

(2012) 04 CAL CK 0099

In the Calcutta High Court

Case No : Writ Petition No. 1000 (W) of 2012 and WP No. 150 (W) of 2012

Dr. Papiya Biswas and Others

APPELLANT

Vs

State of West Bengal and Others
 Dr. Tapas Mandal
and Others Vs WBUMHS and Others

RESPONDENT

Date of Decision : 18-04-2012

Acts Referred:

Bengal Medical Act, 1914 — Section 10(1), 11A(6), 11B(1), 11C, 12
Constitution of India, 1950 — Article 154, 162, 166, 246(1), 246(2)
Indian Medical Council Act, 1956 — Section 19(2), 19(3), 19A(2), 24(2), 33(1)
Postgraduate Medical Education Regulations, 2000 — Regulation 9(1)

Citation : (2012) 04 CAL CK 0099

Hon'ble Judges : Tapan Sen, J

Bench : Single Bench

Advocate : Saptangsu Basu, Mr. Palay Kar, Mr. Ayan Banerjee Mr. Ayanabha Raha in WP No. 1000 W of 2012, Mr. Amal Baran Chatterjee Mr. Rajarshi Halder in WP No. 705 W of 2012, Mr. Amal Baran Chatterjee, Mr. Rajarshi Halder in WP No. 706 W of 2012, Mr. Amal Baran Chatterjee, Mr. Rajarshi Halder in WP No. 708 W of 2012, Mr. Amal Baran Chatterjee, Mr. Rajarshi Halder in WP No. 710 W of 2012, Mr. Amal Baran Chatterjee, Mr. Rajarshi Halder, Mr. Jaydeep Kar, Mr. Tanoy Chakraborty, s in CAN 2414 of 2012, Mr. Tapan Chakraborty, Mr. Balai Lal Sahoo, Mr. Sankha Prasad Ray, s in CAN 2313 of 2012 in WP No. 711 W of 2012, Mr. Amal Baran Chatterjee, Mr. Rajarshi Halder in WP No. 712W of 2012, Mr. Amal Baran Chatterjee, Mr. Rajarshi Halder in WP No. 714 W of 2012, Mr. Tulshi Das Ray, Mr. Himangshu Ghosh, Mr. Tapan Ray in WP No. 387 W of 2012, Mr. Kashikanta Moitra, Mrs. Baisali Ghosal Mr. Baidyanath Ghoshal in WP No. 150W of 2012, Mr. Kashikanta Moitra, Mrs. Baisali Ghosal, Mr. Baidyanath Ghoshal in WP No. 1345 W of 2012, Mr. Kashikanta Moitra, Mrs. Baisali Ghosal, Mr. Baidyanath Ghoshal in WP No. 1788 W of 2012, Mr. Amal Baran Chatterjee, Mr. Rajarshi Halder in WP No. 2800 W of 2012, Mr. Amal Baran Chatterjee Mr. Rajarshi Halder in WP No. 3184 W of 2012, Mr. Amal Baran Chatterjee, Mr. Rajarshi Halder in WP No. 4745 W of 2012, Mrs. Soma Roy Chowdhury in WP No. 5125 W of 2012, for the Appellant;Indranil Roy, Ayan Bhattacharjee For the W.B.U.H.S, Mr. Saugata Bhattacharjee, Sumit Kr. Pan, For the M.C.I., Mr. Debasish Saha Roy, Indranath Mitra, For the Applicants in CAN 2345 of 2012, Mr. Asok Banerjee, Ld. Govt. Pleader, Mr. Subrata Talukdar, Ld. Sr. Govt. Advocate, Mrs. Sucharita Chatterjee (Halder), For the State in WP No. 1000 (W) of 2012, Mr. Indranil Roy, Ayan Bhattacharjee, For the W.B.U.H.S, Mr. Saugata

Bhattacharjee, Sumit Kr. Pan, For the M.C.I., Mr. Asok Banerjee, Ld. Govt. Pleader, Mr. Subrata Talukdar, Ld. Sr. Govt. Advocate, Mrs. Sucharita Chatterjee (Halder), For the State in WP No. 705 (W) of 2012, Mr. Indranil Roy, Ayan Bhattacharjee, For the W.B.U.H.S., Mr. Saugata Bhattacharjee, Sumit Kr. Pan, For the M.C.I., Mr. Asok Banerjee, Ld. Govt. Pleader, Mr. Subrata Talukdar, Ld. Sr. Govt. Advocate, Mrs. Sucharita Chatterjee (Halder), For the State in WP No. 706 (W) of 2012, Mr. Indranil Roy, Ayan Bhattacharjee, For the W.B.U.H.S., Mr. Saugata Bhattacharjee, Sumit Kr. Pan, For the M.C.I., Mr. Asok Banerjee, Ld. Govt. Pleader, Mr. Subrata Talukdar, Ld. Sr. Govt. Advocate, Mrs. Sucharita Chatterjee (Halder), For the State in WP No. 708 (W) of 2012, Mr. Indranil Roy, Ayan Bhattacharjee, For the W.B.U.H.S., Mr. Saugata Bhattacharjee, Sumit Kr. Pan, For the M.C.I., Mr. Asok Banerjee, Ld. Govt. Pleader, Mr. Subrata Talukdar, Ld. Sr. Govt. Advocate, Mrs. Sucharita Chatterjee (Halder), For the State in WP No. 710 (W) of 2012, Mr. Indranil Roy, Ayan Bhattacharjee, For the W.B.U.H.S., Mr. Saugata Bhattacharjee, Sumit Kr. Pan, For the M.C.I., Mr. Asok Banerjee, Ld. Govt. Pleader, Mr. Subrata Talukdar, Ld. Sr. Govt. Advocate, Mrs. Sucharita Chatterjee (Halder), For the State in WP No. 711 (W) of 2012, Mr. Indranil Roy, Ayan Bhattacharjee, For the W.B.U.H.S., Mr. Saugata Bhattacharjee, Sumit Kr. Pan, For the M.C.I., Mr. Asok Banerjee, Ld. Govt. Pleader, Mr. Subrata Talukdar, Ld. Sr. Govt. Advocate, Mrs. Sucharita Chatterjee (Halder), For the State in WP No. 712(W) of 2012, Mr. Indranil Roy, Ayan Bhattacharjee, For the W.B.U.H.S., Mr. Saugata Bhattacharjee, Sumit Kr. Pan, For the M.C.I., Mr. Asok Banerjee, Ld. Govt. Pleader, Mr. Subrata Talukdar, Ld. Sr. Govt. Advocate, Mrs. Sucharita Chatterjee (Halder), For the State in WP No. 714 (W) of 2012, Mr. Indranil Roy, Ayan Bhattacharjee, For the W.B.U.H.S., Mr. Saugata Bhattacharjee, Sumit Kr. Pan, For the M.C.I., Mr. Asok Banerjee, Ld. Govt. Pleader, Mr. Subrata Talukdar, Ld. Sr. Govt. Advocate, Mrs. Sucharita Chatterjee (Halder), For the State in WP No. 387 (W) of 2012, Mr. Indranil Roy, Ayan Bhattacharjee, For the W.B.U.H.S., Mr. Saugata Bhattacharjee, Sumit Kr. Pan, For the M.C.I., Mr. Asok Banerjee, Ld. Govt. Pleader, Mr. Subrata Talukdar, Ld. Sr. Govt. Advocate, Mrs. Sucharita Chatterjee (Halder), For the State in WP No. 150(W) of 2012, Mr. Indranil Roy, Ayan Bhattacharjee, For the W.B.U.H.S., Mr. Saugata Bhattacharjee, Sumit Kr. Pan, For the M.C.I., Mr. Asok Banerjee, Ld. Govt. Pleader, Mr. Subrata Talukdar, Ld. Sr. Govt. Advocate, Mrs. Sucharita Chatterjee (Halder), For the State in WP No. 1345 (W) of 2012, Mr. Indranil Roy, Ayan Bhattacharjee, For the W.B.U.H.S., Mr. Saugata Bhattacharjee, Sumit Kr. Pan, For the M.C.I., Mr. Asok Banerjee, Ld. Govt. Pleader, Mr. Subrata Talukdar, Ld. Sr. Govt. Advocate, Mrs. Sucharita Chatterjee (Halder), For the State in WP No. 1788 (W) of 2012, Mr. Indranil Roy, Ayan Bhattacharjee, For the W.B.U.H.S., Mr. Saugata Bhattacharjee, Sumit Kr. Pan, For the M.C.I., Mr. Asok Banerjee, Ld. Govt. Pleader, Mr. Subrata Talukdar, Ld. Sr. Govt. Advocate, Mrs. Sucharita Chatterjee (Halder), For the State in WP No. 2800 (W) of 2012, Mr. Indranil Roy, Ayan Bhattacharjee, For the W.B.U.H.S., Mr. Saugata Bhattacharjee, Sumit Kr. Pan, For the M.C.I., Mr. Asok Banerjee, Ld. Govt. Pleader, Mr. Subrata Talukdar, Ld. Sr. Govt. Advocate, Mrs. Sucharita Chatterjee (Halder), For the State in WP No. 3184 (W) of 2012, Mr. Indranil Roy, Ayan Bhattacharjee, For the W.B.U.H.S., Mr. Saugata Bhattacharjee, Sumit Kr. Pan, For the M.C.I., Mr. Asok Banerjee, Ld. Govt. Pleader, Mr. Subrata Talukdar, Ld. Sr. Govt. Advocate, Mrs. Sucharita Chatterjee (Halder), For the State in WP No. 4745 (W) of 2012, Mr. Indranil Roy, Ayan Bhattacharjee, For the W.B.U.H.S., Mr. Saugata Bhattacharjee, Sumit Kr. Pan, For the M.C.I., Mr. Amitesh Banerjee, Biswajit Hazra, For the State in WP No. 5125 (W) of 2012, for the Respondent

Judgement

Tapen Sen, J.—Save and except WP Nos. 1504(w) of 2012 Dr. Niladri Roy & Ors. vs. State & Ors. and WP No. 5101(w) of 2012 Dr. Gobinda Ch. Mallick & Ors. vs. State & Ors., the submissions of the learned counsel for the petitioners in all the cases are common including these two cases. However, in these two matters, some additional points have been argued which will be dealt with separately. Let it be recorded that only in two writ petitions viz. WP Nos. 1000(w) of 2012 Dr. Papiya Biswas & Ors. vs. State & Ors. and WP No. 5125 (w) of 2012 [Dr. Kayum Golder & Ors. vs. State], the MCI Regulations are under challenge, but in all the other cases, the State action is under challenge. All these matters have been heard together and they are being disposed of by one common judgment.

2. According to the Learned counsel for the petitioners, the Notification issued by the Government of West Bengal u/s 33 of the Indian Medical Council Act, 1956, is discriminatory inasmuch as it creates and carves out only certain Districts for purposes of bringing them within the ambit of "remote" and "difficult areas". It is submitted that the State Government has no authority or jurisdiction to define such "remote" and "difficult" areas since this is an exclusive prerogative of the Medical Council of India and especially more so when, the Medical Council of India, by its Notification dated 16.4.2010 had clearly mentioned that such areas would be identified and decided by the "competent State authorities" and therefore, the State Government had a very limited role to play and if it proceeded to take upon itself the task of defining as to which area would be remote and/or difficult, then it would take upon itself an action which is beyond the scope of Article 154 read with Article 162 of the Constitution of India. According to the learned Counsel, these two Constitutional provisions are in the field of governance of the State pertaining to its executive powers which can never mean that it can be dictated by the Medical Council of India to decide as to which area would be difficult or as to which area would be remote. Learned counsel points out that if, for the sake of argument, it is taken to mean that the Notification of the Medical Council of India actually delegated its powers upon the State to define and identify such remote and/or difficult areas, then, it must be held that the said Medical Council of India has acted beyond the powers contemplated u/s 33 of the Indian Medical Council Act, 1956. Learned counsel submits that the very purpose of Indian Medical Council Act, 1956 has been highlighted at the very outset where the statement of objects and reasons of the said Act was considered at the stage when it was at the stage of a Bill.

3. Learned counsel submits that the provisions of Section 33 of the Indian Medical Council Act, 1956 clearly lays down that the Council may make Regulations to carry out the purposes of the Act, which, according to the learned counsel, has to be read along with the statement of objects and reasons of the said Statute. Section 33, according to the learned counsel, does not provide for delegation of power upon the State to define or identify "difficult" and "remote" areas nor does it provide delegation of power to the State to make rules or issue

a Notification giving "weightage" to Doctors for each completed year of service in "remote" and "difficult" areas.

4. Learned counsel then submits that the State Notification dated 23.11.2011 as contained in Annexure P-7 purports to have been issued under the provisions of Regulation 9 (1)(b) of the "Post Graduate Medical Education Regulations, 2000" but such an action cannot be either within the ambit of Article 154 of the Constitution of India or under Article 162 of the said Constitution of India.

5. Learned counsel submits that the Notification itself amounts to creating an unreasonable classification between Doctors and, therefore, it amounts to creating "a class within a class".

6. Learned counsel submits that the very concept of giving weightage and incentives amounts to sacrificing merit of Doctors and therefore it runs counter to the idea of producing meritorious Doctors in India.

7. According to learned counsel, the words "competent State authorities" as used in the MCI Notification dated 16.4.2010 would obviously mean "State Medical Council" as defined u/s 2 (j) of The Indian Medical Council Act, 1956.

8. According to the learned counsel, transfer and posting of Doctors in "remote" and "difficult" areas is a prerogative of the State and in the event, a lesser meritorious Doctor is posted in a "remote" or "difficult" area as defined by the State, then by reason of the impugned Notification, these lesser meritorious Doctors would steal a march over more meritorious Doctors. The State has therefore attempted to create not only "a class within a class" but has also, frustrated the very objects and reasons of the Indian Medical Council Act which clearly lays down that it shall make Regulations to carry out the purposes of the Act and, u/s 33(k) read with Object (d), the principle object is to ensure the standard of Post-Graduate Medical Education and also to ensure the standard of staff etc. for medical education. By giving incentives, the same would dilute the concept of ensuring standards.

9. According to the learned counsel, Sections 33 and 33(I) of the Indian Medical Council Act, 1956, lays down, inter alia, that the Medical Council of India shall make regulations to generally carry out the purposes of the said Act and may provide for the conduct of professional examinations, qualifications of examiners and the conditions of admission to such examinations.

10. Learned Counsel submits, with reference to a judgment passed in the case of Dr. Dinesh Kumar and Others (II) Vs. Motilal Nehru Medical College, Allahabad and Others, that when selection of candidates are being made in super specialty courses, no factor other than merit should be allowed to tilt the balance in favour of a candidate. According to him, by assignment of weightage for "rural" and "difficult" areas, the Respondents have attempted to tilt the balance in favour of such candidates, thereby sacrificing merits.

11. Learned Counsel then argues that even if weightage for "rural/difficult"

postings are to be given, the same should not under any circumstances, be beyond 5 % in terms of the ratio of the judgment delivered in the case of Dr. Snehelata Patnaik and Others Vs. State of Orissa and Others,

12. Learned Counsel then submits that in view of the ratio of the judgment laid down in the case of Dr. Narayan Sharma and Another etc. Vs. Dr. Pankaj Kr. Lehtar and Others etc., , it has been held in para-24 (e) that admission to the post graduate courses should be strictly based on merits and in para-24(f) and (g), it has been held that the merits of the candidates seeking admission to higher educational courses shall be judged by a uniform standard and for that purpose, holding of an entrance examination is the best method and that there should be no dilution of the standards in higher educational courses and specially, post graduate courses.

According to the learned Counsel, the action on the part of the Respondents is totally contrary to these pronouncements.

13. Learned Counsel submits that the duty of a Doctor is not to earn incentives by being told in advance that by rendering services in a rural or difficult area he would capture better prospects of earning a higher professional qualification but their duty is to serve and be present always on duty whether it be in a "rural/difficult" area or in an urban area. Consequently the concept of granting incentives for post graduate studies poses a threat to their concept of duty. Learned counsel has attempted to submit that initially the original post graduate medical education regulations, 2000 made it clear, under Clause 9(1), that students for post graduate courses shall be selected strictly on the basis of their academic merit. In the year 2009, when an Amendment Notification came on 21.7.2009 (Annexure-P/4) it was again repeated under Clause 9 that merit/academic merit determined by a competitive test shall be a relevant criteria and that students for post graduate medical courses shall be selected strictly on the basis of their inter-se academic merit. However, by reason of the Notification dated 17.11.2009 (Annexure-P/5) the Medical Council of India attempted to dilute the provisions of post graduate admissions by giving incentives @ 10% of the marks obtained for each year in service in "remote" and "difficult" areas upto a maximum of 30% of the marks obtained.

According to the learned Counsel, the incentives of marks being given between 10% to 30% is a clear departure from the judgment of the Hon'ble Supreme Court passed in the case of Dr. Snehelata Patnaik and Others Vs. State of Orissa and Others, which has held that weightage can, at best, be given to the extent of only 5%.

According to the learned Counsel, after providing for such weightage illegally, the Medical Council of India attempted to further confuse and confound the issues when, on 16.4.2010, they came out with an Amendment Notification (Annexure-P/6) by which they made an amendment in Clause 9(1)(b) of the 2000 Regulations by adding that "the remote and/or difficult areas" would be as per

decisions of the competent State authorities. Therefore, according to the learned Counsel, the State Government, functioning under Article 154 of the Constitution of India read with Article 166 thereof cannot be said to have the necessary jurisdiction or the locus standi because "competent State authorities" would always mean the "State Medical Council" and it could not connote State functions under Articles 154 read with 166 of the Constitution of India.

In order to further strengthen such a submission, learned Counsel submits that The Indian Medical Council Act, 1956 has itself referred to the words "The State Government" at different places of the Statute and therefore it is deemed that the concept of State functions under these Articles of the Constitution, are well-known to the Medical Council of India and therefore, if its intention had been to authorize the State Government to decide as to what would be a "difficult terrain" or a "rural area", it would have used the words "as decided by the State Government" instead of using the words "as decided by the competent State authorities". In order to show that the Indian Medical Council Act, 1956 is aware of the words "The State Government", learned Counsel refers to Sections 19(2), 19(3), 19A (2) and 24(2) thereof.

Consequently, learned Counsel submits that the decision to carve out areas and term them as "difficult" or "rural" lay within the exclusive domain of the Medical Council of India/The State Medical Council.

14. Learned Counsel then submits that the State Government has grossly misused its powers by the Notification published/issued on 23.11.2011, inasmuch as they have, in the garb of their powers given to them under the Indian Medical Council Act, created an unreasonable classifications inter-se amongst Doctors. He refers to Annexure-P/7 and submits that there is no justification as to how and under what circumstances they picked out only a handful of sub-Divisions/Districts as "remote" and "difficult" areas. Learned Counsel has given an example stating that the Government Hospital situated in Bangur is very much an urban location. It is within Tollygunge but in the District of South-24 Pgs. By assigning the logo of "remote and difficult area" to South-24 Pgs. would mean that it would include the Government Hospital at Bangur. This therefore is a complete non-application of mind and an unreasonable classification because a Doctor posted at Bangur gets the weightage/incentive of 10 to 30% whereas a Doctor posted just about 4 Kilometers away at PG. Hospital is deprived of such a weightage/incentive. He therefore submits that the Notification itself is unreasonable, mechanical and amounts to creating an unreasonable classification amongst Doctors and therefore, creates a "Class within a Class".

15. His alternative argument is that even if this Notification is held to be good, it must be prospective and it cannot be allowed to intrude into the rights of Doctors who had already been posted at a time when such a Notification was not in force. He refers to a judgment passed in the case of Kusumam Hotels (P) Ltd. Vs. Kerala State Electricity Board and Others, where it has been held that "In our

constitutional scheme, however, the statute and/or any direction issued thereunder must be presumed to be prospective unless the retrospectivity is indicated either expressly or by necessary implication. It is a principle of the rule of law. A presumption can be raised that a statute or statutory rule has prospective operation only."

16. In W.P. Nos. 150 (W) of 2012/W.P. No. 1435(W) of 2012/ and W.P. No. 1788 (W) of 2012 - Dr. Tapas Mondal & Ors. Vs. WBUMHS/ Dr. Sobhankanta Sen Vs. WBUMHS & Ors./ and Dr. Somnath Das & ors. Vs. WBUMHS & Ors., Sri K.K. Moitra, learned Senior Advocate has argued that the Petitioners of these Writ Petitions have not challenged the entire Notifications but in fact they pray that the Notification be extended to include those Doctors who are posted in other sub-Divisions in the District of Darjeeling namely Phasidah, Naxalbari and Matigara. Supporting the submissions of the learned Counsel in the other cases in respect of the argument that an unreasonable classification has been created, he has submitted that the State owes an explanation as to why they have left out these areas and have not included other "remote" and "difficult" terrains such as Sunderbans. On the point that the State cannot create "a class within a class" Mr. Moitra has submitted that others cannot be excluded unless their inclusion is impossible or detrimental to public interest. According to him, there is no justification in excluding those Doctors who have been posted in the other places of Darjeeling and their inclusion is neither an impossibility nor detrimental to public interest. Learned Counsel cites the judgment the Hon"ble Supreme Court passed in the case of B.Prabhkar Rao & Ors. Vs. State of Andhra Pradesh & Ors. reported in 1986 SCC (L&S) 49.

Learned Counsel then submits that the classification made by including only a handful of Districts and attempting to give weightage to those posted there, is a classification which is not based on any rational differentia and does not have any reasonable nexus with the object sought to be achieved. Learned Counsel relies upon the judgment of the Hon"ble Supreme Court passed in the case of Roop Chand Adlakha and Others Vs. Delhi Development Authority and Others,

Learned Counsel then submits that mini classifications based on micro distinction are false to our egalitarian faith and only substantial and straight-forward classifications plainly promoting relevant goals can have constitutional validity. To overdo classification is to undo equality. He refers to a judgment passed by the Hon"ble Supreme Court in the case of The State of Jammu & Kashmir Vs. Shri Triloki Nath Khosa & Ors. reported in 1974 SCC (L&S) 49.

17. In W.P. Nos. 705, 706, 708, 710,711, 712, 714, 387 and 1504 (W) of 2012, Mr. Amal Baran Chatterjee, learned Counsel, while adopting the submissions of Mr. Kashi Kanta Moitra, has however made some additional arguments.

He has submitted that the posting to remote areas is not within the control of Doctors since they have to obey orders of transfer and posting by the Government. Therefore, by default if somebody is posted in a difficult or rural

area without an open Advertisement or indication to all others that such postings would carry weightage then there is no explanation as to why others who have not been so posted can be discriminated and weightage cannot be given to them.

He therefore submits that in the absence of any proper Notification disclosing to all that weightage would be given, there can be no retrospective operation of the Notifications because no one knew, at the time of their posting that they were being so posted at remote or difficult areas or rural areas. Learned Counsel submits that if any Government Policy fails to satisfy the test of reasonableness, the same would be unconstitutional. He relies upon the judgments of the Hon'ble Supreme Court delivered in the cases of Haryana State Industrial Dev. Corp. Vs. Shakuntla and Others, and B. Manmad Reddy and Others Vs. Chandra Prakash Reddy and Others, .

Learned Counsel, while referring to Page 108 of W.P. No. 705(W) of 2012, has referred to the Memorandum of the State of West Bengal issued on 9.11.2011 under Memo No. HF/O/MA/3431/1M-01/11 whereby and whereunder the existing transfer policy of the Govt. of West Bengal relating to Medical Officers was recast and new transfer policy was set out. In that policy, new categorization of areas to be treated as "difficult" was indicated. The "difficult" areas were put under Category A. Areas falling in North-24 Pgs. were shown as "difficult" areas but in the impugned Notification dated 24.11.2011, North-24 Pgs. has not even been included. Learned Counsel submits that therefore there is a complete non-application of mind on the part of the State which has proceeded to issue the impugned Notification dated 23.11.2011 without verifying the records and in complete deviation of the transfer policy referred to above and which was issued only 14 days ago on 9.11.2011. The relevant portions of the said Notification which is at page-108 of W.P. No. 705 (W) of 2012 reads as follows:

Government of West Bengal Health & Family Welfare Department Swasthya Bhawan, GN-29, Sector-V, Bidhannagar, Kolkata- 700091 Medical Administration Branch

No. HF/O/MA/3431/1M-01/11 dated 09.11.2011

MEMORANDUM

5. Accordingly, I am directed by the Order of the Governor to say that the Governor is pleased to set out a new Transfer Policy as follows:-

A. New categorization of areas-

Category A- All the six districts of North Bengal, Purulia, all PHCs within the district of Murshidabad, all BPHCs/RHs within Jangipur Subdivision of Murshidabad, blocks within Jhargram Sub-division of Paschim Medinipur, Blocks within Khatra Sub-division of Bankura district, Gosaba, Basanti, Sagar & Patharpratima Blocks of South 24 Paraganas, Sandeshkhali Block of North 24 Parganas and Sandalerbill BPHC, Jogesganj & Sahebkhali PHCs under Hingalgunj block of North 24 Parganas. Areas covered under this category shall be treated

as "difficult" for Medical Officers hailing from areas belonging to other two categories.

Category B- All other health institutions outside the KMDA areas.

Category C- Health institutions within KMDA areas."

(Quoted)

He has submitted that whereas Bankura has 569 backward villages, Purba Medinipur has only 9 backward villages but in the impugned Notification, the whole of Purba Medinipur has been included and this therefore, is another example of a complete non application of mind of those who have attempted to create an unreasonable classification by reason of the impugned notification. He has relied upon paras-16 and 17 of the judgment of the Hon''ble Supreme Court passed in the case of State of H.P. and Another Vs. Anjana Devi and Others, . He has finally submitted that there can never be any compromise on merits and by awarding 30% marks without framing adequate guidelines and without providing any method of assessment of merits, a mere conferment of weightage, nullifies merits and there is always a danger that it can be extended even to underserving candidates.

18. In W.P. 387(W) of 2012- Dr. Tapas Kr. Roy & Ors. Vs. State & Ors., Mr. Tulsidas Rai, Advocate has adopted the submissions of Mr. Saptangsu Basu as well as of Mr. Amal Baran Chatterjee. He has stated that the Petitioners of the said Writ Petition (W.P. 387(w) of 2012) are all teaching staff who require Post Graduate Degrees and such Degrees must be given on the basis of merits.

19. Mrs. Soma Roy Chowdhury appearing in W.P. No. 5125 (W) of 2012 - Dr. Kayum Golder and Ors. Vs. State and Ors. has adopted the submissions of Mr. Saptangsu Basu.

This Court has heard the elaborate and erudite submissions of learned Lawyers appearing for the parties at great length and has also considered those judgments which have appeared to this Court to be relevant to the issues involved and having so considered the same including the submissions, the conclusions arrived at are, that these Writ Petitions are devoid of merit. The conclusions of this Court would be evident from the paragraphs following hereafter.

20. This Court would first like to deal with the argument as to whether the State Government has the power to issue the Notification or not?

The argument that it is only the State Medical Council which could have issued the Notification and not the State in its capacity as laid down within the ambit of Articles 154 and 166 of the Constitution of India, is an argument which cannot be accepted. It is well known that Entry 66 of List-1 of the Seventh Schedule appended to the Constitution of India read with Entry 25 of List-III confers power both on the Centre as well as on the State to deal with functions relating to

"Coordination and determination of standards in institutions for higher education or research and scientific and technical institutions" & "Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List-1; vocational and technical training of labour," respectively.

21. Thus, both the State as well as the Centre have the authority under the Constitution to deal with matters pertaining to medical education subject to List-1. List-1 gives power upon the Union to coordinate and determine the standards of higher education or research and of standards pertaining to scientific and technical institutions.

Now, under Article 246(2) and (3), the legislature of any State can make laws with respect to any of the matters enumerated in List-III subject to Article 246(1). Article 246(1) lays down that notwithstanding anything contained in clauses (2) and (3), the Parliament has exclusive power to make laws with respect to any of the matters in List-1. Article 246(3) lays down that subject to clauses (1) and (2), the legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List-II. Thus, the power of the State to make laws in respect of education, medical education cannot be said to be without jurisdiction or unconstitutional. Additionally, Article 254(2) read with Article 254(1) clearly lays down the circumstances under which the law made by the Parliament and the law made by the legislature of the State shall prevail. The Notifications which are subject matter of these writ petitions therefore cannot be held to be illegal.

22. The other argument to the effect that only the State Medical Council/West Bengal Medical Council could have identified "difficult" and "remote" areas and the State could not have done so, is also an argument which cannot be accepted. The West Bengal Medical Council has been created under the provisions of "The Bengal Medical Act, 1914". Sections 15, 16, 17, 19, 20-25A and 33 are powers vested upon the Council but nowhere do these provisions either vest any legislative power on the said Council nor do they confer power upon the Council to make laws which would have the effect usurping the powers of the State Legislature or of the Union Parliament in matters indicated in List-1 and List-III. Thus, the words used in the Notification dated 16th April, 2010 issued by the Medical Council of India inserting, in Clause 9(1)(b) after the words "remote and/or difficult areas", the words "as decided by the competent State authorities from time to time" cannot be said to mean that such "competent State authority" must mean the State Medical Council. It has to be read in the context of the constitutional provisions and once that is so done, the only inescapable conclusion would be that the words "competent State authorities" would mean the State Government exercising its powers under Article 154 read with Articles 162 and 166 of the Constitution of India. Sections 15, 16, 17, 19, 20-25A and 33 of The Bengal Medical Act, 1914 are reproduced below and they read as follows:-

15. Orders by Council for maintenance of register of registered practitioners.- (1)

The Council shall, as soon as conveniently may be after the commencement of this Act and from time to time as occasion may require, make orders for regulating the maintenance of a register of registered practitioners.

(2) The said register shall be kept in such form as may be prescribed by rule made u/s 33.

16. Maintenance of register by Registrar:- (1) The Registrar shall, keep the register of registered practitioners in accordance with the provisions of this Act and of any orders made by the Council, and shall from time to time make all necessary alterations in the registered addresses or appointments, and the registered qualifications *****, of such practitioners and erase the names of any practitioners who have died.

(2) To enable the Registrar to fulfill the duties imposed upon him by sub-section (1), he may send through the post a letter to any registered practitioner, addressed to him according to his registered address or appointment, to inquire whether he has ceased to practise or whether his residence or appointment has been changed; and if no answer to any such letter is received within a period of six months from its despatch, the Registrar may erase the name of such registered practitioner from the register: Provided that any name erased under this sub-section may be re-entered in the register under the direction of the Council.

17. Persons possessing any of the qualifications referred to in the Schedule entitled to be registered.- [Every person who possesses any of the qualifications referred to in the schedule] shall, subject to the provisions hereinafter contained, and on payment of such fee as may be prescribed in this behalf by regulation made u/s 33, be entitled to have his name entered in the register of registered practitioners: Provided that the Council may refuse to permit the registration of the name of any person-

(a) who has been sentenced by any Court for any non-bailable offence, such sentence not having been subsequently reversed or quashed, and such person's disqualification on account of such sentence not having been removed by an order which the [State Government] [is] hereby empowered to make, if (it thinks) fit, in this behalf; or

(b) whom the Council, after due inquiry (at which an opportunity has been given to him to be heard in his defence and to appear either in person or by counsel, vakil, pleader or attorney, and which may, in the discretion of the President, be held in camera), have found guilty, by majority of two-thirds of the members present and voting at the meeting, of infamous conduct in any professional respect.

19. Power to Council to call for certain information from authorities of any examining body included or wishing to be included in the schedule.

(1) the Council shall have power to call on the [authorities of any examining

body] included in or desirous of being included in the schedule;

(a) to furnish such reports, returns or other information as the Council may require to enable them to judge of the [standard of the examinations held by such body and of the efficiency of the instruction given in the Medical colleges or Schools or Institutions where candidates for the examination by such body are trained]; and

(b) to provide facilities to enable any member of the Council (deputed by the Council in this behalf) to be present at the examinations to be held by such [examining body].

(2) The Council shall have power to inspect any [Medical College or School or Institution where candidates for examination by such examining body are trained] and may for this purpose appoint a Special Committee of not less than three or more than five members of the Council to inspect any [such Medical College or School or Institution] and submit a report in regard thereto to the Council.

20. Information to be furnished to Registrar with application for registration.- Every person who applies to have his name entered in the register of registered practitioners-

(a) must satisfy the Registrar that he is possessed of some *****qualification referred to in the schedule is altered by notifications (if any) issued u/s 18; and*****.....

(c) *****must correctly inform the Registrar of the dates on which he obtained the ***qualifications which entitle him to claim registration under this Act.

21. Entry of new qualifications in the register.- (1) If any person whose name is entered in the register of registered practitioners obtains any medical qualification other than the qualification in respect of which he has been registered, he shall on payment of such fee as may be prescribed by regulation made in this behalf u/s 33,-

(i) if such qualification be a qualification included in the schedule, - be entitled to have such qualification entered against his name in the register either in substitution for or in addition to any entry previously made;

(ii) if such qualification be a qualification not included in the schedule, - be entitled to have such qualification entered against his name in the register as an additional qualification, provided such qualification is included in the list prepared under sub-section (2).

(2) The Council shall from time to time prepare a list of qualifications (not being qualifications included in the schedule) which may be approved by them for the purpose of this section.

22 Disposal of fees.- All fees received by the Council under this Act shall be applied for the purposes of this Act, in accordance with such rules as may be made by the [State Government] u/s 33.

23 Appeal to Council from decision of Registrar.-If any person is dissatisfied with any decision of the Registrar, refusing to enter the name or qualification of such person in the register of registered practitioners, he may at any time within three months from the date of such decision, appeal to the Council, whose decision shall be final.

24 Erasure of fraudulent and incorrect entries.- Any entry in the register of registered practitioners which is proved to the satisfaction of the Council to have been fraudulently or incorrectly made, may be erased under an order in writing of the Council.

25 Power to Council to direct removal of names from register, and re-entry of names therein.- The Council may direct-

(a) that the name of any registered practitioner-

(i) who has been sentenced by any Court for any non-bailable offence, such sentence not having been subsequently reversed or quashed, and such person's disqualification on account of such sentence not having been removed by an order which the [State Government] [is] hereby empowered to make, if [it thinks] fit, in this behalf; or

(ii) whom the Council, after due enquiry [in the same manner as provided in clause (b) of section 17] have found guilty, by a majority of two-thirds of the members present and voting at the meeting, of infamous conduct in any professional respect, be removed from the register of registered practitioners [or that the practitioner be warned], and

(b) that any name so removed be afterwards re-entered in the register.

25A. Effect of removal of name from register.- (1) A registered practitioner whose name has been removed from the register under clause (a) of section 25 shall forthwith surrender his certificate of registration to the Registrar, and the name so removed shall be published in the Official Gazette.

(2) In the name of a registered practitioner removed register under clause (a) of section 25 is afterwards re-entered in the register as provided in clause (b) of that section the fact of such re-entry shall be published in the Official Gazette and the certificate of registration shall be returned to the registered practitioner by whom it was surrendered.

33. Rules and regulations.- (1) The [State Government] may from time to time make rules to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, the [State Government] may make rules-

(a) to regulate elections under clauses (b), (c), (d) and (e) of sub-section (1) of section 4.; (a1) the period to be prescribed under sub-section (2) of section 4; (a2) the manner of selection by lot referred to in proviso (i) to clause (c) of sub-section (1) of section 10; (a3) the manner of recommending names under sub-section (1) and sub-section (6) of section 11A, the election of the Vice-President referred to in sub-section (1) of section 11B, the manner of filling vacancies referred to in sub-section (3) of that section and the functions to be performed by the President and the Vice-President;

(b) to prescribe the form of the register of registered practitioners to be maintained under this Act;

(c) to regulate the application of fees u/s 22; and

(d) to regulate the procedure to be followed by the Council in-

(i) conducting any inquiry referred to in proviso (b) to section 17, or clause (a) of section 25; and

(ii) disposing of appeals from the decision of the Registrar preferred u/s 23.

(3) In addition to the power conferred by [sub-section (6) of section 11C, section 12 and sub-section (1) of section 21] the Council may, with the previous sanction of the [State Government] make regulations-

(a) to prescribe the fees chargeable in respect of any registration under this Act; and (b) to regulate the keeping of accounts of such fees.

(4) All such rules and regulations shall be published in the [Official Gazette].

(Quoted)

23. The argument cannot end only as above because if the provisions of Section 2(j) of The Indian Medical Council Act, 1956 is looked into, it will appear that "State Medical Council means a medical council constituted under any law for the time being in force in any State regulating the registration of practitioners of medicine."

Thus, even under the aforesaid Section 2(j) of The Indian Medical Council Act, 1956, a State Medical Council can only regulate the registration of practitioners and it cannot be expected that it will step beyond its jurisdiction to frame laws or regulations to decide as to which would be a "difficult area" or which would be a "remote area".

24. In *Dr Preeti Srivastava and Another Vs. State of M.P. and Others*,], their Lordships of the Supreme Court recognized the power of the Medical Council of India by observing that their Lordships were in agreement with the reasoning given in other judgments the Apex Court which had taken the view that "under the Indian Medical Council Act, 1956, the Medical Council of India has been set up as an expert body to control the minimum standards of medical education and to regulate their observance. It has implicit power to supervise the qualifications

or eligibility standards for admission into medical institutions. There is under the Act and overall vigilance by the Medical Council to prevent sub-standard entrance qualifications for medical courses. These observations would apply equally to postgraduate medical courses."

25. Thus, there was no illegality or irregularity when the Medical Council of India decided to amend the postgraduate medical education regulations by introducing the concept of giving weightage and marks as incentives for purposes of determining the merit and the entrance test for postgraduate admissions.

26. The argument of the petitioners to the effect that in view of the judgment of the Hon'ble Supreme Court passed in the case of Dr. Snehelata Patnaik and Others Vs. State of Orissa and Others, the percentage of marks, in any event, could not have exceeded 5% is also not acceptable to this Court. Paragraph 2 of the said judgment reads as follows:

2. In our opinion, this observation certainly does not constitute the ratio of the decision. The decision is in no way dependent upon these observations. Moreover, those observations are in connection with All India Selection and do not have equal force when applied to selection from a single State. These observations, however, suggest that the weightage to be given must be the bare minimum required to meet the situation. In these circumstances, we are of the view that the authorities might well consider giving weightage up to a maximum of 5 per cent of marks in favour of in-service candidates who have done rural service for five years or more. The actual percentage would certainly have to be left to the authorities. We also clarify that these suggestions do not in any way confer any legal right on in-service students who have done rural service nor do the suggestions have any application to the selection of the students up to the end of this year.

27. Upon a perusal of the aforementioned Paragraph 2, it is evident that the Apex Court had given liberty to the authorities to consider giving weightage up to a maximum of 5% to those in-service candidates who had done rural service for 5 years or more. However, their Lordships also observed that "The actual percentage would certainly have to be left with the authorities." In other words, while ratifying the fact that weightage can be given, their Lordships also left the matter in relation to deciding the actual percentage upon the authorities. Now, if, the authorities of the State, pursuant to their constitutional powers as explained in the earlier paragraphs have chosen to assign a certain percentage of marks/weightage, that by itself cannot be held to be illegal.

28. In The State of Madhya Pradesh and Others Vs. Gopal D. Tirthani and Others, the question that was posed in paragraph 25 was as to whether, weightage can be given to Doctors for their having rendered specified number of years of service in rural/tribal areas. Their Lordships, considered the cases of (i) Dr. Dinesh Kumar and Others (II) Vs. Motilal Nehru Medical College, Allahabad and Others, ; (ii) Dr. Snehelata Patnaik and Others Vs. State of Orissa and Others,

(iii) Dr. Narayan Sharma and Another etc. Vs. Dr. Pankaj Kr. Lehar and Others etc., and State of Uttar Pradesh and Others Vs. Pradip Tandon and Others, Having considered, their Lordships gave their conclusions in Para 36 of the said judgment passed in Tirthani's case supra and in paragraph 36(4), their Lordships held that "A consolidated merit list of successful in-service candidates shall be prepared. Such list shall include (i) the 36 candidates who have already been declared successful and have also satisfied the sponsorship criteria, and (ii) the candidates declared successful at the P.G. Entrance test which will now be held for the remaining seats pursuant to this judgment. The consolidated list having been prepared, the order of merit shall be fixed by assigning weightage for rural service consistently with the prevalent rules and allowed participation in counselling to the extent of available seats."

Although, the aforesaid directions were in the facts of that case but what is relevant to be expressed here is that in Tirthani's case supra, their Lordships did direct that weightage shall be given to in-service candidates for rural service. Thus, there is no doubt that weightage is a concept which is not unknown.

29. At this stage, this Court would once again refer to the Notification dated 23rd November, 2011 issued by the Government of West Bengal identifying rural and difficult areas. This Notification, as has already been explained earlier, is giving effect to Entry 25 of List-III. Therefore, for all practical purposes this is in the field of legislation or framing of a legislative policy in the form of an Executive Order expressed to have been taken in the name of the Governor of West Bengal under Article 166 of the Constitution of India. It is also in the nature of a delegated legislation inasmuch as, the State Government has proceeded to issue the Notification in terms of Clause 9 of the Postgraduate Medical Education Regulations by which they have given the power to the State Government to decide and identify "remote and/or difficult areas". It is now well-known that so long as the body entrusted with the task of framing rules or regulations acts within the scope of the authority conferred on it, it is not within the legitimate domain of the Court to determine as to whether the purpose of a statute can be served better by adopting any policy different from what has been laid down by the Legislature or its delegate. It is also well known that the Legislature and its delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act for its efficacious implementation. Any drawbacks in the policy will not render it ultra vires and there is no scope for interference by the Court unless a particular provision can be said to suffer from any legal infirmity such as, (i) it is wholly beyond the scope of the regulation making power or (ii) inconsistent with any of the provisions of the parent enactment or (iii) in violation of any of the limitations imposed by the Constitution. Reference for this proposition may be made to the case of Maharashtra State Board of Secondary and Higher Secondary Education and Another Vs. Paritosh Bhupeshkumar Sheth and Others, . In the instant case, this Court does not find any of the vitiating factors as indicated by the Apex Court as above. On the contrary, the Medical Council of India has acted within its

scope and powers to frame regulations u/s 33 of The Indian Medical Council Act, 1956 and while doing so, it has left it to the discretion of the State to act within the parameters of Entry 25 of List-III. Consequently, there is no legal infirmity either in the Notification issued by the Medical Council of India nor in the Notification issued by the State of West Bengal nor can they be said to be beyond the provisions of the parent enactment being The Indian Medical Council Act, 1956 nor are they in violation of any of the limitations imposed by the Constitution of India.

30. Upon being questioned, the State Government, referring to their prayer for leave to rely upon a "Note" of the Department of Health and Family Welfare, produced a bunch of documents which will show that before coming to the conclusion, there was an active decision making process. The said bunch of documents was taken on record. It shows that there was no illegality in the decision making process and therefore it cannot be said that the Notifications are mechanical.

31. For all the reasons stated above, this Court is of the view that none of the points argued by the petitioners are acceptable to this Court. The Writ Petitions are all based on presumptions and there is no merit in their submissions that the action of the respondents is illegal.

32. So far as the arguments for including other areas of Darjeeling are concerned, this Court will not interfere as inclusion or non-inclusion of areas fall within the ambit of policy making of the State. The scope of judicial review in matters pertaining to policy matters of the State is limited. Reference for the aforesaid proposition may be made to the cases of Transport and Dock Workers Union and Others Vs. Mumbai Port Trust and Another, and Indian Airlines Officers' Association Vs. Indian Airlines Ltd. and Others, However, in the absence of the Notifications clearly specifying that it would have retrospective and retroactive operation, this court is inclined to hold that the Notifications should be deemed to be prospective in nature. In this context, paragraph 36 of the judgment of the Apex Court passed in the case of Kusumam Hotels (P) Ltd. Vs. Kerala State Electricity Board and Others, must be looked into. The said paragraph reads as follows:

36. The law which emerges from the above discussion is that the doctrine of promissory estoppel would not be applicable as no foundational fact therefor has been laid down in a case of this nature. The State, however, would be entitled to alter, amend or rescind its policy decision. Such a policy decision, if taken in public interest, should be given effect to. In certain situations, it may have an impact from a retrospective effect but the same by itself would not be sufficient to be struck down on the ground of unreasonableness if the source of power is referable to a statute or statutory provisions. In our constitutional scheme, however, the statute and/or any direction issued thereunder must be presumed to be prospective unless the retrospectivity is indicated either expressly or by necessary implication. It is a principle of the rule of law. A presumption can be

raised that a statute or statutory rule has prospective operation only.

(Quoted but underlining is by this Court)

For the aforesaid reasons, all these Writ Petitions are Dismissed. There shall be no Order as to Costs.

Upon appropriate Application(s) being made, urgent Photostat Certified copy of this Judgment, be given/issued expeditiously subject to usual terms and conditions.