F and 20G. He has also referred to Item 5 of Schedule "K" thereto.

15. Referring to 2005 Volume 7 Supreme Court Cases page 1 (State of Punjab v. Shivram), 2016 Volume 4 Supreme Court Cases page 631 (Sayyed Ratanbhai Sayeed & Ors. v. Shirdi Nagar Panchayat & Anr.) and 2016 Volume 7 Supreme Court Cases page 353 (Modern Dental College and Research Centre & Ors. v. State of Madhya Pradesh & Ors.) learned Advocate General has submitted that, the Supreme Court had noted the need for regulations of the medical profession. The Supreme Court has recognized that, there can be a conflict between a private and public interest. When such a conflict arises, the public interest should prevail. In the present case, if there is a conflict between the interests of the doctors in his private field with his public obligations then the Act gives priority to the public purpose and requires the doctor to discharge his public obligations, in preference to the private one. He has submitted that, as in the educational field, where regulations are permitted, so also regulations are permitted in the medical profession field. The Act of 2017 ought to be looked at from the perspective of a patient or the patient party or public at large rather than the view point of an individual doctor alone. A doctor is required to serve the society at large, where service is primary and receipt of monetary benefit is secondary. The Act of 2017 recognizes such social obligation of a doctor. Therefore, the doctors cannot be heard to complain that, they are not being paid and that, the Act of 2017 impedes the earnings of a doctor. Quite to the contrary, the Act of 2017 seeks to protect the public from being overcharged and fleeced by unscrupulous elements operating at the health sector. Operators in the health sector are not limited to individual doctors. There are other stakeholders also. The Act of 2017 seeks to address such issues to the extent possible, through one mechanism.

16. Referring to 1995 Volume 3 Supreme Court Cases page 86 (State of Bihar & Ors. v. Sachchidanand Kishore Prasad Sinha & Ors.) and 1977 Volume 3 Supreme Court Cases page 592 (State of Rajasthan & Ors. v. Union of India & Anr.) learned Advocate General has submitted that, the possibility of abuse of a statutory provision should not be a guiding factor for the purpose of considering the constitutionality and constitutional validity of a statute. The constitutional

validity and constitutionality of a statute ought to be looked into under the parameters recognized in 2013 Volume 1 Supreme Court Cases page 745 (Namt Sharma v. Union of India).

17. Referring to the contention that, there is a conflict between the Consumer Protection Act, 1986 and the Act of 2017, learned Advocate General has submitted that, both the Acts operate at different fields. The Consumer Protection Act, 1986, seeks to grant compensation for deficiencies in services. The Act of 2017 seeks to protect the public at large from unscrupulous elements in the private health care sector. He has referred to 2003 Volume 2 Supreme Court Cases page 412 (State of Karnataka v. Vishwabharathi House Building Cooperative Society & Ors.) and 1995 Volume 6 Supreme Court Cases page 651 (Indian Medical Association v. V.P. Shanta & Ors.) in this regard.

18. Learned Advocate General has submitted that, the Act of 2017 was enacted in exercise of powers granted to the State Legislature in List II Entry 6 thereof. Therefore, the State Legislature has adequate legislative competence to enact the Act of 2017.

19. Learned Advocate appearing for the respondent no. 2 has submitted that, the disciplinary proceedings in respect of doctors are to be considered by the State Medical Council. He has referred to Sections 23 and 24 of the Indian Medical Council Act, 1956 in this regard. He has relied upon 2008 Volume 4 Supreme Court Cases page 720 (Government of Andhra Pradesh & Ors. v. P. Laxmi) as well as Section 38 of the Act of 2017.

20. Learned Advocate appearing for the respondent no. 3 has submitted that, the petitioner is not entitled to challenge the entirety of the Act of 2017 or the provisions specified, in course of argument, inasmuch as the prayers in the writ petition does not sustain the same. He has submitted that, there is no repugnancy between the Act of 2017 and the Regulations of the Medical Council of India.

21. In reply the learned Senior Advocate for the petitioners has distinguished the judgments cited on behalf of the respondents. He has submitted that, in the facts scenario of the present case, the judgments cited on behalf of the respondents do not apply.

22. The issues that have arisen for consideration in the instant writ petition may be summarized as follows:- (i) Is the writ petition as framed maintainable?

(ii) Are the provisions of Sections 1(4), 2(c)(ii), 2 (d), 2(v), 2(z), 7(2), 7(3)(c), 7(3)(i), 7(3)(j), 7(3)(k), 7(3)(l) to (p), 7(3)(r), 7(3)(s), 7(3)(v), 13, 27, 29, 30, 32, 33(1), 33(2), 36, 38 and 42 of the Act of 2017 ultra vires the Constitution of India?

(iii) To what reliefs, if any, are the parties entitled to?

23. The maintainability of the writ petition has been questioned on two grounds.

One of the grounds of questioning the maintainability has been that, the writ petition does not contain any prayer challenging the sections of the Act of 2017 argued in the course of hearing and the other being that, the petitioners have no cause of action to maintain the writ petition. No right of the petitioners is infringed by the Act of 2017 for the petitioners to approach a High Court. *Jai Prakash Singh & Anr. (supra)* has held that, the High Court in the facts of that case had travelled beyond the pleadings. A non-grant of permission to operate the Gramin Public Call Office was under challenge in a writ petition. The High Court had set aside the policy for grant of such permission. In such context, it has held that, the High Court had travelled beyond the pleadings and that, the legality of the policy was not under challenge in the writ petition. *Manohar Lal (supra)* has held that, a Court cannot grant a relief which has not been specifically prayed for by the parties. A writ petition was filed challenging the allotment of land in favour of the appellant. Three question of law had arisen for consideration before the Supreme Court. One of them was, whether a Court can grant relief which has not been asked for. In answer to such issue, the Supreme Court having noticed the various authorities on the subject, has arrived at the finding that, a Court cannot grant a relief which has not been specifically prayed for by the parties.

24. In the present case, five doctors are before the Court. They have claimed themselves to be members of West Bengal Doctors Forum, a trust having its registered office at New Barrackpore. The petitioners have referred to the provisions of the Act of 2017 as noted in the second issue, in the body of the writ petition. They have raised contentions in the pleadings of the writ petition, with regard to such provisions of the Act of 2017. At the prayer portion of the Writ petition, the petitioners have, in aggregate, made seven prayers. In the first prayer, the petitioners have sought for a declaration that, the provisions of Section 14 of the Act of 2017 are ultra vires. In the second prayer, the petitioners have sought for appropriate writ or writs. In the third prayer, the petitioners have prayed for a Rule NISI. In the fourth prayer, the petitioner have sought for an interim order restraining respondents from giving effect to the provisions of Sections 1(4), 2(c)(ii), 2(d), 2(v), 2(z), 7(2), 7(3)(c), 7(3) (i), 7(3) (j), 7(3)(k), 7(3)(l) to (p), 7(3)(r), 7(3)(s), 7(3)(v), 13, 27, 29, 30, 32, 33 (1), 33(2), 36, 38 and 42 of the Act of 2017. The balance of the prayers are consequential to the previous prayers. There are pleadings with regard to the vires of the Sections that are under challenge, in the body of the writ petition. The prayer portion of the writ petition is not happily drafted. A member of the public would not be committing sacrilege, if such member was to observe that, the prayers made in the writ petition under consideration, imitates the level of diligence and care , the public have become accustomed to receive from the medical practitioners in the present day. However, it would be harsh to return a finding that, the writ petition is not maintainable as the prayers are not happily drafted. It is not a scenario, where the respondents are not aware of the challenges to the provisions of the Act of 2017 and where the petitioners are

seeking to travel beyond the pleadings. A better way would have been to amend the reliefs, to make it in consonance with the pleadings. The petitioners have chosen not to do so. Then again, a Writ Court can mould the reliefs. In moulding the reliefs, the Writ Court should not travel beyond the pleadings. That caveat stands satisfied in the facts of the present case. Even if the Court is to consider the challenges to the various provisions of the Act of 2017, notwithstanding the prayers as it stands in the writ petition, the Court would not be guilty of travelling beyond the pleadings.

25. The maintainability of the writ petition has also been questioned on the ground that, the petitioners do not have any cause of action to maintain the writ petition. The petitioners are not registered under the Act of 2017. Therefore, no right of the petitioners stands affected by the Act of 2017 has been the contention. *Kusum Ingots & Alloys Ltd. (supra)* has held that, passing of a legislation by itself does not confer any right to file a writ petition unless a cause of action arises therefor. It has noticed in paragraph 6 that, "6. Cause of action implies a right to sue. The material facts which are imperative for the suitor to allege and prove constitute the cause of action. Cause of action is not defined in any statute. It has, however, been judicially interpreted inter alia to mean that every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court."

26. *Namit Sharma (supra)* has held that, no prejudice needs to be proved in cases where breach of fundamental right is claimed. A law which violates the fundamental rights of a person is void. In the present case, the issue as to whether the fundamental right of a doctor to carry on practice in medical profession stands violated by the provisions of the Act of 2017 or not is required to be considered. The petitioners have canvassed a point of view which makes out a case to go to trial. Therefore, the petition discloses a cause of action. The issues raised in the writ petition are required to be decided. The writ petition as it stands cannot be dismissed on the ground of maintainability alone. It is one thing to say that, the writ petitioners may not receive any relief upon consideration of the merits of the matter. It is another thing to say that, the merits of the writ petition need not be adjudicated upon as the writ petition as it stands, is not maintainable.

27. The first issue is therefore, answered in the affirmative and in favour of the petitioners. The writ petition is maintainable.

28. As noted above, the petitioners are doctors claiming themselves to be members of a Doctors Forum. The petitioners have claimed to be engaged in individual medical practice. They have claimed that, their right to practice stands infringed by the various provisions of the Act of 2017.

29. *K. Shyam Sunder & Ors. (supra)* has held that, the history of legislation needs to be looked at by lifting the veil. It recognizes that, legislative competence can also be looked at while deciding the question of a vires of a

particular provision of an Act. In such light, the history of the impugned Act needs consideration. It has not come about suddenly. The system of registration and regulation of clinical establishment has not been introduced for the first time through the Act of 2017. It was available in some form or the other from 1950. The system of registration and licensing in respect of the clinical establishment can be traced to the West Bengal Clinical Establishment Act, 1950. The Act of 1950 had introduced a system of registration and licensing. It had defined a clinical establishment to mean any nursing home, physical therapy establishment, clinical laboratory, hospital, dispensary with bed, medical camp, medical institution of analogous establishment, by whatever name called. The Act of 1950 had understood medical clinical to mean a place where a registered medical practitioner treats a patient and is available for consultation and treatment. The element of treatment was introduced in the Act of 1950. Section 3 thereof had prohibited keeping or carrying on a clinical establishment without being registered. Section 4 thereof provided for registration and licence. Cancellation of registration and licence had been provided in Section 5 thereof. The Act of 1950 had contemplated classification of clinical establishment. It had also contemplated establishment of State level and District level committees to advise the State Government on the implementation of the provisions of such Act. It had provided for power to enter and inspect in Section 6 thereof. Section 7 had provided for offences and penalties for contravention.

30. The State Government had found the Act of 1950 to be unable to keep up with pace of the expansion in the health care. The State Government had noted the need for supervision and regulation. Despite the amendments introduced to the Act of 1950, the State Government had felt that, the same was not adequate to redress the problems faced at the health service sector. In order to address such issues, it had promulgated the West Bengal Clinical Establishment (Registration and Regulation) Act, 2010. The Act of 2010 was divided into six chapters. Clinical establishment and clinical laboratory were defined in the Act of 2010. It brought into its fold a single doctor establishment in the definition of medical clinic. According to it, a medical clinic would mean a space used or intended to be used for consultation and treatment by a registered medical practitioner. The registration and standards were laid down in Chapter II. The procedure for registration and licensing were laid down in Chapter III. It had provided for powers to enter any clinical establishment. It had also provided an appeal to the designated appellate authority in the event of orders being passed under the various provisions of the Act were assailed. Chapter IV of the Act of 2010 had dealt with the contravention and penalty. Chapter V of such Act had provided for an adjudicating authority and a Tribunal in respect of complaint relating to contraventions of Sections 27, 28, 29(1) and Section 30 of such Act. The Act of 2010 was more elaborate than that of the Act of 1950 and it had covered a large horizon than the previous Act of 1950. The Act of 2010 had repealed the Act of 1950.

31. The State Government subsequently found the Act of 2010 not to be

adequate to address the issues of lack of transparencies in the functioning of clinical establishment in general and private hospitals or nursing homes in particular. It found unnecessary and avoidable harassment and exploitation of service recipients at the hands of private operators in the health sector. The State Government took a view that, health care is not a commercial proposition and that, it is a service with humility and human touch. It wanted to regulate the costs and charges imposed by such establishment while dealing with service recipients. In order to address such issues, the State Government came up with the Act of 2017.

32. According to the petitioners, the provisions of the Act of 2017 do not satisfy the test of Article 14 of the Constitution of India, amongst others. The sections identified by the petitioners to be ultra vires, are set out below:- "1. Short title, extent, commencement and application. -

(1)
.. ..

(2)
.. ..

(3)
.. ..

(4) It shall apply to all clinical establishments other than-

(a) any clinical establishment maintained by, or under the control of, the State Government, Central Government or Local Self-Government or any local authority; or

(b) any clinical establishment or asylum established or licensed under the Mental Health Act, 1987(14 of 1987); or

(c) the clinical establishments owned, controlled or managed by the Armed Forces.

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

(a).....
.....

(b).....
.....

(c) "clinical establishment".....s hall include -

(i).....
.....

(ii) a single doctor establishment or medical clinic.

Explanation.-"medical clinic" shall mean a place used or intended to be used for consultation and treatment by a registered medical practitioner but shall not include any place utilised by a registered Medical Practitioner solely for the purpose of consultation and advice, which shall have to be displayed as "Medical Consultation clinic."

(d) "clinical laboratory" means any establishment or premises used or intended to be used for the -

(i) pathological, bacteriological, genetic, radiological, chemical, biological or other tests, examination, analysis or collection of sample and specimen or other diagnostic or investigative services, procedure or intervention, or

(ii) preparation of cultures, vaccines, sera or other biological or microbiological products, with the aid of laboratory or other medical equipment for the purposes of diagnosis, treatment or research of diseases;

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(v) "service provider" means a medical doctor, nurse, midwife, other paramedical professional, social worker or other appropriately trained and qualified person with specific skills relevant to particular health care services including management of clinical establishment, and any reference to service provider shall mean the same unless specifically stated otherwise;

(w)
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(za) "West Bengal Clinical Establishment Regulatory Commission", (hereinafter referred as the Commission), means a body constituted by the State Government as described in Section 36 of this Act. It shall have such regulatory, supervisory and grievance redressing functions for patients as may be prescribed over the activities of clinical establishments licensed under this Act.

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7. Conditions for registration and licence.-

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(2) No license shall be granted in respect of a clinical establishment unless it has
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(a) provided such minimum standard of accommodation as may be prescribed;

(b) engaged such minimum number, and norms, of service providers including registered medical practitioner, registered nurse, other paramedical staff and other categories of employees with such qualification as may be prescribed;

(c) made arrangements for such minimum standard of services including emergency care and referral services as may be prescribed;

(d) installed such equipments and machineries as may be prescribed; (e) made such arrangements for disposal of biomedical wastes as may be prescribed;

(f) made provisions for maintenance of such records and registers in such form and containing such particulars as may be prescribed;

(g) fulfilled any other condition that may be prescribed.

(3) Every license granted under sub-section (1) shall be subject to the following terms and conditions :-

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(c) that the clinical establishment shall not resort to any unethical or unfair trade practices including unfair pricing for different services;

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(i) that every case of a victim of accident, injury, or trauma, received or accommodated or both thereto shall be reported to the police station within the jurisdiction of which such clinical establishment is located after providing immediate medical treatment;

(j) that every clinical establishment shall provide necessary medical treatment to victims of road traffic accident, persons suffering from sudden calamities, acid attack victims and rape victims irrespective of their ability to bear the treatment cost at the relevant time: Provided that the clinical establishment shall have the right to recover the cost from the service recipients or his representatives in due

course of time;

(k) that there should be no delay in releasing the Dead Body of patients or service recipients to their representatives due to billing or other issues, including inability to pay the treatment cost : Provided the clinical establishment shall have the right to recover the cost and charges from the representatives of the service recipients in due course;

(l) that every clinical establishment shall maintain a Public Grievance Cell for lodging of any complaint regarding treatment, improper billing, deficit in service, attending staffs' behaviour etc. and for redressal thereof;

(m) that every clinical establishment shall set up a proper Help Desk to maintain regular and proper communication with the service recipients or their representatives regarding treatment, recipient's condition, regular billing etc. and for their proper counseling;

(n) that every clinical establishment shall immediately after coming into force of this Act, implement e- Prescription, maintain Electronic Medical Records and provide a set of all medical records and treatment details along with the discharge summary at the time of discharge of the service recipient;

(o) that every clinical establishment shall strictly follow the fixed rates and charges including the Package Rates for investigation, bed charges, operation theatre procedures, Intensive Care, ventilation, implants, consultation and similar tests and procedures, and any additional treatment or procedure shall not attract additional charges over and above such fixed rates and charges including the Package Rates;

(p) that every clinical establishment shall provide proper estimates for treatments not covered in fixed rates and charges including the Package Rates, to the service recipients or representative of service recipients during initiation or due course of treatment, and final bills shall not exceed estimates by a certain percentage, as may be prescribed by the Government;

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(r) that every clinical establishment having more than 100 beds may endeavour setting up Fair Price Medicine Shop and Fair Price Diagnostic Centre;

(s) that any clinical establishment which has received land or other facility from the Government during initiation and in course of continuance of their projects shall be responsible to provide completely free treatment to 20 percent of Outdoor Patient Department patients and 10 percent of Indoor Patient Department patients in such manner as may be prescribed: Provided that clinical establishments, owned and managed by corporate entities that have not availed such benefits, may endeavour to provide completely free treatment to 20 percent of Outdoor Patient Department patients and 10 percent of Indoor Patient

Department patients as part of their Corporate Social Responsibility;

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(v) that no person shall be denied, under any circumstances, including inability to pay the requisite fee or charges, such emergency life-saving medical treatment and critical care by the clinical establishment as may be prescribed:

Provided that the clinical establishment has the right to recover the cost from the service recipient or his representative in due course of time;

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13. Grant or rejection of application. - On receipt of application made under subsection (1) of section 12, the licensing authority shall, if it is satisfied after causing such enquiries as may be necessary and after following the criteria as may be prescribed, pass an order within the prescribed period from the date of receipt of application, either-

(a) granting the application for registration and license or renewal of registration and license; or

(b) rejecting the application,

and shall send a copy of the order to the applicant by registered post or in such other manner as may be prescribed:

Provided that if the licensing authority rejects an application for registration and license or renewal of registration and license, it shall record its reasons therefor.

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27. Penalty for non-registration and licensing.- (1) Whoever carries on a clinical establishment without registration and license shall be liable to a penalty which may extend to one lakh rupees, along with a further penalty of one thousand rupees for each day of operation of the clinical establishment without license subject to maximum of ten lakh rupees.

(2) Whoever knowingly serves in a clinical establishment which is not duly registered and licensed under this Act, shall be liable to a penalty which may extend to twenty-five thousand rupees.

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29. Minor and major deficiencies.- (1) Whoever contravenes any provision of this

Act or any rule made thereunder resulting in such minor deficiencies, that do not pose any imminent danger to the health and safety of any patient or public and can be rectified within a reasonable time, shall be liable to a penalty which may extend to fifty thousand rupees.

(2) Whoever contravenes any provision of this Act or any rule made thereunder resulting in such major deficiencies, that pose an imminent danger to the health and safety of any member of the public or patient and which cannot be rectified within a reasonable time, shall be liable to a penalty which may extend to ten lakh rupees.

Explanation.-For the purpose of this section "minor deficiencies and major deficiencies" shall have such meaning as may be prescribed.

30. Whoever contravenes any provision of this Act or any rule made thereunder shall, if no penalty is provided elsewhere, be liable to a penalty which may extend to fifty thousand rupees for the first contravention and one lakh rupees for any subsequent contravention.

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32. General provision relating to penalties. - (1) While adjudging the quantum of penalty under this Chapter, the Adjudicating Authority or the Commission, as the case may be, shall have due regard to the following:-

- (a) the amount of gain or unfair advantage, wherever quantifiable, made as a result of the contravention;
- (b) the amount of loss caused or likely to be caused to any person as a result of the contravention;
- (c) the repetitive nature of the contravention;
- (d) whether the contravention is without his knowledge; and
- (e) any other relevant factor.

(2) The penalties which may be imposed for contravention of any provision of this Act or any rule made thereunder shall be without prejudice to the power of the licensing authority to suspend or cancel the license.

33. Compensation in case of injury or death of the service recipients.- (1) Without prejudice to the other provisions of this Chapter, if any clinical establishment whether by itself or by any other person on its behalf, while providing services causes injury to the service recipient or his death, due to negligence or any deficiency in providing service, it shall be lawful for the Commission, on substantiation of charges, to direct it to pay compensation to the victim or the legal representative of the victim, a sum-

- (a) which may extend to three lakh rupees in case of simple injury;

(b) which may extend to five lakh rupees in case of grievous injury; and

(c) which shall not be less than ten lakh rupees in case of death:

Provided that the compensation shall be paid at the earliest and in no case later than six months from the date of occurrence of the incident:

Provided further that in case of death, an interim relief shall be paid to the next of the kin within thirty days of the incident.

(2) Where any person is held guilty of a contravention leading to grievous injury or death, the Commission may cause the name and place of residence of the person held guilty, the offence and the penalty imposed to be published at the offender's expense in such newspapers or in such other manner as the Commission may direct and the expenses of such publication shall constitute the cost and the same shall be recoverable in the same manner as fine.

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36. Constitution of West Bengal Clinical Establishment Regulatory Commission. -

(1) The State Government shall constitute a West Bengal Clinical Establishment Regulatory Commission to exercise the powers and perform the functions conferred on the commission under this Act for the purpose of regulation and supervision of the functioning and activities of the clinical establishments licensed under this Act for ensuring accountability and transparency in dealing with patients by clinical establishments in providing patient care services, to advise the Government on measures be adopted for enhancing and augmenting the performance of clinical establishments in the State.

(2) The West Bengal Clinical Establishment Regulatory Commission shall consist of-

(a) a Chairperson, appointed by the State Government, who is or has been a High Court Judge or any officer who has held the office of Chief Secretary, Additional Chief Secretary in the State Government or any officer who has held equivalent post in the Government of India: Provided that a retired High Court Judge, if appointed as Chairperson, may pursue his professional work;

(b) a Vice -Chairperson who is a person of eminence to be appointed by the State Government;

(c) members not exceeding eleven in number, to be appointed by the State Government, selected from the fields of medicine including diagnostics, public health, academia, social services, law, finance, public administration, nursing and consumer interests.

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38. Powers and Functions of the West Bengal Clinical Establishment Regulatory Commission.-

(1) The Commission shall-

- (i) monitor the functioning of clinical establishments;
- (ii) regulate and supervise functions of clinical establishments as prescribed;
- (iii) mine and consider complaints, filed manually or electronically through an online system in matters related to patient care service, deviations from declared fees and charges, refusal of supply of copy of medical records and allied matters, alleged irrational and unethical trade practice alleged before the Commission by aggrieved patient parties against clinical establishments and after issue of notice and hearing both parties, adjudicate, compensate and pass such other orders, as deemed appropriate:

Provided that any complaint of medical negligence against medical professionals will be dealt with by respective State Medical Councils:

Provided further that the Commission for the purpose of adjudicating disputes and appeal under this Act, shall have a quorum of the Chairperson and not less than two other members;

- (iv) make regulations with regard to fixing of rates or charges for indoor patient department and outdoor patient department treatment including diagnostics and also to ensure compliance with fixed rates and charges by clinical establishments;
- (v) enforce transparency in dealing with patients by the clinical establishments;
- (vi) tender advice and make suggestions regarding measures to be adopted under this Act, for improving patient care services and redressal of grievances;
- (vii) undertake planned or surprise inspections to examine and ascertain strict compliance by clinical establishments with provisions of this Act;
- (viii) hear appeals arising from orders and decisions passed by the Adjudicating Authority in the Districts;
- (ix) have the powers to award such compensation as deemed appropriate not exceeding fifty lakh rupees, including interim compensation;
- (x) ensure that only properly trained medical and paramedical personnel like doctors, nurses, technicians, pharmacists are employed by the clinical establishment.

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42. Salary, allowances etc. to the Chairperson, the Vice-Chairperson and other Members.- (1) The salary, allowances payable to and other terms and condition of service of the Chairperson, the Vice- Chairperson and members of the West

Bengal Clinical Establishment Regulatory Commission shall be such, as may be prescribed: Provided that the salary, allowances and other terms and conditions of service of Chairperson, the Vice-Chairperson and the members, shall not be varied to their disadvantage after appointment.

(2) Notwithstanding anything contained in sub-section (1), the Chairperson, the Vice-Chairperson or any Member of the commission may relinquish his office by giving in writing to the State Government a notice of not less than three months.

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33. The preamble to the Act of 2017 is as follows:- "An Act to provide for the registration, regulation and transparency of clinical establishments of the State and for matters connected therewith or incidental there to. WHEREAS it is expedient, in the public interest, to provide for registration, regulation and transparency in the functioning and activities of clinical establishments licensed under this Act, to preserve minimum standards of facilities and service to be provided by them to the service recipients."

34. As the preamble suggests, the Act of 2017 has come into being to provide for the registration, regulation and transparency of the clinical establishment in the State. It seeks to provide matters connected therewith and incidental thereto. It states that, such registration, regulation or transparency is required in the public interest so that, the functioning in the clinical establishment licensed under the Act of 2017 preserves minimum standard of facilities and service.

35. The Act of 2017 is divided into six chapters. The first Chapter is the preliminary of the Act of 2017. It contains the definitions, amongst others. The second Chapter deals with registration and standards. The third Chapter deals with the procedure for registration and licensing. The fourth Chapter deals with contravention and penalty. The fifth Chapter deals with the adjudicating authority and provides for the establishment of the West Bengal Clinical Establishment Regulatory Commission. The sixth Chapter deals with the miscellaneous provisions of the Act of 2017. Clinical establishment is defined in Section 2(c) of the Act of 2017. As rightly pointed out on behalf of the petitioners, the definition of clinical establishment brings into its fold, an individual doctor who satisfies the test laid down in the Explanation to Clause (II) thereof. The Act of 2017 while defining clinical establishment in Section 2(c) thereof, makes a distinction between a medical clinic and medical consultation clinic. A medical consultation clinic is one which a registered medical practitioner utilizes solely for the purpose of consultation and advice. It is required to display such place as a medical consultation clinic. A medical clinic on the other hand, means a place used for consultation and treatment by a registered medical practitioner and it would come within the definition of clinical establishment meaning thereby that, the rigours of the Act of 2017 would have to be followed by such registered medical practitioner having a medical clinic within the meaning of the Act of 2017. It is

true that, given the infinite numbers situations that may arise in the treatment of a patient, an individual doctor carrying on practice of consultation and advice may be called upon to treat a patient, that is to say administer medicine or take measures so as to save the life of a patient coming for consultation and advice, at the medical consultation clinic, as contemplated under the Act of 2017. Once such a doctor treats the patient, he comes within the ambit of the Act of 2017. His intention was not to come within the Act of 2017. However, he was forced to come within the Act of 2017, in view of a situation which is beyond his control.

36. Clinical laboratory is defined in Section 2(d). A service provider is defined in Section 2(v). A doctor comes in within the meaning of a service provider. Section 2(za) defines West Bengal Clinical Establishment Regulatory Commission. It is a body constituted under the Act of 2017 as described in Section 36 thereof. It is required to regulate, supervise and discharge grievance redressal functions for patients as may be prescribed, over the activities of the clinical establishments licensed under the Act of 2017. Section 6 of the Act of 2017 requires a clinical establishment to obtain a registration and licence. It prohibits any person from keeping or carrying on any clinical establishment without any registration or licence. The conditions for registration and licence are laid down under Section 7 of the Act of 2017. Sub-section (2) of Section 7 prohibits grant of licence towards a clinical establishment unless such clinical establishment satisfies the criteria laid down therein. Sub-section (3) of Section 7 lays down that, a licence granted under the Act of 2017 would be subject to the terms and conditions laid down therein. Clause (c) prohibits a clinical establishment from resorting to any unethical or unfair trade practices including unfair pricing for different services. Clause (i) requires reporting of every case of a victim of accident, injury or trauma to the jurisdictional police station of the clinical establishment after providing immediate medical treatment. Clause (j) mandates every clinical establishment to provide necessary medical treatment to victims of road traffic accident, persons suffering from sudden calamities, acid attack victims and rape victims irrespective of their ability to bear the treatment cost at the relevant time. The clause comes with a proviso. The proviso allows the clinical establishment the right to recover the costs from the service recipients or their representatives in due course of time. Clause (k) mandates a clinical establishment not to delay releasing a dead body of the service recipient due to billing or other issues including inability to pay the costs of treatment. The proviso thereto, allows the clinical establishment the right to recover the costs and charges. Clause (l) requires a clinical establishment to maintain a Public Grievance Cell for lodging any complaints regarding treatment, improper billing, deficit in service, attending staffs' behavior and other matters. It requires the clinical establishment to provide for redressal thereof. Clause (m) contemplates a Help Desk to maintain regular and proper communication and proper counseling to the service recipients and their representatives regarding treatment, conditions of the patient, billing and other matters. Clause (n) requires a clinical establishment to implement e-prescription, maintain Electronic Medical Records

and provide a set of all medical record and treatment details along with the discharge summary at the time of discharge of a service recipient. Clause (o) requires a clinical establishment to follow the fixed rates and charges and other charges as may be fixed. Clause (p) requires a clinical establishment to provide proper estimates for the treatment not covered under fixed rates and charges. Clause (r) requires a clinical establishment having more than 100 beds to set up a fair price medical shop and fair price diagnostic centre. Clause (s) deals with clinical establishment which has received any amount or other facility from the Government to provide free treatment of 20 per cent of outdoor patients and 10 per cent of indoor patients. Clause (v) lays down that, no person shall be denied, under any circumstances, including inability to pay the requisite fee or charge, such emergency life-saving medical treatment and critical care by the clinical establishment as may be prescribed. The proviso also allows the right to recover the costs from the service recipient or their representative in due course of time.

37. Section 12 of the Act of 2017 deals with the application for registration and licensing. Section 13 of the Act of 2017 deals with grant of registration and licence. Section 13 of the Act of 2017 allows either grant or rejection of an application for licence or renewal. The grounds for rejections are specified in Section 14 of the Act of 2017. Section 24 of the Act of 2017 allows any officer of the State Government duly authorised to make inquiries, examine the place or establishment, inspect equipment and other things and enter and search any premise in the manner and for the reasons as provided therein. Section 29 of the Act of 2017 distinguishes between minor and major deficiency. Section 30 provides for penalty for contravention. Section 32 deals with the general provisions relating to penalties. Section 33 allows the Commission established under the Act of 2017 to grant compensation in case of injury or death of the service recipients. Section 36 contemplates the constitution of the West Bengal Clinical Establishment Regulatory Commission. The powers and functions of the Commission established under the Act of 2017 are delineated in Section 38. It includes the power to make or regulate the rates and charges and award of compensation not exceeding Rs.50 Lakhs including grant of interim compensation.

38. As noted above, the writ petition is at the behest of the individual medical practitioners. They are not large clinical establishments which the Act seeks to regulate. However, such individual medical practitioner have ended up in challenging the provisions of the Act of 2017, namely, Section 7(3)(r) and (s) in the fourth prayer of the writ petition. Such provisions deal with clinical establishment having more than 100 beds and a clinical establishment which has received land or other facility from the Government. If an individual medical practitioner is capable of having a clinical establishment with more than 100 beds or has received land or other facility from the Government, such medical practitioner cannot be heard to say that, the other rigours of the Act of 2017 are so onerous so as to violate his fundamental rights to carry on medical profession. Learned Senior Advocate for the petitioners has repeatedly emphasized the fact

that, the petitioners as individual medical practitioners are before Court and that, such petitioners are not espousing any cause of any large clinical establishment which the Act of 2017 seeks to address. He has repeatedly emphasized the fact that, in the garb of regulating a large clinical establishment, the Act of 2017 has ended up impeding the profession of individual doctors. The fourth prayer as framed and as noted above, does not entirely agree with such stand of the petitioners in Court. Ignoring the portion of disagreement, the thrust of the contentions of the petitioners with regard to the vires of the provisions of the Act is taken up for consideration.

39. *Ajay Hasia & Ors. (supra)* has held that, Article 14 strikes at arbitrariness, as any legislative or executive action which is found to be arbitrary would constitute denial of equality. Article 14 guarantees equality. Article 14 springs into action and strikes down action of the legislature or the executive which violates the guarantee of equality. The concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme. It is a golden thread which runs through the whole of the fabric of the Constitution. Article 14 is not limited to the formula of discrimination initially laid down. The scope of Article 14 has been noticed in *Harbilas Rai Bansal (supra)*. It has held that, to be permissible under Article 14, a classification must satisfy two conditions, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons and things that are grouped together from others left out the group, and (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different basis, but what is necessary is that, there must be a nexus between the basis of classification and the object of the Act under consideration. *B. Narasimha Reddy & Ors. (supra)* has held that, the doctrine of arbitrariness is not restricted to executive actions only, but also applies to the legislature. However, the action of the legislature, violative of Article 14 of the Constitution should ordinarily be manifestly arbitrary. There must be a case of substantive unreasonableness in the statute itself for declaring the Act ultra vires Article 14 of the Constitution.

40. *Namit Sharma (supra)* has discussed the parameters of determining the constitutional validity of a constitutional provision. It has held that, "11. An enacted law may be constitutional or unconstitutional. Traditionally, this Court had provided very limited grounds on which an enacted law could be declared unconstitutional. They were legislative competence, violation of Part III of the Constitution and reasonableness of the law. The first two were definite in their scope and application while the cases falling in the third category remained in a state of uncertainty. With the passage of time, the law developed and the grounds for unconstitutionality also widened. D.D. Basu in the "Shorter Constitution of India" (14th Edn., 2009) has detailed, with reference to various judgments of this Court, the grounds on which the law could be invalidated or could not be invalidated. Reference to them can be made as follows:

"Grounds of unconstitutionality. - A law may be unconstitutional on a number of

grounds:

(i) Contravention of any fundamental right, specified in Part III of the Constitution. (Ref. Under Art. 143: Special Reference No. 1 of 1964, In AIR 1965 SC 745 : 1965 (1) SCR 413)

(ii) Legislating on a subject which is not assigned to the relevant legislature by the distribution of powers made by the 7th Sch., read with the connected articles. (Ref. Special Reference No. 1 of 1964, In AIR 1965 SC 745 : 1965 1 SCR 413)

(iii) Contravention of any of the mandatory provisions of the Constitution which impose limitations upon the powers of a Legislature, e.g., Article 301. (Ref. *Atiabari Tea Co. v. State of Assam*, AIR 1961 SC 232)

(iv) In the case of a State law, it will be invalid in so far as it seeks to operate beyond the boundaries of the State. (*State of Bombay v. Chamarbaughwala*, AIR 1957 SC 699)

(v) That the Legislature concerned has abdicated its essential legislative function as assigned to it by the Constitution or has made an excessive delegation of that power to some other body. (*Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554 : 1960 Criminal Law Journal 735)."

41. The Act of 2017 seeks to regulate clinical establishment. As noted above, a medical practitioner satisfying the definition of a clinical establishment comes within the fold of the Act of 2017. According to the Advocate General, the need to regulate the medical profession has been noted by the Supreme Court. In *Shivram* (supra), in a suit for damages, against a doctor in the employment of the State, on account of a child being born in spite of the wife undergone a tubectomy operation the Supreme Court has observed that, the medical profession, is developing a tendency to forget that self-regulation which is at the heart of their profession is a privilege and not a right and a profession obtains this privilege in return for an implicit contract with society to provide good, competent and accountable services. It has also observed that, self-regulatory standards in a medical profession have shown a decline and this can be attributed to the overwhelming impact of commercialization of the sector. It has noted reports against the doctors engaging in exploitative medical practices, misuse of diagnostic procedures, brokering deals for sale of human organs, amongst other. It has felt the need for external regulation to supplement professional selfregulation. In *Sayyed Ratanbhai Sayeed & Ors.* (supra) small scale shopkeepers located in the vicinity in an internationally revered seat of a religious organization faced ouster from their sites, being governed by a decree of compromise. In such context, the Supreme Court has noted that, where private interest is pitted against public interest, particularly in the field of health, law and order, peace, security, clean environment, and area of public and collective good, private rights take a back seat.

42. In *Modern Dental College and Research Centre & Ors. (supra)* the validity of the provisions of an Act and the Rules framed thereunder were under challenge. It has held that, the right under Article 19(1)(g) is not absolute in terms and can be subject to reasonable restrictions. The reasonableness of the restriction has to be determined having regard to the nature of right alleged to be infringed, purpose of the restriction, extent of the restrictions and other relevant factors. In applying these factors, directive principles of State policy should be taken into consideration. It has allowed regulations to be formulated for the purpose of fees and admission to a medical college in the larger interest of the public and welfare of the student community. *Sachchidanand Kishore Prasad Sinha & Ors. (supra)* has dealt with the constitutional validity of a taxing statute. It has observed after noting the various authorities on the subject that, while considering the constitutional validity of a statute said to be violative of Article 14, the Courts should presume in favour of the constitutionality. The burden is upon the petitioners to show that, there are clear transgressions of the constitutional principles. *State of Rajasthan & Ors. (supra)* has held that, merely because power may sometime be abused, it is no ground for denying the existence of the power.

43. Irrationality and unreasonableness are two grounds which are foundational basis for the attack of the vires of the Act of 2017. Distinction between a medical clinic and a medical consultation clinic introduced in the definition of clinical establishment under Section 2(c) of the Act of 2017 allegedly gives rise to unreasonableness and irrationality. The petitioners have contended that, any doctor in private practice is required to treat a patient at the consultation chamber. Therefore, a doctor undertaking a private practice has to obtain registration under the Act of 2017 and thereby throw himself into the rigours of such Act when such doctor is in private practice, while the Act professes to regulate the large clinical establishments. True, the definition of clinical establishment as appearing in Section 2(c) of the Act of 2017, makes a distinction between a medical clinic and a medical consultation clinic. A person engaged in a medical clinic has to take a registration under the Act of 2017. Medical consultation clinic stands outside the scope and ambit of the Act of 2017. For a doctor to run a medical consultation clinic and stand outside the scope and ambit of the Act of 2017, the doctor concerned, cannot treat a patient at such medical consultation clinic. A medical consultation clinic will be used solely for the purpose of consultation and advice. The Act of 2017 does not take away the choice of an individual doctor to carry on its profession as a doctor and have a medical clinic or a medical consultation clinic. If a doctor is required to treat a patient in the course of consultation and advice, such a place would be considered as a medical clinic coming within the definition of clinical establishment under Section 2(c) of the Act of 2017 requiring such doctor to take a registration under the Act of 2017. The choice is left to the concerned doctor. It may be contended that, the choice is impractical and, therefore, non-existent as a doctor in course of his duties is required to treat a patient. Pure consultation

and advice is neither feasible nor possible. Assuming that to be so, then every doctor in private practice would be required to obtain registration under the Act of 2017. Requirement to undergo a registration under the Act of 2017 by itself does not infringe or take away the right to carry on one's profession guaranteed under Article 19 (1)(g). The right guaranteed under Article 19(1)(g) is not absolute and can be subjected to reasonable restrictions. The private practice of doctors, are sought to be regulated by the Act of 2017. The regulations put in place by the Act of 2017 have not been substantiated to be violative of Article 19(1)(g) of the Constitution of India.

44. P. Laxmi (supra) has noticed the hierarchy of the law in India. It has noticed that, the law can be classified under four broad headings. It has gone on to say that, if a law in a higher layer in the hierarchy clashes with a law in the lower layer, the former will prevail. Such a situation does not arise in the facts of the present case. There is no conflict between the definition of clinical establishment given under Section 2(c) or a medical clinic with that of the Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002. The Act of 2017 does not even remotely suggest that, a doctor need not adhere to the Regulations of 2002 or seek to prohibit any of such Regulations in their application and regulation of the conduct of a doctor. Segregation of a medical clinic and a medical consultation clinic within the definition of a clinical establishment under Section 2(c) of the Act of 2017, ipso facto, does not lead one to infer that, there is a violation of the Regulations of 2002 or that, a doctor is called upon to violate the same while acting under the Act of 2017.

45. The Act of 2017 does not impede a doctor in the discharge of his professional duties. The conduct of a doctor is guided by the Regulations of 2002. A doctor is to serve the society. The nature of the profession and the oath that a doctor takes, requires a doctor to put service to the society prior to receipt of monetary benefits. The various provisions of the Act of 2017 which requires a doctor to serve the patient first and then look for the monetary return, in my view, does not infringe upon the right of a doctor to receive the monetary benefits for the services rendered or contravenes any provision of the Regulations of 2002. No regulation of the Regulations of 2002 has been placed before Court to suggest that, the Regulations of 2002 require a doctor to obtain the monetary benefit first before treating a patient, rather it is to the contrary. The Act of 2017 allows a doctor to recover the costs of treatment from the patients or the service recipients or their representatives in due course and through the due process of law. The provisions of the Act of 2017 seeks to arrest a disquieting trend in the medical profession to detain a service recipient, not to extend appropriate and adequate medical facilities, till such time the costs and exorbitant at that, are realized in advance. That surely is not the oath of a doctor. It has not been suggested to be so. Therefore, the Act of 2017 does not militate against the right of the doctor to recover the reasonable and appropriate cost for the treatment advanced. It has been suggested that, the various provisions of the Act of 2017 which permits a service recipient to receive the service first and pay later will

give rise to a situation where a service provider would not be in a position to recover the cost. With respect, such a view is contrary to the oath of a doctor. Moreover, the Act itself provides that, a doctor will be entitled to recover the costs from the service recipient or their representatives. What it essentially seeks to do is, address the malpractices obtaining in the health care sector. The provisions of the Act of 2017 do not impede the discharge of duties of a doctor carrying on his profession with integrity, honesty and in terms of his oath.

46. The apprehension that, a medical practitioner would not be able to recover the just costs for the services rendered, in my view, emanates out of a perceived trust deficit between a patient and a medical practitioner. It is when a service recipient perceives the costs and charges that are realized for the services rendered to be exorbitant and divorced from the reality, it gives rise to friction and trust deficit. A single medical practitioner which the petitioners before the Court claim to be, would not be falling in the category of such clinical establishments who charge exorbitantly for the services rendered. In the given scheme under the Act of 2017, there would be transparency with regard to the costs of services rendered. The State Government seeks to prescribe uniform rates and charges. In any event, an individual medical practitioner would be declaring the fees payable in respect of the services to be rendered. Therefore, there would be no question of a service recipient after knowing the declared fees, not paying the same upon receipt of such services. None of the provisions of the Act of 2017, in my view, impedes the receipt of just remuneration for the services rendered by an individual medical practitioner.

47. Learned Advocate General has referred to List II Entry 6 under which the Act of 2017 has been enacted. List II of the 7th Schedule to the Constitution of India is the State List. Entry 6 relates to public health and sanitation; hospitals and dispensaries. The Act of 2017 seeks to regulate public health. It seeks to regulate private hospitals and dispensaries. Therefore, it can be said that the Act of 2017 is within the legislative competence of the State Government to legislate.

48. K.T. Plantation (P) Ltd. (supra) has held that, the classification created by a statute must have reasonable nexus with the object to be achieved. If the object can be achieved by an amendment to an existing statute, then a new Act need not come into being. Noted above, the State Government had felt that the existing laws were not sufficient to tackle the issues obtaining at the private health care sector. The legislature is deemed to know the subject on which it is legislating on. It has not been substantiated that the provisions of the Act of 2010 were sufficient to provide for all the areas now sought to be covered by the Act of 2017.

49. Chapter V of the Act of 2017 lays down the adjudicating authority for adjudicating complaints with regard to contravention of Sections 27, 28, 29(1) and 30 of the Act of 2017. The Act of 2017 contemplates constitution of the West Bengal Clinical Establishment Regulatory Commissioner. The powers and functions of such Commission are to monitor the functioning of the clinical

establishment, regulate and supervise its functions, examine and consider complaints filed manually or electronically through online system, matters relating to patient care service, deviation of declared fees and charges, refusal of supplies of copy of medical treatment bill or allied matters as also other matters specified under the Act of 2017. It is to hear appeals from the order and decisions of the adjudicating authority. It has been contended that, the constitution of the adjudicating authority as also the Commission are such that, they would be manned by non-medical personnel. Such a contention is unacceptable in view of the provisions of the Act of 2017. The composition of the Commission is such that, the State Government will appoint members not exceeding 11 in number selected from the fields of medicine including diagnostic, public health, social services, law, finance, public administration, nursing and consumer interest. The spectrum of choice of the State Government is wide. It includes the field of medicine but does not limit itself thereto. A large section of the stakeholders are sought to be accommodated in the Commission so that a better view on a matter can be achieved. It is contended that, the quorum of meeting of the Commission is such that, a meeting of the Commission can be held with the persons from the medical field being absent in such meeting. It may be true in a given circumstance. However, per se that would not vitiate either the decision making process or the decision itself of the Commission, unless in an individual case, it can be established to stand vitiated on the known parameters of the legal challenge in respect thereof. Absence of a medical personnel at the meeting of the Commission, ipso facto, does not vitiate either the decision of the adjudicating authority or that of the Commission. Significantly, service provided by a doctor is amenable to scrutiny under the Consumer Protection Act, 1986. The adjudicating process under the Act of 1986 does not mandate a medical personnel or a person from the medical field to hear and dispose of a complaint thereunder.

50. It has been contended that, there is a conflict between the Consumer Protection Act, 1986 and the Act of 2017. With respect, there is no conflict at all. A service recipient may approach the Consumer Forum under the Act of 1986 for compensation with regard to deficiency in services rendered. He may also make a complaint under the Act of 2017. The complaint under the two Acts would operate in different fields although at a given level, both the Acts would consider grant of compensation for deficiency in services.

51. V.P. Shanta & Ors. (supra) has held that, a professional man owes to his client a duty in tort as well as in contract, to exercise reasonable care in giving advice or performing services. Medical practitioners do not enjoy any immunity and they can be sued in contract or tort on the ground that, they have failed to exercise reasonable skill and care. Medical practitioners are not immune from a claim for damages on the ground of negligence. It has noted that, although medical practitioners are governed by the Indian Medical Council Act and are subject to disciplinary control of the Medical Council of India and/or State Medical Council as the case may be, the right of person to seek redress is not affected.

Vishwabharathi House Building Co-operative Society & Ors. (supra) has held that, the Consumer Protection Act, 1986 seeks to provide before protection of the interest of the consumers. Dr. Sou Jayshree Ujwal Ingole (supra) has noted that, a person engaged in medical practice is required to take risk in order to save life. A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient.

52. The Act of 2017 seeks to regulate the private operators and leaves the Government hospitals out of its folds. As the statement of objects and reasons as also the preamble of the Act of 2017 suggest, the State Government is concerned with the lack of transparency in the functioning of clinical establishment, private hospital and nursing homes. The malpractices and malaise obtaining in the private health care sector is sought to be addressed by the Act of 2017. It cannot be said that the Act of 2017 discriminates between similarly situated and circumstanced persons. T.M.A. Pai Foundation & Ors. (supra) has considered the grievance that, there are unnecessary and unproductive regulations with regard to private educational institutions. It has held that, a private minority institution is not immune from regulation.

53. In view of the discussions above, the second issue is answered in the negative and against the petitioners.

54. The answers to the first two issues does not permit grant of any relief to the petitioners. The writ petition is, therefore, required to be dismissed. The third issue is answered accordingly.

55. W.P. No. 14039 (W) of 2017 is dismissed. No order as to costs.

56. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance of the requisite formalities.