
(1991) 07 CAL CK 0008
In the Calcutta High Court

Dr. Sukumar Mukherjee and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 10-07-1991

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1), 19(1)(1), 19(1)(6)
Indian Medical Council Act, 1956 — Section 10, 11, 12, 13, 14(1)(b)

Citation : 95 CWN 912

Hon'ble Judges : Khwaja Mohammad Yusuf, J

Bench : Single Bench

Advocate : Siddhartha Sankar Ray, Dipankar Gupta, Ajit panja, S. Pal, Goutam Mitra, Ranjan Deb, V.N. Dwivedi, Shyamal Sarkar, Saktinath Mukherjee, Jayanta Mitra, H.M. Banerjee, L.K. Gupta, A. Bose, S. Bose, Kashi Kanta Maitra, Nigam Chandra Chakborty, Sanjib Misra and Shyamali Ganguli, for the Appellant; Somnath chatterjee, Dipankar Ghosh, Samarjit Gupta and Sitesh Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Khwaja Mohammad Yusuf, J.—All the writ petitions are heard analogously and disposed of by this judgment. The writ petitioners belong to the medical profession and some of them are eminent doctors in their respective fields of medical streams. One writ petition has also been filed by the Health Services Association. All the writ petitions challenge the West Bengal State Health Service Act, 1990 and the Rules framed or Notification issued thereunder as ultra vires the Constitution of India, null and void and all the writ petitions revolve round this vital prayer and a decision on the above point will answer the challenge either way. It is not necessary to summarize the writ petitions of each and every petitioners but the arguments of the Learned Counsels will sufficiently place the challenge thrown by them to the West Bengal State Health Service Act, 1990 (henceforth referred to as the "Act of 1990" or the impugned Act"). A galaxy of Learned Counsels appeared for the different petitioners and I propose to summarise their submissions.

2. The case of the writ petitioners, Dr. Sukumar Mukharjee, Dr. Syed Abdul Women and Dr. Ramkrishna Dutta Roy was projected by Mr. S.S. Ray Mr. Dipankar Gupta, Mr. Ajit Panja assisted by Mr. S. Pa along with their juniors. According to them the Act of 1990 and certain Rules framed thereunder are violative of Articles 14 and 19(1)(1) and (sic) to Article 254 of the Constitution. The principal point of controversy is the total prohibition of private practice by the petitioners who also teach in the State Medical colleges and Hospitals which is sought to be brought about by the impugned Act because the right to private practice of those doctors existed prior to coming into force of the impugned Act on 25th May, 1990. Their further case is that on 22nd January, 1958 the State Government promulgated the West Bengal Health Service (Cadre, Pay and allowance) Rules, 1958 by which different cadres in the Health Service existing prior to 1st January, 1958 were unified and designated as the West Bengal Health Service. Under Rule 7 all posts were made non-practising with effect from 1st January, 1958 except in some cases. Under Rule 27 power was conferred upon the Governor to relax the provisions of any of the Rules in such circumstances as may be considered necessary. In 1962 the Government of West Bengal constituted an Expert Committee to make recommendations regarding reorganisation of the Cadre of Health Services in West Bengal. After due consideration of the Expert Committee's recommendation and under Rule 27 the Government by Order dated 1st April, 1965 made all posts except as shown in Annexure "I" of the said order, in the unified cadre of the Health Service as practising posts and the posts shown in Annexure "I" were purely administrative posts and posts concerned with preventive or public health work. By Order of 1965 some restrictions were imposed with regard to the private practice, such as, the Medical Officers shall be eligible for private practice during the hours when they were not required to attend the Hospitals or Institutions; the private practice would not be undertaken within the precincts of Hospitals or Institutions; such private practice must not interfere in any manner with the duties of the Medical Officers; and the Medical Officers in spite of private practice would have to be available for duties in Hospitals or Institutions whenever necessarily. The Medical Officers with Special Selection grade were debarred from private practice after the Order of 1965. The above position continued till the West Bengal State Health Service Ordinance, 1990 was promulgated and thereafter replaced by the Act of 1990. The Government attempted to rescind the order of 1965 by Memorandum dated 8th June, 1982 and to amend Rule 9 of the Rules of 1958 by Notification dated 8th June, 1982. But the same was challenged in a writ petition and was stayed by the High Court and the writ application is still pending. A Committee of the West Bengal Legislative Assembly constituted in 1989 made a report on Medical Education. This Committee consisted of 23 Members out of which 5 were Doctors and 13 Politicians. A draft report was placed before the committee on 3rd March, 1990 but it appears that the report was presented to the Assembly on 23rd March, 1990. According to the petitioners these two dates are vital because the West Bengal Health Service Ordinance, 1990 was promulgated on 7th February, 1990 and the West Bengal

State Health Service Act, 1990 is adverbatis reproduction of the Ordinance. The thrust of the petitioners in on the point that the Act was conceived before the report of the Subject Committee was born.

3. It is submitted that Section 9 of the Act of 1990 is violative of Art. 14 of the Constitution. It creates different classes and the Teacher-Doctors are prohibited from practising. This particular Section includes the cadre of West Bengal Medical Education Service (WBMES). Section 7 of the Act makes it clear that the Members of WBMES would have to perform duties of treatment of patient in the Hospitals. u/s 11 of the said Act a Member of West Bengal Health service, other than the cost included in the cadre of Public Health-cum-Administration would continue in such post on such terms and conditions as were in force immediately before coming into effect of the impugned Act. This reference to the Order of 1965 which permitted all Medical Officers in the Health Services to practice subject to certain restrictions and as such under the impugned Act non-teaching doctors are allowed private practice, it is further submitted that there are some doctors who are holding teaching post on contract basis in State Medical Colleges and Section 18 of the said Act of 1990 provides that this legislation would not apply to any such person and they would continue on some terms and conditions as they had been doing before coming into force of the impugned Act. In this way the distinction is made between a Member of West Bengal Medical Education Service and a Member of West Bengal health Service as well as between a Member of West Bengal Medical Education Service and a contract-holder u/s 18 of the impugned Act inspite of the fact that both are teachers and also treat patients. It is further contended that Article 14 prohibits class legislation but not reasonable classification (1) Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others, on the basis of this principle as enunciated by the Supreme Court it is submitted that a reasonable classification must be tested on two points : (a) such classification must be on intelligible differentia and (b) that differentia must have a rational nexus. A reference is made to the case of D.S. Nakara and Others Vs. Union of India (UOI), when a constitution Bench of the Supreme Court held that the burden lies on the State to prove that the twin test must be satisfied if the State establishes not only the rational principle on which classification is founded but co-relates it to the object sought to be achieved. According to the petitioners this classification has not been achieved in the impugned Act. So far as the differentia and the rational (sic) is concerned the petitioners relied upon the Statement of Object and Reasons of the impugned Act. According to them the primary object of the legislation was made for the efficiency of the West Bengal Health Service and according to the said Statement the cause of weakness is the efficiency of Medical Officers occupying administrative as well as teaching posts. The submission is that the object of Legislation is to do away with the weakness of efficiency of Medical Officers and thereby to improve the efficiency of the entire service. But practice is effective to improve the quality of efficiency for both medical teaching and hospital care. According to the submissions the impugned Act does not stand the twin-test of a valid

classification. Section 4(3) of the said Act has also been attacked because it provides that any person appointed to a post included in WBMS other than the post included in public Health Administration (PHA) may be transferred to a post included in the cadre in PHA. But the option allowed puts a doctor in a post included in West Bengal Health Service (WBHS) and it might continue to practice and once Government transferred him to PHA his right to practice ceases by virtue of Section 10 which is highly unreasonable.

4. Section 9 of the Act is also attacked as violative of Article 19(1)(g) of the Constitution. This Article deals with the right of freedom and guarantees to the citizens, inter alia, to practice any profession, or to carry on any occupation, trade or business. The submission is that the Fundamental Right as guaranteed in this Article includes the right to practice any "profession" and the words "profession" and "occupation" have used distinctively. In this connection the meaning of the word practice has been relied on as given in the Shorter Oxford Dictionary. A reference is also made to the case of *Sodan Singh v. New Delhi Municipal Committee*, reported in AIR 1989 SC 1988 where profession according to Their Lordships means an occupation carried on by a person by virtue of his personal and specialised qualifications, training or skill. In this connection "a reference is made to Section 27 of the Indian Medical Council Act, 1956 that every doctor whose name is entered in the Register shall be entitled to practice and earn fees, etc. and as such the right to practice any profession guaranteed under Article 19(1)(g) cannot be taken away except under Article 19(C) and as such it must be reasonable restrictions and must be imposed by law. It is submitted on the strength of *Chintaman Rao Vs. The State of Madhya Pradesh*, that the expression reasonable restrictions connotes under Article 19(6) that the restriction must be appropriate and not of excessive nature. The excessive nature, according to the Supreme Court, means beyond what is required in the interest of the public and must contain the balance of equality of reasonableness. *Chintaman Rao's* case is further supplemented by the decision of the State of Madras v. J. Row, in *State of Madras Vs. V.G. Row*, It is further submitted on the basis of the case of *Narendra Kumar v. Union of India* (AIR 1958 SC 430) that greater the restriction the more the need for strict scrutiny by the Court. The burden of proving that a restriction is reasonable or not within the scope of Art. 19(6) is upon the State and in this connection was cited the decision in the case of *Laxmi Khandhari and Others Vs. State of U.P. and Others*, The argument was also based on the various materials relied upon by the State including the Affidavit-in-Opposition with some of its paragraphs. It was also contended, that the Report on Medical Education by the Committee of the State Assembly which is the real basis on which the Ordinance was promulgated and the impugned Act was enacted did not disclose any material which could reasonably be considered was the justification for restriction which brings about total prohibition of the right to practice medicine for teachers of a Government Medical College. It was submitted that the Report of the Committee of the Assembly was not that of any Expert Committee because it consisted mainly personnel of non-medical

profession Suspicion is also made as said earlier that the Main Report was presented to the Assembly on 23rd March, 1990 and the ordinance was promulgated on 7th February, 1990 and the same ordinance was enacted thereafter as the impugned Act. The petitioners have elaborated very much upon the Main Report submitted to the Assembly and attacked it. It is also submitted that the National Health Policy of the Government of India, 1983 deals with the problem in a general way and there is nothing in the said policy that teachers engaged in medical Education should be permitted to carry on private practice but at the same time it is (sic) said that for restructuring the Health Services teachers in Medical Colleges should be prohibited from carrying on private practice. It is also submitted that significant original contribution has been made in research and papers were published by a number of eminent doctors and as such it is practically wrong to say that as compared to all-India basis the research work or publication of work of Bengali doctors have declined. During argument it is also submitted that how compulsory non-practising condition would automatically lead to improvement in the standard of medical teaching and care. It is submitted that the deterioration mal-administration in the standard of Government Hospitals and Institutions requires judicial notice and the practising doctors cannot be held responsible for the same. In this connection they have submitted that the Honorary and Emeritus Professors work on fixed honorariums and therefore allowed private "practice, itself demonstrate that the State is satisfied in principle that there was nothing wrong for teacher-doctors to practice outside their working hours. It is further submitted that the Vice-chancellor and the Dean of medical Faculty of Calcutta University could teach and practice because they belong to the service of the Calcutta University is arbitrary and unreasonable. It is questioned that such disproportionate restrictions, not being reasonable restrictions are certainly outside the scope of Article 19(1)(6). The argument has also been made on the point that there cannot be any waiver of Fundamental Rights on the basis of the decision in the case of Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, is referred to bring home the point that the courts can declare a term in a contract of service violative of Fundamental Rights and thus void and as such in a contract of service a person is not required to sign a bond of slavery.

5. The next submission is that the impugned Act is repugnant to the Indian medical Council Act, 1956 so far it prohibits private practice by doctors and thus void under Article 254(1) of the Constitution. In this connection much emphasis is made on Section 27 of the I.M.C. Act, 1956 which provides that a doctor enrolled shall be entitled to practice the profession of medicine and earn fees therefor and this Central Act is based on Entry 26 of List 3 of the Concurrent List. Entry 26 runs as under; "26 legal, medical and other professions." It is submitted that section 27 of the I.M.C. Act clashes with the impugned Act to the extent that it prohibits private practice of doctors and the direct authority on the point is cited as AIR 1207 SC 1518 (H.S.(sic) Raghavachari v. State of Karnataka & Ors.).

6. Mr. Dipankar Gupta summarised his argument by submitting that the West

Bengal State Health Service Act, 1990 as amended by the Amendment Act, 1990 as well as the Notifications and the Rules thereunder are ultra vires the provisions of Arts, 14, 19 and 254 of the Constitution, He submitted that the impugned Act prohibits practising for those Medical Officers who teach in Government Hospitals, Colleges and Institutions and such prohibition is not directed against non-teaching Medical Officers, it is therefore, the duty of the Government to show that private practice interferes with teaching. The private practice by Medical Officers has two dimensions. The first is the private right claimed by Medical Officers and its curtailment is to take away their Fundamental Right and the second is the ability of medical attention and treatment from the point view of general public vis-a-vis the dimension of private practice. As Medical facilities in government hospitals are inadequate the Medical Officers without hindrance in any way in their service, devote the spare time in treating the public in need of medical attention and thus fulfil a vital need which the Government cannot provide. If they do not do private practice in their spare time the prime sufferers would be the public. Mr. Gupta next discussed the scope of Article 14 which after the principle laid down in *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, labels an arbitrary act as violative of the test of reasonableness or non-arbitrariness. He also made references to the case of *S.G. Jaisinghani Vs. Union of India (UOI) and Others*, He submitted that the Supreme Court stressed that the real Rule is that if a law is vague or appears to be so, the Court must try to construe it, as far as may be, and language permitting, the constructions sought to be placed on it, must be in accordance with the intention of the legislature. In this connection Section 2(b) and Section 3 of the impugned Act were attacked because of the word "former" and "shall be constituted" were used in the two Sections.

7. Referring to the exercise of option and the fixation of time Limit" for exercising of option, Mr. Gupta submitted that the process of exercise of option to the new services cannot begin unless the new services are constituted and the essential features and characteristics of the service are known. According to section 12 of the Act the option is to be applied in one way or the other of the two new services "in such manner as may be prescribed". It is admitted that the Government framed Rules known as West Bengal Medical Education Service (option) Rules, 1990 specifying 90 days of exercising option with effect from 25th May, 1990 but the West Bengal Health Service has not yet been constituted, though the West Bengal Education Service has been constituted it is still incomplete as itself basic structure is not known, as for example, categories of post strength, pay and conditions of service, etc. In this connection he raised many technical points. In fact he submitted that the exercise of option in any event would be sham and illusory and therefore unreasonable and arbitrary. He attacked Section 12 for making a distinction between a person "appointed" or "deemed to be appointed" but these two categories are not specified. He further submitted that Section 12 of the impugned Act makes distinction between the exercise of option and the selection for appointment. A new corner of attack is

hostile discrimination between the non teaching and non-administrative Medical Officers in the former west. Bengal Health Service. Objection is also taken to Section 19 and under this Section amendments of any Rules, Orders and Notifications would not apply to West Bengal Health Service because Section 11 states that they shall be governed by such terms and conditions "as were in force immediately before coming into force of the Act". Section 19 is termed as wholly unreasonable and uncertain because this Section is bound to lead to total uncertainty and confusion and to practice discrimination.

8. The case of Dr. Tapandeb Chatterjee and another was placed by Mr. Saktinath Mukherjee assisted by Mr. Jayanta Mitra along with their juniors. Henceforth I shall mention only those submission not already covered earlier and at the utmost shall touch those points only if necessary. Here Mr. Mukherjee made emphasis on Article. 14 as it described the impugned Act as a legislation in which members of a particular class similarly situated are treated alike while Others treated differently so the principle of "equality for (sic) preferential treatment to particular persons amounts to (sic) and patronage inspite of the fact that those persons might be Medical Teachers of (sic) category Mr. Mukherjee"s submission in so many word in fact is that the petitioners have not only seen differently treated from others but have been so treated (sic) from persons similarly circumstanced without (sic) reasonable whatsoever and he cited a number of decisions in favour of his contention. He further submitted that the classification must not be arbitrary and it must be rational and while classifying two conditions must be fulfilled : - the classification must be on "intelligible differentia which distinguishes those that are grouped together from others; and the differentia must be a rational one to the object sought to be achieved by the Legislation. If there would be no reasonable classification on this basis the law was bound to be void and violative of Article of the Constitution. As the object of the impugned Act is to improve the quality of Medical, Education and Hospital care, a ban on private practice would not be prejudicial to public interest because Hospitals are lying with poor medical facilities and equipment. A set of cases have been cited in this connection. It is submitted that the classification and the object are different and distinct elements and the object itself cannot be the basis of classification. Sections 17A and 19A of the impugned Act give the State Government unguided, unfettered, uncanalised and arbitrary discretionary powers that can be used as instruments of option and discrimination to the serious prejudice of the petitioners and others similarly circumstanced. Mr. Mukherjee vent a step further and submitted that under Article 304(b) the Constitution gives the Legislature of a State power to make a law imposing reasonable restrictions on the freedom of trade, commerce, etc. as required in public interest, subject to, however, that no Bill should be introduced without the previous sanction of the President, in this case the impugned Act clearly imposes restrictions on the freedom of trade, commerce or intercourse in the public interest but no prior sanction was received by the President as required under the Constitution. It is well-settled that where the law lays down that a thing must

be done in a particular manner, the thing must be done in that particular manner or not at all and as such the impugned Act cannot have any legal effect without presidential sanction under Article 304(b) and is void, illegal and inoperative. A number of decisions have been cited to bring home the point.

9. Mr. Mukherjee submitted that the object of the Bill has created discrimination against a class within a class with no reasonable nexus and any cut-off-date. No provision has been made for appointment and promotion of Medical Teachers commensurate with qualification and experience whereas the Government can promote anybody at its sweet will. The method of selection u/s 12 of the Act has not been disclosed, there is no protection of rank or post and accrued benefit, no equal opportunity is given; at the time of recruitment there was only one cadre and no difference in pay scale but discrimination between same class for same work has been made and equal opportunity denied. The West Bengal Health service has not been constituted as provided under Sections 2(s) and 2 and the power to transfer from "S to Public. Health-cum-Administration (Non-Practising cadre) has been retained and under Sections 12 and 13 undisclosed power has been retained to victimise by appointing in a post. By undisclosed power Mr. Mukherjee meant to appoint anybody to higher posts of Reader or Professor on such terms and manner as may suit the convenience of the Government under the second proviso of Section 14(1)(b) of the Act. The age of retirement of a Medical officer who opts for teaching has also been interfered with from 60 plus 5 years but if he opts for WBHS he would have to retire at the age of 58 plus 2 on basic grade. Further no Medical Officer posted in non-teaching Institution can become Teacher even if he possesses qualifications and experience to that effect. According to Mr. Mukherjee's submission the option is illusory because the services of the west Bengal Medical Education Service and the west Bengal health Service are not disclosed and there is no scope for comparison, the intention is to victimise and no similar post of teachers such as Professors, Assistant professors, Headers, lecturers, are found in WBHS whereas the existing Teachers have already been existing post in former Health service as Superintendent, BMO, CMO, etc. The notice of the Act is public interest and Medical Education as projected in the Statements and Objects but the motive does not appear to have been material at all and in this connection Mr. Mukharjee puts a number of question censoring the Government.

10. Mr. Nigam Chakravarty assisted by his learned juniors appearing on behalf of Dr. Saibal Gupta started his argument with a personal note of his client's sacrifice that he had to forego his promotion to the special Selection Grade because of his having opted for practising under the Government Order dated 1st April, 1965, He stressed upon the present academic status of his client and his research work, teaching experience and study in the field of operation. He has come out with the case that this particular petitioner could not derive much clinical experience from the Calcutta national Medical College and Hospital because of its ill-equipment of the Cardio-Vascular-Surgery unit as well as Thoracic Surgery and he got the experience by being engaged in the private

practice and exhibited his experience by feeling engaged in the private practice and exhibited his expertise. Mr. Chakravarty very lambently submitted that the petitioner was denied appropriate teaching as well as suitable rank or academic status inspite of his qualification and experience.

11. Mr. Chakravarty submitted that the petitioner challenged the Government Order dated 8th June, 1982 in C.R. No. 13459(W) of 1982 when an interim order was passed till the disposal of the Rule and no appeal was preferred against it. In his submission the interim order stands in the way of the new scheme under the impugned Act which could not come into effect. During the pendency of the said Rule the West Bengal Health Service Act, 1990 came into effect containing Section 20 the legality and validity of which has been specifically challenged including on the ground of inroad to judicial process. The learned Advocate went into the details of the various departments of a Medical College and the Regulations of Medical Council of India which I think are not so very material in deciding the vires of the impugned Act. Mr. Chakravarty projected more his client than the cause for which his client stood.

12. Mr. Chakravarty next attacked the Cabinet Memorandum dated 27th December, 1989 containing proposal for re-organisation of existing cadre of WBHS into two separate services by an Ordinance. Apart from making some allegations regarding the said Memorandum he also doubted very much the intention of the Secretary who according to him misled the Cabinet and kept the Cabinet in dark about the whole development in the High Court; he also questioned the opinion of the Legal Remembrancer With regard to paragraph 4 of the said Memorandum he submitted that it does not contain all essential details of the impugned Legislation for consideration by the Cabinet and cryptic references have been made to some of the provisions of the impugned Legislation. Mr. Chakravarty once more projected his client as a victim of so many unjustified Acts and in this connection he brings Articles 300A and 311 to establish his view point. The learned Advocate submitted that the academic rank of Professor conferred upon his client without any condition cannot be terminated without terminating the academic rank for which there is no provision in the impugned law. He has also taken the plea of differential treatment without any intelligible differential. Mr. Chakravarty described his client a Professor and Specilist in a Super-speciality and as such his service cannot be utilised in any institution inhere Super-speciality does not exist. The argument is more personal in nature than on the vires of the Act. A long bio-data of Dr. Gupta's chequered career has already been filed.

13. Mr. Kashi Kanta Moitra assisted by Mr. Nigam Chakravarty along with their juniors placed the case of the Health Service Association, West Bengal. He started on the restrictions on the State Medical Education and the role of private practice. According to him there is no evidence on record nor any report to the effect that the standard of Medical Education is deteriorating in the State as well as there is nothing on record to show the Government is concerned of the falling

standard of medical Education. On the contrary Medical Graduates of West Bengal fare well in the competitive Post-graduate Admission Test as compared to other States. There is no evidence that the practising teachers are less dedicated to their job of teaching and the authorities have never pulled up any practising teacher for negligence or lower standard of teaching on the contrary the practising teachers have regularly been promoted after scrutiny. It is, however, admitted by Mr. Moitra that the standard of patients is very low but this is not the responsibility for teacher-doctors. Therafter Mr. Moitra pointed out a number of anomalies in the impugned Act and Notifications with particular reference to Sections 4, 5, 6, 12, 13, 18 and 19 of the impugned Act. He passed on to the point of discrimination and repeated most of the arguments already indicated hereinbefore. On the point of option he submitted that option is difficult to exercise without clarification of certain points including the promotional prospect, transfer policy, academic rank, duty hours, nature of duty, seniority etc. According to him the stand of the Association on private practice is that all should have the option to private practice or none, and prefers universal non-practising term only on the condition that the loss suffered by practising doctors in respect of pay, seniority, retirement benefit, etc. should be made good with retrospective effect. He points out certain anomalies in the impugned Act with regard to option and most of the anomalies have already been argued earlier. In the submission of the learned Advocate the option offered, is really no option but a travesty of option. On the question of interim absorption to West Bengal Medical Education Service before, the expiry of the last date of option, it was submitted that such absorption was without any principle and full of discrimination He also attacked the absorption of Medical Officers on the basis of the interim order granted by this Court. He said that among those absorbed there are some very Junior Officers and even those who have not acquired post-graduate degree which is the minimum qualification for appointment as teachers.

14. Mr. Somnath chatterjee with Mr. Dipankar Ghosh and assisted by their learned juniors appearing for the Stated respondents submitted that the vires of the west Bengal State Health Service Act. 1990 has been challenged only on the grounds of : (a) legislative incompetence; (b) repugnancy with a Central Act; and (c) infringement of part III of the Constitution. Apart from the above three grounds it was argued by the petitioners that the legislation was mala fide and was intended to benefit one section of doctors at the expense of others. Mr. Chatterjee's submission on the point is that Statute cannot be challenged on the ground of mala fides and the petitioners have not placed any material to substantiate the allegation. In this connection he cited R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another, The second point taken by the petitioners was that the Government should have heard " the doctors likely to be affected before it constituted the new service and by not having done so the impugned Act is bad. The Learned Counsel answered that before passing any legislation the Legislature-is not bound to hear anybody likely to be affected and the validity of the impugned Act cannot be weighed on this

ground. His further submission is that the concept of natural justice has no applicability before the Legislature enacts a law (AIR 1981 SC 1495. S.S. moghe and Ors. v. Union of India & Ors.). The allegation of the petitioner that the constitution of a separate service for doctors engaged in teaching was not necessary and there was no material before the Government to justify the creation of such a service was answered by the Learned Counsel for the respondents that the continuance of -the existing system was felt to be unsatisfactory as appears from the Legislative Sub-Committee Report and the measure taken by notification of 1st April, 1965" was an experimental one. He also took the Court to para 4 of the Affidavit-in-Opposition which contains ample materials justifying the creation of the new service. He further submitted that the Government has the power to constitute a separate service to bifurcate the existing service and to create as many cadres as it pleases. The creation of Service is a matter of policy which is not justiciable and does not attract equality clause and the Government can change the policy at any time. The Court cannot substitute its own policy in place of that of the Executive. A number of decisions were cited on the above submissions. The plea of the petitioner that the promotion of the members of the existing Health Service who opts for the new service would be adversely affected has already been discouraged by the Supreme Court in AIR 1987 SC 2346 (K.S. Vora & Ors. v. State of Gujarat) that prospects of promotion is not an entertain able grievance. The contention of the petitioner that the doctors who are allowed private practice have acquired a right to practice and the Government had given assurance that this state of affairs would continue. This argument according to the Learned Counsels is incorrect because of the fact that by Order of 1965 it was made temporary until further orders on experimental basis and therefore no right accrued. There was also a provision that the matter would be reviewed afterwards. It is wrong to say that the Government ever gave any assurance that the doctors would be allowed private practice and the said order in law ipestopped against exercise of legislative power and it supports the famous case Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, as cited.

15. Dealing with the point of legislative competency as to the vires of the WBSHS Act of 1990 Mr. Chatterjee submitted that the State legislature was fully competent to pass the Act in question. By virtue of Article 246(3) of the Constitution the State has exclusive power to legislate in matter relating to "State Public Services" which is in List II Entry 41 of the 7th Schedule. The attack on the Act that it was repugnant to the Indian Medical Council Act and void by reason of Article 254(2) of the Constitution on the ground that Section 27 of the IMC Act gives all doctors " right to practice but Sections 6 and 9 of the impugned Act takes away the right of practice of the doctors attached to Medical Colleges and Teaching Institutions is answered this way. Basing arguments on the decision reported in A.S. Krishna Vs. State of Madras, it is submitted that for the sake of the satisfaction of compliance of Article 254(2) of the Constitution it must be seen that the State law must be with regard to the matter in the

Concurrent List as mentioned in the List III of the 7th Schedule and whether it refers to Entry 26 of List III i.e. Medical profession as against Entry 41 of List II i.e. State Public Services. The submission on the point is that the records must be taken to the doctrine of pith and substance which means that if the Act is referable to an Entry in List II, then it is not with respect to Entry in I. III. It is decided in AIR 1976 SC 2250 (I.N. Saksena v. State of Madhya. Pradesh) that Entry 41 of List It is of widest amplitude. It is to be seen that the impugned does not in any way deal with the Medical profession at all and even it so deals it does only incidentally or in an ancillary manner. The doctrine of pith and substance comes to the rescue of the impugned legislation as it relates to Entry 21 or List II.

16. On the point that the impugned Act was violative of the Fundamental Right as guaranteed in Article 19(1)(g) of the Constitution, Mr. Chatterjee submitted the Fundamental Right enumerated in Art. 19(1)(g) is not absolute but subject to reasonable restrictions which may be imposed under Art. 19(6). The restriction imposed in the impugned Act on private practice is a reasonable restriction in public interest under Art. 19(6) and is in conformity with the Directive principles as contained in Art. 47. It was argued basing on the judgment of the Allahabad High Court reported in Dr. Y.P. Singh and Others, etc. Vs. State of U.P. and Others, that preventing doctors in Government service from engaging in private practice is a reasonable restriction under Art. 19(6) and reasonable restrictions can be imposed on Fundamental Right or the Government servants in the larger public interest. Further on the basis of the Supreme Court decision it was said that no one has a fundamental right to be a Government servant (AIR 1981 S.C. 344 , Fertilizer Corporation Kamagar Union & Ors. v. Union of India & Ors.). Dealing with the question of infringement of Art. 19(1)(g) Mr. Chatterjee referred to a number of decisions cited by the petitioners and frankly admitted that there is no dispute as regards the principles laid down in those cases are concerned. But at the same time he submitted that it must be seen and examined whether the restriction imposed on fundamental right is a reasonable restriction or not and the impugned Act must be scrutinised as such by the Court. So many cases were cited by the petitioners particularly by Mr. Pal on the point. According to Mr. Chatterjee those decisions have no application to the facts and circumstances, of the instant writ petition. Mr. chatterjee then took up Art. 14 of the Constitution and submitted that if there is reasonable Classification, there is no discrimination and cited Ganga Ram Das Vs. Tezpur Kaibarta Co-operative Fishery Society Ltd., and Ramesh Prasad Singh Vs. State of Bihar and Others, in this connection. According to him, judging by the tests laid down in the above two decisions the impugned Act is a reasonable classification in the context of Art. 14 based on intelligible differentia with a reasonable nexus. The petitioners have argued that the option given u/s 12 of the impugned Act was arbitrary and illusory because the choice was between Medical Education Service and west Bengal Health Service as the Health Service has not yet been consituted and no option is possible and the opinion given is unreasonable and arbitrary. The submission by the defence is that there is an existing West Bengal Health Service which has not

been done away with as indicated in Section 19 of the impugned Act and which states that Rules pertaining to the existing services are saved and continue in force and are not repealed but only modify to the extent of their inconsistency with the new Act. If fact, Section 12 grants two separate options to members of the existing Health Service, one is to join the new medical Service and another is the new Health Service and it is not necessary that the services should be constituted simultaneously as the section refers to "at different times" In the circumstances Section 12 cannot be said to be bad or contrary to Art. 14, 1980 (3) SLR 203, *Narain v. Ramlal*). On the point of opinion the petitioners cited 1960(2) All E.R 457 (*Gardner v. Blaxill & Anr.*) that the option could be exercised either by conduct and a written notice was not necessary but this case has no bearing on the point in consideration. The case cited by Mr. Panja reported in Judgment Today 1990(4) SCC 211 ; *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, which lays down the principle that the judicial review can extend to arbitrary action, even in the realm of contract. It is submitted that it has no application whatsoever because for a Government servant it is not a matter of contract but of his status.

17. Mr. Chatterjee submitted that the petitioners attacked the vires of the Act by submitting that the impugned Act did not make provisions for many matters such as proviso to Section 4(1), Sees. 5, 7, 9(2), 12, 15, 17 and 17A and as such the Act is vague and unworkable leaving one in complete darkness as regards the new service and prospects, promotion and seniority and because of this option cannot be exercised properly. The Learned Counsel answered that if any Act without making any provision for a particular matter leaves it to be prescribed later on, it does not make the Act invalid or ultra vires of Article 14. These are matters of subordinate legislation and do not touch the vires of the impugned Act. He further submitted that it is not obligatory for the Government to make Rules for recruitment before a service is constituted and that the prospects of promotion might be affected is not an entertainable grievance *K.S. Vora and Others Vs. State of Gujarat and Others*, He did not agree with *Kunnathath Thathunni Moopil Nair Vs. The State of Kerala and Another*, on this point. The case of Mr. Gupta was totally on a different subject as the Act did not contain any provision for notice of demand to the assessee nor any opportunity of hearing nor of appeal by aggrieved person and therefore it was held that the Act was bad and infringed Arts. 19 and 14. Another decision placed by the petitioners before the Court was of AIR 1957 SC 1427 (*S.G. Jaisinghani v. C.K. Tikku*) but this is of no assistance to the petitioners because according to the Supreme Court when there is a Statutory Rule it is not open to the Government to act arbitrary on its whim and it is violative to the Rule. Mr. Chatterjee has pointedly referred to Mr. Saktinath Mukherjee's penetrating arguments on the point of non-specification of the strength of the cadre of the new service which is a fatal flaw in the Statute to invalidate it. Without the total strength of the service known to one, option is not possible to be exercised To this Mr. Chatterjee's reply is that no authority for this proposition was cited by Mr. Mukherjee. As a matter of fact in any Service

Rules the strength of the cadre is not mentioned, even the WBHS Rules framed under Art. 309 does not contain the strength of cadre. In this connection Mr. Chatterjee referred to the Statements of Objects and Reasons of the WBSHS Bill, 1990: which clearly mentions 1,400 doctors would comprise the new service. He referred to paragraph 23 of the writ petition of Dr. Sukumar Mukherjee which clearly admitted the strength of teaching doctors and as such it indicates that the ignorance pleaded is not genuine. Another argument of the petitioners was that the retirement age of members of the new service is higher than that of the members of the existing service, the pay scale is also high, etc and therefore is discriminatory in nature; It is answered by the state that there cannot be any discrimination or violation of Article 14 as between members of the same service only i.e. amongst equals but there cannot be discrimination between members of different services. The objection raised by the petitioners that no restriction is there upon Honorary professor who are in Medical Colleges as well as Teachers in Dentistry and doctors belonging to the Ex-Management Staff of National Medical, R.G. Kar and N. R.S. Medical Colleges. It is answered that none of the persons referred to above belong to MES or HS and they get only honorariums for travelling purpose. Therefore the question of discrimination does not arise. They are very few and in advanced age and expected not to continue for long.

18. Mr. Chatterjee shifts on to the argument of Mr. Moitra that the impugned legislation has violated the interim order passed by the High Court in another writ petition in 1982 and it is therefore bad and void. He relied upon 1985(1) All. ER 211 (Clarke & Ors. v. Chadburn & Ors.) and Nawal Kishore Prasad Sinha and etc. Vs. State of Bihar and Others, Mr. Moitra's submission that it encroached into the judicial domain and purported to overrule the Court's order as well as Mr. Chakravarty's contention that Section 20 of the impugned Act is bad to override legislation by Parliament is answered in the following manner. The interim order passed by the High Court in 1982 did not restrain the Legislation from passing any Act and, in fact, no such order can be passed by the Court and the cases referred to by Mr. Moitra are not applicable in the present case because the facts were not similar with the present one. In Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, the Supreme Court laid down that if a statute purported to overrule a judgment it would be beyond the legislative competence of the State Legislature. Here no such thing is being done. By the impugned Act the substantive law itself has been changed and a Legislature can alter a law even with retrospective effect and such an act on the part of Legislature may render any previous judgment inoperative or ineffective. In this connection reliance was made on AIR 1976 SC 2250 (I.N. Saksena v. State of Madhya Pradesh) and 1976 SC 1031 (The Kerala State Electricity Board v. Indian Aluminium Co. Ltd. & Ors.).

19. So far as the argument relating to the hearing given to the affected parties are concerned and reference has been made to H.L. Trehan and Others Vs. Union of India (UOI) and Others, Mr. Chatterjee submitted that the case is clearly

distinguishable and in the case under reference the point raised was in respect of a particular Circular which was struck down. The circular was an Executive Order and not in conformity with the Act. The decision reported in AIR 1978 SC 598 (Union of India & Anr. v. K.T. Shastri) is not comparable with the instant case. The Service Rules of the Defence Science Service which was applicable to all the three units were common. The units were trifurcated without giving any option to employees working in the different units to opt for one or the other unit. Mr. Chatterjee and Mr. Ghosh concluded on different dates by making submissions on the strength of their arguments that the writ application is liable to be dismissed.

20. The Learned Counsels of the petitioners replied to the submissions of the State relating to the reasonable restriction within the meaning of Article 19(6) of the constitution and the Allahabad case reported in Dr. Y.P. Singh and Others, etc. Vs. State of U.P. and Others, in relation to Article 19. So far Article 254 is concerned vis-a-vis the Indian Medical Association Act, 1956 was also discussed. It was stated that the question in issue is whether the restriction of total prohibition of a class of doctors who joined the State Medical Service from carrying on private practice is reasonable in the prevailing facts and circumstances and this question naturally is related to proportionality. According to the Learned Counsels of the petitioners no attempt has been made to convince the Court by reference to the Report of the Subject Committee of the West Bengal Legislative Assembly dated 23rd March, 1990 that public interest demanded that only those members of the State Medical Service who are teachers should not be allowed to carry on private practice. The Allahabad case cited by the State came under heavy fire which relates to the U.P. Government Doctors (Allopathic) Restrictions on Private practice Rules, 1978. It is further contended that though the judgment of the Allahabad High Court appears to be that of a Division Bench but, in fact, it is the opinion of a Single Judge. The State did not enlighten the decision of the Division Bench and the Single Judge's approach was termed as "a total misconception" and a narrow view totally divorced from facts and pragmatism. It is also submitted that the Order of 1965 was introduced as temporary-measure and could not create any vested right and was in fact the relaxation of the earlier restriction imposed by the Order of 1958. As the Order of 1965 held the field for over 20 years it must be presumed to be reasonable. The Learned Counsels also scanned the case laws cited on behalf of the State. It is submitted that the court must look into the Objects and Reasons while considering the validity of a law, more particularly when it is challenged on the ground that it violates Articles 14 and 19. The provisions of the impugned Act according to Mr. Gupta are unworkable and unreasonable. It is repeatedly submitted that policy matters can be interfered with by the Court on the ground of mala fide or discrimination. Repeated attack is made on the Subject Committee's Report from different angles. It is denied that the doctrine of pith and substance has any bearing in the instant case and the impugned Legislation is violative of Art. 254. Reference was made to a decision in Ch. Tika Ramji and Others etc. Vs. The State of Uttar Pradesh and Others, which was

never been considered by the Supreme Court in *Kerala State Electricity Board Vs. The Indian Aluminium Co. Ltd.*, which was very much relied on by the Learned Counsels of the petitioners. While scanning the various decisions cited on behalf of the State it was submitted by Learned Counsels of the petitioners that the matter now stands concluded on the authority of AIR 1987 SC 151.8 (*H.S. Srinivasa Raghayachari v. State of Karnataka & Ors.*). But the Counsel of Health Service Association gave a separate reply on the points of discrimination, private practice, unworkability and mala fide, also poinpointing provisions of the impugned Act and the Rules thereunder. The Allahabad judgment was criticised and the judgment reported in AIR 1976 SC 2250 (*supra*), on the point of Entry 41 of List II was distinguished. It was submitted that much confusion has been created by advancing argument that an Act did not become invalid because the Rules had not been framed. It is the definite case of the petitioners that certain provisions of the Rules are illegal and unconstitutional. The contention of the respondents that creation of two different services by bifurcating the unified WBHS cadre being a matter of policy, the same is outside the scope of judicial review on the basis of *The State of Maharashtra and Another Vs. Lok Shikshan Sansatha and Others*, is not correct. The Supreme Court only held that so long there is no violation of any fundamental rights and the principles of natural justice it is not desirable for the High. Court to interfere and the policy should be adopted. The composition of cadre is not known except for a vague statement of 1,400 teaching posts. Various points have been taken in the reply but those are, in fact, repetitions of the arguments.

21. I have given my considerate thought to the facts of the writ petitions and the submissions made on different aspects challenging the validity and constitutionality of the impugned Act. As stated at the very beginning of the judgment that all the writ petitions revolve round the point that the West Bengal State Health Service Act, 1990 including the Rules framed and Notifications issued there under are ultra vires the Constitution of India, null and void. Some petitions worded the same prayer as to recall, rescind, cancel and revoke the impugned Act, Rules and Notifications there under. If this point is decided either in the affirmative or in the negative then all other prayers made by the petitioners need not be gone into unless specifically so required.

22. Let me first examine the Statement of Objects and Reasons as set out in the West Bengal State Health Service Bill, 1990 published in the Calcutta Gazette extraordinary dated 15th March, 1990.

The existing West Bengal Health Service consists of about 8,000 (eight thousand) Medical Officers. Because of its huge size, the efficiency of the Service could not be improved to the expected height as expected from such Services. The weakness lies in efficiency of Medical officers occupying Administrative posts as well as manning of the Teaching posts, specially in the health disciplines, and also quality of medical teaching and hospital care. Normally, Medical Officers do not like to join such posts from the Unified Cadre of the west Bengal Health

Service.

2. It has, therefore, been proposed that the existing Health Service, should be bifurcated and a separate Service called West Bengal Medical Education Service should be created for medical teachers only. The said service shall comprise at about 1,400 (one thousand four hundred) teaching posts. The Service should be made compulsorily non-practising with the expectation that the standard of medical teaching and care to the patients in different Medical Colleges and Hospitals including other teaching hospitals will be improved and there will be no dearth of teachers in most of the disciplines in the near future.

3. It has also been proposed that there should be a Public Health-cum-Administration Unit within the fold of the West Bengal Health, Service. The Administrative unit will consist of about 500 (five hundred) Medical Officers who will solely be Administrators. It is envisaged that with training and experience, such group of Medical Officers would prove themselves as good administrators in the proposed unit which will be entirely non-practising.

The existing West Bengal Health Service cadre, excepting the proposed Public Health-cum-Administration Unit, will, therefore, be consisting of Medical Officers who will be involved in patients' care only.

4. An Ordinance named "The West Bengal State Health Service Ordinance, 1990" was promulgated on 7.2.90 with the assent of the Governor of West Bengal.

5. The Bill has been framed in of the said Ordinance, with slight modifications, also with the above object in view.

No doubt, the objects as set out hereinbefore are laudable and the Reasons indicate that the West Bengal State Health Service Act, 1990 as published in the Calcutta Gazette, Extraordinary, dated 16th May, 1990 has been adopted with pious objects, whatever may be the criticism. Some amendments were made in the said Act of 1990 by the West Bengal State Health Service (Amendment) Act, 1990 as published in the Calcutta Gazette, Extra ordinary, dated 24th August, 1990. On 25th May, 1990 the said Act of 1990 came into force as well as on that very date the West Bengal Medical Education Service was constituted and the West Bengal Medical Service (Option) Rules, 1990 was made by different notifications as published in the Calcutta Gazette, Extraordinary, dated 25th May, 1990. On 30th May, 1990 the West Bengal Medical Education Service (Pay and Allowances) Rules, 1990 which was also published in the Calcutta Gazette, Extraordinary, dated 30th May, 1990.

23. First, I shall take up the submissions of the petitioners that some sections of the Act of 1990 are violative of Art 14 and Art. 19(1)(g) of the Constitution of India Secs. 7, 9, 11, 18 and 19 of the said Act have been quoted profusely as examples of class legislation without reasonable classification. Section 3 has been attacked on the ground that the West Bengal Health Service was not constituted and that the Health Service shall also include a separate unit, the

cadre for public health-cum-administration which would further bifurcate the Health Service. Section 7 is under attack because by the Amendment Act of 1990 the WBMES shall consist of such teaching posts on such pattern and on such terms and conditions as might be prescribed and include such teaching and administrative posts as might be notified and according to the petitioners such amendment further bifurcates the service apart from that Section 3 does. Section 9 of the Act is eye-sore of the petitioners because sub-section (1) of the section says; "The posts included in the cadre of the West Bengal Medical Education Service shall be non-practising" And the troubles actually have started with Section 9(1) otherwise there might not have been so much hue and cry among the practising doctor of the State of West Bengal The vires of Section 11 has been challenged on the ground that this Section is inoperative so long as Sections 8, 9 and 10 of the Act are not complied with and the terms and conditions as referred to in Section 11 will automatically lead to the terms and conditions which was in force under Order of 1965 which permitted all Officers of the erstwhile WBHE to practice subject to certain restrictions. The exception enunciated in Section 18 to any person not belonging to the former WBHS but holding a teaching post on terms and conditions as might be agreed upon by the Government prior to coming of this Act shall continue to be in such post on same terms and conditions even after the enforcement of this Act. It is taken by the petitioners that the contract-holders will be allowed to carry on private practice in Medical Colleges to the discrimination of others As such, discrimination has been made between teachers, one belonging to WBMES and a contract-holder.

24. According to the petitioners the above distinction makes the impugned Act a (sic) legislation not based on reasonable classification and much reliance has been made on the case of *Ram Krishna Dalmia v. Justice S.R. Tendolkar* (supra), where a Bench of five Supreme Court Judges led by Chief Justice C.R. Das while explaining true meaning and scope of Art. 14 quoted from *Budhan Choudhry and Others Vs. The State of Bihar*, decides as follows :-

It is now well established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group : (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 bases, namely, geographical, or according to objects or occupations, or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of the Court that Article 14 condemns discrimination not only by a substantive law but also a law by procedure.

It is further stated by Their Lordships that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who

attacks it to show that there has been a clear transgression of constitutional principles; that the legislation is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest; that in order to sustain the presumption of constitutionality the Court may take into consideration, matters of common knowledge matters of common report, history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and, further, that while good faith and knowledge of the existing conditions on the part of a legislation are to be presumed, if there is nothing on the face of the law or the surroundings circumstances brought to the notice of the Court on which the classification may reasonably be regarded as best, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminatory legislation. The Supreme Court emphasised that these principles would, have to be constantly borne in mind by the Court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws. In this connection the Supreme Court cited the decision in the case of Ameerunnissa Begum and Others Vs. Mahboob Begum and Others, where it was held by a Bench headed by Chief Justice Patanjali Sastri that mere differentiation of inequality of treatment does not per se amount to discrimination, and it is necessary to show that the selection or differentiation is unreasonable or arbitrary and that it does not rest on any rational basis having regard to the object which the legislature has in view in order to invalidate an enactment under Article 14. The petitioner has referred to the case of Ajay Hasia v. Khalid Mujib Sehravardi & Ors. (supra), to refer to a decision reported in E.P. Royappa Vs. State of Tamil Nadu and Another, where the Supreme Court said that "Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined- with traditional and doctrinaire limits". Also reference is made in Rayappa's case (supra) and Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, where the Supreme Court emphasised that Article 14 strikes at arbitrariness in state action and ensures fairness and inequality of treatment. This very principle was again reiterated in the case of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, Attention was drawn to Galsinghani's case (supra), where principles to be followed in discretionary orders have been laid down by the Supreme Court. A Bench headed by the Chief Justice Subba Rao pointed out that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means the decision should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is un-predictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. Here the Supreme Court relied on two foreign

decisions : United States v. Wunderlich, reported in 1951 (342) US 98 and Rex v. John Wilkes reported in 98 ER 327. Sum total of the contention of the petitioners are that the provisions of impugned Act and the Rules and Orders and Notifications made thereunder are violative of the guaranteed constitutional right and hence bad in law.

25. Article 254 also brought in to emphasise that the legislation enacted by the Legislature is without jurisdiction as it falls in the Concurrent List III Entry 26 and not the state List II Entry 41 and as such the legislation is not complete and valid until it receives the assent of the President. Much emphasis has been made by the petitioners that the impugned Act is not in the interest of general public and the restrictions imposed are not reasonable or justiciable. The Medical Service can be regulated to a certain extent but it cannot be total. The requirement of Art. 19(6) must be explained and substantiated before imposing restrictions until the impugned Act defines the two services and their essential characteristics remain absent, it would continue to be a defective legislation.

26. A point is taken that when a writ petition is already pending and injunction order is already there on the State of West Bengal, the Government cannot initiate any legislation and have it passed by the Legislature which would amount to by-passing the judicial order or over-rule the Court's order. In this connection an English decision of Clark and Or. v. chadburn & Ors. reported in 1985(1) All ER Ch. D. 211 is cited which related to breach of injunction and wilful disobedience of the order of the court in changing Union rules passed in defiance of induction. It was held by Sir Robert Mogarry that act done in wilful disobedience of an injunction or Court's order was not only a contempt of court but also illegal and invalid which could not therefore effect any change in the right and liabilities of others. Nawal Kishore Prasad Sinha and etc. Vs. State of Bihar and Others, is also cited. In this decision the meeting was held after the stay order was passed and the meeting was held nonest. Here I do not find any such fact by which the defiance was made of court's order but altogether a new legislation was introduced and enacted replacing the old one and these decisions as such are not applicable. One thing of course strikes me and that is that the option must be considered after the date of exercising option is over, and not before, because in such a case it will violate the principles of natural justice and may cause discrimination to those who rush first with option and those who come afterwards, and I shall deal with it afterwards. It is also argued that Sections 15 and 23 read with Section 27 of the Indian Medical Council Act, 1956 prevail right to those persons possessing qualifications in the Schedules to be enrolled Section 23 relates to the registration in the Indian Medical Register and Section 27 outlines the privilege of persons who are enrolled on the Indian Medical Register. I shall deal with this later on;

27. It will be better to go somewhat deeper in the Second Report on Medical Education submitted by the Subject Committee on Health and Family Welfare (1989-90) of the West Bengal Legislative Assembly which was presented before

the Legislature on 23rd March, 1990. The first objection of the petitioners taken against this Report is that out of 25 Members there are only 4 doctors and the remaining 21 Members are laymen not well acquainted with Medical Education and cannot give any expert opinion on the subject. This objection is not sustainable on the ground that the Subject Committee studied not only existing system of Medical vis-a-vis the real need of the people. The Committee tried to suggest remedies of different problems in this field and also got the co-operation of eminent persons like the Vice-chancellor, Calcutta University; the Dean of the Faculty of Medicine, Calcutta University President, Indian Medical Association, Bengal State Branch; Principals as well as Representatives of Students Unions of seven Government Medical Colleges and further this Subject Committee was headed by Dr. Gouripada Dutta who himself is a doctor. So it cannot be said that the exercise done by the Subject Committee was entirely a layman exercise and no expert was associated with it. I find that apart from some experienced legislators as named on page (i) of the Report a number of experts as noted above also helped the Committee in coming to conclusions on the existing system of Medical Education and the problems relating there to including the real need of the people. Who can deny the contents of the Report as to the basic problems that the functioning of the medical Colleges and Hospitals have degenerated to its lowest limit of functioning on several counts and the two reasons out of the seven cited are the real cancer of the medical system today : (i) the vested interest of Teachers and the Administrators resulting in lack of disciplines amongst the teaching and non-teaching staff and students, and (ii) the teachers remain busy for their commercial benefit using Medical Colleges as their publicity platform and soci-political power. To quote the Report : "Students on the other hand complain that many of the teachers are not interested in imparting practical training and naturally students feel disinterested in attending their classes". The committee has recorded that the Presidents and Secretaries of the Students Union of all the Medical Colleges agreed about the pitiable situation of Medical Education in West Bengal and unanimously complained that the teachers were mostly busy with their private practice and least concerned about the training of students. The Committee came to the conclusion that Medical Education in West Bengal is not only in disarray but in distress, a fact which cannot be denied by any impartial person. The Committee also considered the National Education Policy in Health Sciences submitted by Prof. J.S. Bajaj. The objection that the Report was placed before the Legislature on 23rd March, 1990 and the Ordinance was promulgated on 7th February, 1990 does not have much bearing on the subject. Though the fact is that the Ordinance was born before the Report saw the light of the day but the hard facts remain that the contents of the Report did not reveal anything surprisingly new but it is on the expected line well-known to the authorities as well as the general public.

28. The National Health Policy of the Ministry of Health and Family welfare Government of India, (1983) refers to the Constitution which envisages the elimination of poverty, ignorance and ill-health and directs the State, inter alia,

for the improvement of public health as among its primary duties securing the health and strength of workers, men and women, specially ensuring that children be given, opportunities and facilities to develop in a healthy manner. It will be quite interesting to go through clause 10 of the Policy which relates to Private Practice by Government. Functionaries as under : "It is desirable for the states to take steps to phase out the system of private practice by medical personnel in government service, providing at the same time for payment of appropriate compensatory non-practising allowance. The States would require to carefully review the existing situation, with special reference to the availability and dispersal of private practitioners, and take timely decisions in regard to this vital issue." This is a vital path of the National Health Policy and I shall discuss it with reference to the steps taken by the Government of West Bengal.

29. Let me now come direct to the vires of the impugned Act and take up its legislative incompetence. It is argued that the subject falls under Art. 254(2) of the Constitution. The provisions of clause (2) of the said Article runs as under : "Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State; Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State". Now turn to Seventh Schedule of List II (Concurrent List) Entry 26 which reads : "Legal, medical and others professions" whereas List II (State List) Entry 41 reads : "State Public Services; State Public Service Commissions". A comparative study of Entry 41 of List II and Entry 26 of List III very clearly indicates that the State Government is free to legislate so far as State Public Services are concerned and the West Bengal State Health Public Service Act, 1990 comes under Entry 41 of List II. Further under Art. 246(3) "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 in the Seventh Schedule i.e. the State List".

30. In AIR 1976 SC 2250 (supra), the Supreme Court held that it is noteworthy that in enacting the Act, the State Legislature derives its competence not only from Art. 309 but also from Entry 41 of List II of the Seventh Schedule. Indeed, within its allotted sphere, that is with respect to any of the matters enumerated in List II of the Seventh Schedule the State Legislature has, by virtue of Art. 246(3), exclusive plenary powers of legislation. The Supreme Court further held that it is well settled that the Entries in this Legislative List in Schedule VII are to be construed in their widest possible amplitude, and each general, word used in such entries must be held to comprehend ancillary or subsidiary matters. Thus considered, it is clear that the scope of Entry 41 is wider than the matter of regulating the recruitment and conditions of service of public servants under

Article 309. The area of legislative competence defined by Entry 41 is far more comprehensive than that covered by the proviso to Art. 309. By virtue of Arts. 246 and 309 read with Entry 41, List II, therefore, the State Legislature had legislative competence not only to change the service conditions of State Civil Servants with retrospective effect but also validate with retrospective force invalid executive order retiring the servants, because such validating legislation must be regarded as subsidiary or ancillary to the -power of legislation on the subject covered by Entry 41. It has been held in the case" of Kerala State Electricity Board (supra), that for deciding under which Entry a particular legislation falls, the theory of "pith and substance" has been evolved by the Courts. If in pith and substance a legislation fall within one List or the other but some portion of the subject-matter of that legislation incidentally trenches upon and might come to fall under another List, the Act as a whole would be valid notwithstanding such incidental trenching. In the case of Subrahmanyam Chettiar v. Muttuswami Goundan reported in AIR 1941 SC 47 , Sulaiman, J. observed with regard to the Central Legislature and the Provincial Legislature that if a subject falls exclusively in List II and no other List, then the power of Provincial Legislatures is supreme. But if it does also fall within List I then it must be deemed as if it is not included in List II at all. Similarly, if it also falls in List III, it must be deemed to have been excluded from List II. The dominant position of the Central Legislature with regard to matters in List I and List III is thus established. But the rigour of the literal interpretation is relaxed by the use of the words "with respect to" which as already pointed out only signify "pith and substance", and do not forbid a mere incidental encroachment. In the above context I do not think that the decision reported in Ch. Tika Ramji and Others etc. Vs. The State of Uttar Pradesh and Others, needs any further discussion nor Article 304(b) is involved in any way. Keeping in view the above discussion the plea of legislative incompetence is untenable.

31. It will not be out of place to make reference to an American decision where the learned Judges observed : "Congress and the administrative agencies have authority over the discipline and efficiency of public service. When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required" (United States Supreme Court Reports, 91 Law Ed. 764, United Public Workers of America (C.I.O.) v. Harry V. Mitchell).

32. Section 27 of the Indian Medical Council Act, 1956 is quoted as follows : -

Subject to the conditions and restrictions laid down in this Act regarding medical practice by persons possessing certain recognised medical qualifications, every person whose name is for the time being borne on the Indian Medical Register shall be entitled according to his qualifications to practice as a medical practitioner in any part of India and to recover in due course of law in respect of such practice any expenses, charges in respect of medicaments or other appliances, or any fees to which he may be entitled.

It is submitted by the petitioners that Secs. 6 and 9 of the impugned Act take away the right to practice of those doctors who are attached to Medical Colleges and other teaching Institution or would be included in the WBMES and as such this restriction which is contrary to Sec. 27 of the I.M.C. Act renders those Sections void by reason of Art. 254(2) of the Constitution. This submission appears not sound because no one has compelled the "doctors who are enrolled on the Indian Medical Register u/s 21 of the Act of 1956 to join Government service. The moment they have voluntarily joined Government service they are bound by the laws and rules of Government and cannot deviate from it on the plea of Section 27. There is no compulsion that they should continue to sacrifice their interest by continuing in Government service and by accepting its terms and conditions: they are always free to leave Government service and enjoy their private practice which right was never taken away from such doctors by the State Government. As far back as in the 1965 Order it was made abundantly clear to those doctors serving as teachers in the State Medical Colleges and Hospitals that they are allowed to have private practice on experimental basis and Government would review the policy after wards. So the plea that Sections 6 and 9 of the impugned Act is repugnant to the I.M.C. Act and void because of Art. 254(2) does not appeal to me. The cases cited on the point are not discussed as those have no application to the present case.

33. The question that the impugned Act is violative of the fundamental rights of the petitioners to carry out their profession as guaranteed by Article 19(1)(g) of the Constitution is taken up. Article 19(1)(g) is quoted as under :

All citizens shall have the right to practice any profession, or to carry on any occupation, trade or business.

But Article 19(1)(g) is not absolute but subject to reasonable restrictions which may be imposed under Article 19(6) and the sub-clause (6) can well be quoted as follows:

Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, in the interest of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and in particular nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to -

(i) the professional or technical qualifications necessary for practising any profession or carry on any occupation, trade or business, or (ii) the carrying on by the State, or by a corporation owned or controlled by the State of any trade, business, industry or service whether to the exclusion, complete or partial, of citizens or otherwise.

The amendment in Sub-clause (6) of Article 19 was made by the Constitution (Sixteenth Amendment) Act, 1963 and after this amendment a challenge on the ground of contravention of Art. 14 is also of no avail parbhai The Parbhani

Transport Co-operative Society Ltd. Vs. The Regional Transport Authority, Aurangabad and Others, The Government is well within its right to impose reasonable restrictions upon fundamental rights of Government servants in the larger interest of public and this point has been clearly defined by the Supreme Court in its two decisions reported in Jumuna Prasad Mukhariya and Others Vs. Lachhi Ram and Others, . and Sakhawat Ali Vs. The State of Orissa, A number of decisions have been cited on behalf of the petitioners on the question of infringement of Article 19(1) (g) including Chintaman Rao Vs. The State of Madhya Pradesh, ; State of Madras Vs. V.G. Row, ; Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others, Express Newspaper (Private) Ltd. & Ors. v. Union of India & Ors.; Narendra Kumar and Others Vs. The Union of India (UOI) and Others, and State of Karnataka Vs. Pratap Chand and Others, . the Learned Counsel appearing for the State accepted the principles laid down in the aforesaid decisions but at the same time reiterated that the question is as to whether a restriction imposed on a fundamental right is a reasonable restriction or not has to be judged in the context of the provisions of the impugned Act which is now under adjudication before the Court. The cases cited by the petitioners were not comparable with the impugned Act and as such could not stand.

34. So far Art. 14 of the Constitution is concerned it must be said in all fairness that Bhagawati, J., in a Bench prescribed over by Chief justice Mahajan very emphatically stated that legislation enacted for, the achievement of a particular object or purpose need not be all embracing. It is for the Legislature to determine what categories it would embrace within the scope of legislation and merely because certain categories would stand on the same footing as those which are covered by the legislation are left out, would, not render legislation which has been enacted The reference to this decision has come from the petitioners which goes, directly against the petitioners. Art. 14 (sic) to Right to Equality and more particularly to Equality before law. It runs thus :

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

If the Legislature takes care to reasonably classify persons for legislative purposes and if it deals equally with all persons belonging to a "well defined class", it is not open to the charge of denial of equal protection on the ground that the law does not apply to other persons The State of West Bengal Vs. Anwar Ali Sarkar, The petitioners relied very much upon Ajay Hasia's case (supra), that Art. 14 is concerned not merely with the question of classification but also with arbitrariness. The decision in Babulal Amthlal Mehta Vs. The Collector of Customs, Calcutta, specifically refers that it is now well-established that while Art. 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation and in Ramesh Prasad Singh Vs. State of Bihar and Others, the Supreme Court held that equality is for equals, that is to say those who are similarly circumstanced are entitled to an equal treatment. The guarantee of

equality is far equals, that is to say those Who are similarly circumstanced are entitled to an equal treatment. The guarantee of equality does not imply that the same rule should be made applicable to all persons in spite of differences in their circumstances and conditions. The guarantees enshrined in Art. 14 cannot be carried beyond the point which is well-settled by a catena of decisions by the Supreme Court. In this connection the Supreme Court refers to a number of decisions in that case. I find that the creation of Medical Education Service for those doctors, who are engaged in teaching or teaching institutions is not violative of Art. 14 and cannot be said to be discriminatory. It is argued by the petitioners that the options invited under Sec. 12 of the impugned Act is arbitrary and illusory. Sec. 12 relates to option between Medical Education Service and health Service. Of course, so far as the West Bengal Health Service is concerned it has not yet been constitute under Sec. 3 of the impugned Act and as such the petitioners say that no option can be impugned Act and as such the petitioners say that no option can exercised in the circumstances. But this argument is not appropriate because of the fact that the West Bengal Health Service is already in existance and has not yet been done away with and Sec. 19 of the impugned Act makes it clear that the rules pertaining to the axisting service are saved and to continue in force and are not repealed so the option is open either to join the west Bengal Medical Education Service or the West Bengal Health Service. The State has accepted no doubt, that the West Bengal Health Service as required u/s 3 has not yet been constituted. In view of Sec. 19 the position is some What saved but there is vagueness. The admitted position is the option between WBMES and WBHS. The State's plea is that the option is unworkable and bad in law would not prevail but the settled principle of interpretation of Statutes that if two interpretations of a statutory provision are possible, one which saves the statutory provision, and the other which renders it bad in law then the interpretation which saves and preserves the statutory provision and its constitutionality should be preferred. The State relies upon Union of India and Another Vs. Tulsiram Patel and Others, The petitioners relied on (1960) 2 All ER 457 (Gardner v. Blaxill and Anr.) which relates to option exercisable by conduct and it was held that the option had been validly exercised by conduct as discussed in the decision. But this decision is of no help in this particular case. Whatever might be the case there appears to be some anomaly so far the exercising of option under Sec. 12 of the impugned Act is concerned and it puts the petitioners in an embarrassing position.

35. The argument on behalf of the petitioners that without consulting the doctors or their representatives the review of the old Rules of 1965 cannot be made, does not appear convincing. When Government forms a policy for a particular service it is not always necessary for the state to consult Government servants on important policy matters. The consent of the employees is totally immaterial. In a latest decision the Supreme Court has made it clear that the powers of Government to make rules, to regulate the service conditions of its employees are very wide and unfettered. These powers can be exercised unilaterally without

the consent of the employees concerned. In the case of *S.S. Moghe and Ors. v. Union of India and Ors.* (AIR 1981 SC 1495) it was urged by the petitioners that the Screening Committee under the Aviation Research Centre (Technical) Service Rules, 1976 had acted in violation of the principles of natural justice in as much as it had not afforded to the petitioners an opportunity to make their representations before the committee. The Supreme court held that the law does not cast any obligation to invite representations from the persons while adjudging their suitability for appointment into the new service and therefore rejected the argument that there was any violation of principles of natural justice. In *Roshan Lal Tandon Vs. Union of India (UOI)*, it was held that the terms of service can be altered unilaterally by Government. In the case of *H.L. Trehan and Others Vs. Union of India (UOI) and Others*, a circular was challenged whereby the Management of Caltex Oil Refining (India) Ltd. altered the service conditions of the staff of Caltex (India) Ltd. to their disadvantage without giving them any opportunity of hearing. Post-decisional hearing was given but not the pre-decisional hearing. The Supreme Court held that the Circular was not in conformity with the industrial Disputes Act and so the Circular was against the principles of natural justice. The instant writ petition is not hit by this Supreme Court case.

36. The contention of the petitioners that the impugned Act does not make provision for many of the matters such as relating to the proviso to Sec. 4(1) Secs 5, 7, 9(2), 12, 15, 17 and 17A renders the Act in question vague and unworkable because" those persons wishing to opt for new service are completely in dark as regards the conditions of new service and prospects thereof, including seniority, etc. It must be said that making provisions for some matters in the impugned Act and leaving some other to be prescribed later on, does not render the impugned Act invalid or void because these are matters of subordinate legislation and do not touch the question of vires of the Act and this is recognised by the Supreme Court's decision in *Ramesh Prasad Singh Vs. State of Bihar and Others*, where it is clearly held that it is not obligatory to make rules of recruitment etc, before a service is constituted or a post is created or filled up. It is also held in the case of *K.S. vohra and Ors. v. State of Gujarat and Ors.* (supra), that prospects of promotion in future if prejudiced is yet not a grievance which could be made of new Rules provided they are made bona fide to meet the exigencies of service. Reliance has been made on *Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another*, This case deals with *Tra-vancore-Cochin Land Tax Act, 1955* and under this Act the tax demand could be recovered by recourse to the *Madras Revenue Act* as arrears of revenue without the assessee having any opportunity, whatsoever, to contest the validity of the demand. I think this decision has no similarity with the instant case and has no application to this. The facts of the case in *S.G. Jaisinghani v. Union of India* (supra) was also different from the one in the instant case. Para 145 of the judgment has been quoted by the petitioners in their support; it must be noted that in para 13 of the said judgment that promotions were " made from one

particular service in excess of the prescribed quota and Government's contention was that the quota rule was merely an administrative direction and its breach was not justiciable. This contention of Government was not accepted by the Supreme Court," as the Rule was statutory in nature and therefore binding on Government. The only point which is emphasised in this case is that it was not open to Government to act arbitrarily when Statutory Rule embodies some basic principles. Mr. Saktinath Mukherjee has laid much stress on non-specification of the strength of the cadre of the new service and according to him it was a fatal flaw, invalidating the Statute. No direct decision on the point has been cited that fixation or specification of strength of a cadre is imperative otherwise the Act or the Rules framed thereunder would become invalid. In the Statement of Objects and Reasons of the West Bengal State Health Service Bill, 1990 as quoted hereinbefore it has been clearly spelt out that about 1,400 doctors would comprise the new service and this position has also been admitted in the writ petition of one of the petitioners, Dr. Sukumar Mukherjee. Ignorance of strength does not appear to be genuine. So far as the retirement age and pay scale are concerned both are higher in the new service than in the existing service and, therefore, not discriminatory in nature which nullifies the Act. It may be pointed out that there can be discrimination violative of Art. 14 only as between members of same service i.e. among equals and there cannot be any discrimination among members of different services. Further the retirement age of teachers in WBMES. is the Same as the retirement age in other services in the State. In this connection reference may be made of Ramesh Prasad Singh Vs. State of Bihar and Others, as well as State of Punjab Vs. Joginder Singh, There are some persons who are excluded from the purview of the impugned Act as indicated in Sec. 18 because they do not belong to the former West Bengal Health Service. They come under three categories, i.e. (i) Honorary Professors who get honorariums as travelling expenses; (ii) Teachers in Dentistry; and (iii) Ex-Management doctors. So there is no question of discrimination between members of WBMES as regards private practice. Those belonging to Dental Service come under category (c) which is a diminishing class and will continue till existence of the contracts whereas in category (a) there are a few in number and almost all of them are of advanced age and not expected to continue for long. The argument that Sec. 20 of the impugned Act is bad because it seeks to override legislation by Parliament is not of any force.

37. I like to revert to a topic again and refer Goodyear India Ltd., Gidore (India) Pvt. Ltd., Kallinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, where it was held that if a Statute purported to overrule a judgment it would be beyond the legislative competence of the State Legislature. This observation of the Supreme Court was in a special reference of Goodyear and Bata India. But this principle is not applicable here. By the impugned Act the substantive law itself has been changed. In AIR 1976 SC 2250 (supra), the Supreme Court held that in view of the distinction between legislative and judicial functions, the Legislature cannot by a bare declaration

directly overrule, reverse or override a judicial decision, it may, at any time in exercise of the plenary powers conferred on it by Arts. 245 and 246 of the Constitution render a judicial decision ineffective by enacting a valid law on a topic within its legislative field fundamentally altering or changing with retrospective, curative or neutralising effect the conditions on which such decision is based. Further, the Supreme Court held that rendering ineffective of judgments or orders of competent Courts and Tribunals by changing their basis by legislative enactment is a well-known pattern of all validating Acts. Such validating legislation which removes the causes for ineffectiveness or invalidity of actions or proceedings is not an encroachment on judicial power. In this connection the Supreme Court relied on *Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another*, When examining a legislation from the angle of its vires, the Court has to be resilient, not rigid, forward-looking, not static, liberal, not verbal in interpreting the organic law of the nation *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*,

38. It will not be out of place to refer to the Government Order dated 1st April, 1965 issued by the Secretary to the Government of West Bengal to the Director of Health Services, West Bengal, on the basis of an Expert Committee set up in 1962 to make recommendations regarding the reorganisation of the cadre of Health services in West Bengal. The recommendations made by the Committee, included inter alia, the question as to how far and in what manner the benefit of private practice would be extended to a large number of posts on the curative side of the West Bengal Health Service had been under active consideration of Government for some time past. One Governor by virtue of the power conferred, made relaxation of some provisions in the West Bengal Health Service (Cadre, Pay and Allowance) Rules, 1958 and the West Bengal Health Service (Pay, Allowance and Promotion of Non-Gazetted Medical Officers) Rules, 1959 purely on temporary basis until further orders. It was made out in the Order of 1965 that those in practising posts shall be eligible for private practice on terms stated in the said Order including that such private practice must not interfere in any manner with the duties and responsibilities of the Medical Officers. It was also made clear in the said Order that the doctors eligible for private practice would not acquire any claim for appointment to practising posts only in future and they would continue to be liable to be transferred to any post in the cadre, practising or non-practising, in the exigencies of public service as at present. It was made abundantly clear in para 7 that the scheme for reorganisation of the West Bengal Health Service as formulated in said Order except the provisions contained in paras 2 and 3 in sanctioned temporarily as experimental measures, so that the position may be reviewed at a suitable time in future in the light of the experience gained and the results achieved in the matter of treatment of patients and teaching of students as also research. So it was made abundantly clear that the Order of 1965 would be reviewed and might take any shape in future. This was known to the petitioners as far back as in 1965.

39. Allow me to go back to the Subject Committee's Report of 1989-90 wherein

the students complained that the teachers are not interested in imparting medical training and naturally the students feel disinterested in attending their classes. It must be said in all fairness that the part of the Order of 1965 to the effect that private practice must not interfere in any manner with the duties and responsibilities of the-. Medical Officers was not only not followed but violated in general, and those doctors who are allowed private practice started taking more and more interest in their private patients than taking normal interest in their students in Medical Colleges or their patients in the Hospitals. I think it will be rather a tribute to them to say that they were not taking normal interest, the fact is that they were taking very little interest with their students and patients in the Medical Colleges and Hospitals. The entire matter was reviewed in the background of this experience and result since 1965 and a new policy decision was taken by the Government. Who can deny the poor state of affairs in a state-run Medical College and Hospital. Is it not a fact that eminent doctors who have extraordinary skill in their respective medical art are more inclined to sit in their crowded air-conditioned chambers for private practice than to run to the medical Hospitals to attend on dying patients who lie in precarious condition? It is also a truth, nothing but truth, that these eminent doctors utilise the Medical College for the purpose of their commercial benefit and publicity. In case they are not associated with any Government Medical College, their private practice will shrink considerably. These doctors who undoubtedly excelled in their respective fields are not ordinary men of the profession but extraordinary giants of the profession and more responsibility rests on them than on the ordinary doctors to take care of the patients and the students in Hospitals than to devote more energy and enthusiasm to their private practice. In case they follow the right path, undoubtedly their financial expectation will dwindle considerably and no one will be ready today in the capitalist set-up to make this sacrifice but will prefer to sacrifice the middle and poor class patients and the students. In our society it is quite difficult, rather unthinkable, for a middle class person to spend fabulous money in a nursing home under the benign care of an eminent medical personality- He will have to go to a Government Medical Hospital or Institution for his ailment, however serious it might be, and whatever be his fate he is bound to accept the same with a smiling face. The Court can always be guided by the beacon light of the Preamble to the Constitution of India and the principles underlining the Fundamental Rights and the Directive Principles of State Policy enshrined in the Constitution. It is worthwhile to quote from Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, where Their Lordships of the Supreme Court said :

The law exists to serve the needs of the society Which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. It must keep time with the heartbeats of the society and with the needs and aspirations of the people. As society changes, the law cannot remain immutable the early nineteenth century essayist and wit, Sidney Smith., said, "When I hear any man talk of an unalterable law. I am

convinced that, he is an unalterable fool." The law must, therefore, in a changing society march in tune with the changed ideas and ideologies legislatures are, however, not best fitted for the role adopting the law to the necessities of the time, for the legislative process is too slow and the legislatures often divided by politics, slowed down by periodic elections and overburdened with myriad other legislative activities. A constitutional document is even less suited to this task, for the philosophy and ideologies underlying it must of necessity be expressed in broad and general terms and the process of amending a constitution is too cumbersome and consuming to meet the immediate needs. This task must, therefore, of necessity, fall upon the courts because the courts can by the process of judicial interpretation adapt the law to suit the needs of society.

Their Lordships then quoted a classic passage from Oliver Wendell Holmes's "The Common Law" (Harvard, 1881) as under:

The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.

40. The reliance by defence on the controversial Allahabad case reported in Dr. Y.P. Singh and Others, etc. Vs. State of U.P. and Others, caused considerable excitement among the petitioners and a volley of attack from the petitioners on the respondents on the plea that this Allahabad decision is wholly misplaced. It is stated on behalf of the petitioners that the Uttar Pradesh Government Doctors (Allopathic) Restriction on Private Practice Rules, 1976 was subsequently substituted by the Uttar Pradesh Doctors (allopathic) Restriction on Private Practice Rules, 1983. The vires of the new Rules was also challenged and a Division Bench of the Allahabad High Court stayed the new Rules. The petitioners have also annexed an order of a Division Bench of the Allahabad High Court (Lucknow Bench) in Writ Petition No. 4806 of 1983 which stayed the new Rules of 1983. But at the same time it was directed that it would be open to the petitioners to opt whether they would like to give up private practice and accept non-practising allowances. The Learned Counsels of the petitioners were completely wrong in their attack on this Allahabad case because this case is wholly and solely based on the U.P. Government Doctors (Allopathic) Restriction on Private Practice Rules, 1978 and has nothing to do with the new U.P. Govt. Doctors (Allopathic) Restriction on Private Practice Rules, 1983. It is admitted by the petitioners that the Rules of 1978 was substituted by the Rules of 1983 and as such this Allahabad case reported in Dr. Y.P. Singh and Others, etc. Vs. State of U.P. and Others, has nothing to do with the Rules of 1983 which is under stay by a Division Bench of the Allahabad High Court. The principle laid down in this decision is absolutely the same and identical with what I have been discussing all through. The Division Bench consisting of Satish Chandra and T.N. Misra, JJ. emphatically said that the imposition of total restriction on private practice by medical practitioners engaged in Government service is reasonable and is in the

interest of general public. It is neither arbitrary nor unfair, nor excessive in nature, and, as such are not violative of Art. 19(1)(g). The consistent view of all the Committees appointed to opine on the subject of private practice by Government doctors over the years and of the Indian Medical Council has been that Government doctors should not be allowed to do private practice for remuneration. The impugned rule mainly aims in achieving the objects so emphatically asserted from time to time by these bodies. The policy evolved in the rule is manifestly in public interest and is in conformity with the directive principles contained in Art. 47 of the Constitution. Their Lordships further said that the Government doctors do not give medical advice after office hours without charging fees. Their fees cannot be paid by hungry, indigent person. They are approached by those who can afford to pay them. So, the majority of these deprived persons are not going to get any benefit from them. They have to depend on the hospitals and dispensaries set up by the Government for public benefit. The right of the doctors in question to practice the profession of medicine cannot be said to have been violated by the impugned Rules. The Rules do not prevent a graduate in medicine and surgery from practising his profession. It in effect only provides that if such a graduate has become a Government doctor a graduate has become a Government doctor and draws salary from public exchequer he shall not be entitled to do private practice for pecuniary consideration in case or kind while remaining in Government service. The restriction imposes merely prescribed conditions which must be observed if the appointees want to remain in Government service. A rule prohibiting exploitation of the misery of the people by privileged doctors is in preponderate interest of the society. Medical education means to lay stress on the profession of a solid foundation in the pathology of disease and the practical aspects of patient management. The Medical Colleges provide teaching of both core curriculum and elective courses. Multi-disciplinary research in these Colleges is therefore an imperative necessity so as to provide effective and wholesome medicare and medicare. Private practice by Government doctors would be the greatest hindrance in achieving the goal. The impugned rule is obviously a prescription to cure malady. The restriction on private practice by Government doctors would benefit the student community and the poor neglected patients and help in improving the academic standard in Medical Colleges and it is quite plainly in the interest of the general public. Their Lordships made references to the case of *Laxmi Khandasari v. State of U.P.* (AIR 1931 SC 873) and the decision in *Bishambhar Dayal Chandra Mohan v. State of Uttar Pradesh* (AIR 1932 SC 33) where it was noticed that the liberty of an individual to do as he pleases is not absolute and it must yield to the common good. Absolute and unrestricted individual rights do not and cannot exist in any modern State.

41. The Allahabad case under reference categorically spelt out that the right under "article 19(1) to (g) in a way represents the claims of the individual. But the claims of the individual have been made subject to the claims of the society or State or other individuals. So the limitations imposed under Article 19(2) to

(6) protect the claims, of society or State or other individuals. Their Lordships were of the opinion that if a person obtained a degree of graduation in medicine or " surgery or doctorate, he may adopt any of the following courses : (i) start private practice and open his own clinic; (ii) apply for a teaching job; (iii) apply for Government job; and (iv) engage himself in any other trade or business or profession. So pertinent is an observation of the Division Bench that I cannot resist the temptation to quote the same as follows : -

Public interest requires that only such persons should be appointed as Government doctors who are physically, intellectually and morally fit to be appointed as a doctor in Government Medical Colleges and Government Hospitals and Dispensaries and it would indeed be contrary to public weal to retain a person as a Government doctor if he neglects his duties, which are pious and noble and missionary in character and adopt exploitative tactics and indulges in fleecing the helpless ailing patient openly in public gaze. A teacher in a medical college, whatever may be his rank in the hierarchy, is expected to give his unflicking devotion in his task of teaching and to render medical aid and advise to the hungry patients who would go to him in the hospital. Then his spare time is expected to be utilised in academic pursuits and research work to keep him efficient. There would hardly be any time left with him to run a private clinic unless he concedes that after being saddled firmly in the Government job he has nothing to read and write.

This Allahabad decision is criticised by the petitioners as a total misconception with narrow and pedantic approach totally divorced from the facts and pragmatism and it was described as the decision of a Single Judge. Well, apparently it appears to be a " Division Bench, decision but even if it is a Single Judge verdict it endorses the views and the reason's given by the Division Bench consisting of K.N. Singh and R.C. Srivastava, JJ.

42. The name of Dr. Bhaskar Roy Chowdhury, Vice-Chancellor of- the Calcutta University, has been unnecessarily dragged in by some of the petitioners knowing full well that Dr. Roy Chowdhuri is not a Government servant nor on the payroll of the Government. He is the administrative and executive head of a statutory body and does not stand at par with those doctors who are allowed private practice in Government service. It shall not be out of place to mention that the writ petition of the eminent cardiothoracic surgeon, Dr. Saibal Gupta, in my humble opinion, is full of self-eulogy rather than on the vires of the impugned Act. His grievance is that in spite of possessing (sic) high qualification (he enclosed a long bio-data of 26 items) he has been denied appropriate teaching rank/academic status in keeping with his qualification and experience. His allegation that the rank of Professor was acquired by him by dint of his educational qualification, research and publications, teaching experience and other academic achievements upon proper evolution and the same has become a part and parcel of the terms and conditions of his employment and cannot be taken away or diminished except in, violation of Art. 311 or his status can be

taken away without due authority of Law in violation of Art. 300A. The Professor is more concerned with his academic rank and status than the line adopted by other petitioners.

43. Some confusion has been created by the submissions made on behalf of the petitioners that because some of the Rules have" not been framed the impugned Act becomes invalid. In my opinion an Act does not become invalid merely because the Rules have not been framed Non-framing of rules does not make the Act unconstitutional the rules may be framed after the enactment of the Act and before its implementation. At best it can be said that some provisions of the impugned Act become unworkable because the Rules have not been prescribed to that effect or Notifications made relating thereto. But the unworkable theory cannot render an Act unconstitutional under any circumstance, it could only stand in its-way of implementation for a limited period if the framing of the Rules are so very essential. The Supreme Court has very specifically laid down the principle on this point-In the case of Ramesh Prasad Singh Vs. State of Bihar and Others, Their Lordships said :

It is not obligatory to make rules of recruitment etc. before a service is constituted or a post is created or filled up. The process of rule making is a protracted and complicated one involving consultation with various authorities and compliance with manifold formalities. The exigencies of administration at times require immediate" creation of service or posts and any procrastination in that behalf cannot but prove detrimental to the proper and efficient function of public departments. In such like situation, the authorities concerned would have the power to appoint or terminate administrative personnel under the general power of administration vested in them.

Their Lordships relied upon two Supreme Court decisions namely, T. Cajej Vs. U. Jormanik Siem and Another, and AIR 1956 SC 1942 (B.N. Nagarajan and Ors. v. State of Mysore, and Ors.) As the West Bengal State Health Service Act, 1990 is purely based on policy, I feel that in policy matters the Court should not poke its nose and the judicial review must shrink to the minimum and that too in exceptional cases only. This case does not come within this category.

44. Now let me come to a vital issue of those doctors who are in the Government service and allowed private practice but at the same time they are at the verge of superannuation. Their case must be taken on sympathetic consideration not as a policy matter but on humanitarian ground and they must be allowed some concessions in the new set up. If at the fag end of their career they are abruptly thrown out of service suddenly it will be a jolt for them and disrupt their programme of rehabilitation after retirement. Those who are younger in age and have several years to go for retirement they of course can manage and arrange their future programme but it will be quite difficult for the old guards to be abruptly off the service. In this connection some concessions must be provided to those who are going to be superannuated in near future. Here a cut-off year must be given for the ends of justice to the old guards who are to retire on or

before 31st July, 1993 and their service and private practice should not in any way be disturbed till the date of superannuation as mentioned hereinbefore. I also want to point out the two Interim Orders I made on 23rd August, 1990 and 5th September, 1990 whereby I directed 200 and 400 doctors, respectively, to hold office on ad hoc basis under the West Bengal State Health Service Act 1990 and on condition that their absorptions and/or appointment would abide by the result of the writ applications requires direction as to how they will be dealt with.

45. In view of the discussion made hereinbefore, I hold that the West Bengal State Health Service Act, 1990 with all the Rules made there under are valid, lawful and intra vires the Constitution of India. I further hold that the Act is in conformity with Arts. 14 and 19 of the Constitution, and within the legislative competence of the State Legislature and is not hit by Art. 254 of the Constitution. I direct the State-respondents to prescribe all the remaining Rules and necessary Notifications and publish the same in the Gazette at the earliest; and not later than 31st August, 1991. From the date of publication in the Gazette of all the Rules and Notifications, 15 (fifteen) clear days" time shall be given to exercise option to the doctors Which shall be notified by the respondents through Gazette as well as by public notification in at least two English and two Bengali newspapers of largest circulation published from Calcutta. After the last date of the option is over the Government of West Bengal shall implement the West Bengal State Health Service Act, 1990 and shall take into consideration "all the options exercised at a time together. Those doctors who have already exercised options and come within the purview of Interim Orders of 23rd August, 1990 and 5th September, 1990 shall also be treated along with the rest of the doctors and fresh absorptions should be made because they were holding office subject to the result of the writ applications. I further direct that those doctors who are allowed private practice and who are to be superannuated on or before 31st July, 1993 shall not be disturbed from their position until their retirement and shall draw all the retiring benefits in accordance to their conditions of service.

46. All the writ applications are dismissed with the aforesaid directions upon the State-respondents. There will be no order as to costs.

47. The Court thanks the eminent Counsels for their assistance and help during 29 days of hearing.

48. Let xerox copy of the judgment be made available to the parties on usual undertaking and upon compliance of necessary formalities. After the judgment is delivered, the Learned Counsels appearing for the petitioners pray for stay of the judgment for two weeks. In view, of my Order the act in question shall be implemented by the Government of West Bengal after 15 clear day"s notice for option to the doctors which shall be published in the Gazette as well as four Newspapers as indicated in the Order. The Learned Counsels want two weeks stay of the order whereas by my Order they get 15 days time before which no implementation of the Act is possible. As such, I do not find any reason to give the stay order. The prayer is accordingly refused.