

(1994) 02 J&K CK 0003
In the Jammu And Kashmir High Court
Case No : O.W.P. No. 407 of 1992

Sukesh Chander Khajuria

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 14-02-1994

Acts Referred:

Constitution of India, 1950 — Article 21
Jammu and Kashmir Medical Education (Gazetted) Service Recruitment Rules, 1979 — Rule 1, 15(10)
Jammu and Kashmir Public Men and Public Servants (Declaration of Assets and Other Provisions) Act, 1983 — Section 15(1)

Citation : AIR 1994 J&K 73

Hon'ble Judges : S.C. Mathur, C.J; S.M. Rizvi, J

Bench : Division Bench

Advocate : A.V. Gupta, for the Appellant; B.A. Mazki, A.V.G., T.S. Thakur and K.S. Johal, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Mathur, C.J.—A single individual, Sukesh Chander Khajuria, has filed this writ petition seeking ban on private medical practice by

doctors in the service of the State Government and for creation and assurance of proper, adequate and hygienic medical facilities for the citizens of

the State. The petition has been claimed to have been filed in public interest. The petitioner has claimed himself to be a social activist and President

or member of several social organisations. A few facts necessary for the disposal of the writ petition may be stated:

2. Government doctors likely to be affected by the petition fall in two categories: (1) those posted at Primary Health Centres and Hospitals; (2) the

posted at institutions imparting medical education . Doctors belonging to the second category are governed by Jammu and Kashmir Medical

Education (Gazetted) Service Rules, 1879. Said doctors along with other Government servants are governed by Jammu and Kashmir Public Men

and Public Servants (Declaration of Assets and Other Provisions) Act, 1983. According to the petitioner, under both these statutory provisions it

was not permissible for the doctors in the employment of the State Government to indulge in private practice, yet the said doctors indulged in

private medical practice which resulted in deterioration of services which they were required to render to the citizens of the State Government or

public servants. Their indulgence in private medical practice was ignored as they had a powerful political lobby. On 7-3-1986 Governor's rule was

imposed in the State and Shri Jagmohan was appointed the Governor. He took note the malaise and on 31-5-1986 Government order was issued

imposing ban on private medical practice by the said doctors. This Government order was challenged by Dr. S.N. Dhar and several other

Government doctors through writ petition No. 668/1986. These Government doctors invoked Article 19(1)(g) of the Indian Constitution to assail

the ban. They asserted that the private practice did not interfere with the efficient discharge of their official duties. This petition was contested on

behalf of State and was dismissed by a Division Bench on 17-10-1986. Governor's rule ended and democratic Government was installed and

Government doctors political lobby again became active. They succeeded in obtaining SRO No. 42 dated 23-1-1987 which permitted them to do

private practice along with their jobs as Government servants. This is the order which is under challenge in the present petition.

3. The first ground of challenge raised by the petitioner is that SRO dated 23-1-1987 is contrary to the statutory provisions and the same cannot

therefore be sustained. The statutory provisions relied upon by the learned counsel for the petitioner are the Act of 1983 and the Rules of 1979

mentioned hereinabove. In the Rules reliance has been placed by the learned counsel on Rule 15(1) which reads as follows:

15(1) Unless otherwise directed by the Government by any general or special order no member of the service shall undertake private practice.

Every such member shall be entitled to a monthly non-practising allowance at such rate as may be determined by the Government from time to

time.

1979 Rules deal with doctors appointed in the institutions imparting medical education. Their appointment may be in the teaching wing,

administrative or general wing. On the basis of the provisions contained in Rule 15(1), the submission of the learned counsel is that doctors

belonging to second category cannot do private practice.

4. In view of the emphasised portion in Rule 15(1) we are unable to uphold the submissions of the learned counsel. In view of the emphasised

portion the bar on private practice will apply only in the absence of any general or special order. Once such an order is issued permitting private

practice, the bar on private practice contemplated by Rule 15(1) would stand lifted. In the present case the bar stood lifted by the impugned SRO

No. 42 dated 23-1-1987. Accordingly in our opinion the impugned SRO cannot be said to be contrary to 1979 Rules. Challenge based on the

said Rules is therefore overruled.

5. The Jammu and Kashmir Public Men and Public Servant (Declaration of Assets and other Provisions) Act 1983 (V of 1983) deals with

declaration of assets by public men. The term Public Man is defined in Clause (e) and the term Public Servant is defined under Clause (f) of

Section 2. Public servant is defined to mean the public servant as defined in Section 21 of the State Ranbir Penal Code but does not include a

public man as defined in the Act. The Government doctors will be covered by the definition contained in Clause (f) and not by the definition

contained in Clause (e). Chapter II deals with the declaration of assets by public men and Chapter III deals with declaration of assets by public

servant. Section 9(1) falling under Chapter III requires every public servant to submit to the prescribed authority a return of all the assets

possessed by him and his family members within three months of his becoming a public servant. Sub-section (2) requires him to submit such return

annually. Chapter IV deals with the acquisition of property, and trade. Section 13 falling under this Chapter lays down that no public servant shall

practice any profession or carry out any trade or business directly or indirectly without the previous permission in writing of the prescribed

authority, Section 14 contains the penalty for contravention of the provisions of Section 13.

6. The learned counsel for the petitioner has submitted that since violation of

Section 13 has been made penal by Section 14, there is no occasion for the State Government to permit private practice. The right to permit private practice is contained in Section 13 itself which permits private practice with the permission of the prescribed authority. The impugned SRO contains the permission to do private practice. Accordingly, in our opinion, the impugned SRO cannot be challenged even on the basis of the provisions contained in this Act.

7. The next statutory provision relied upon by the learned counsel is Rule 2 in Part II of the Medical Council of India Rules reproduced at page 11

of the petition. It runs as follows:

The teaching staff of all departments of a medical college shall be wholetime and non-practising. In institutions where part time/ Hony, teachers are

employed in clinical departments, they should be replaced by wholetime teachers by 1985. In the meantime, such part time/Hony. teachers will

only be recognized as teachers provided they put in not less than 4 hours clinical and teaching duties per day in one teaching institution.

Neither the source of power to make the Rule has been mentioned in the writ petition nor the authority which has exercised the power has been

disclosed. Section 32 of the Indian Medical Council Act, 1956 (Cii) of 1956 confers powers to frame Rules on the Central Government and

Section 33 confers power on the Medical Council of India to make Regulations. We may assume that the Rule has been framed by the authority

competent in that behalf and examine its impact on the impugned SRO.

8. The Rule does enjoin that teaching staff in all departments of a Medical College shall be non-practising. On the basis of this mere Rule it has

been stated in ground (d) that the Medical Colleges in the State of Jammu and Kashmir are at the risk of being de-recognised by the Medical

Council of India. Rule which confers power to de-recognise on this ground has not been brought to our notice. On the basis of mere Rule 2

reproduced hereinabove we are unable to hold that permission of private practice will necessarily lead to de-recognition of Medical colleges in the

State. Ban on private practice was lifted more than six years ago. Obviously Government Doctors are doing private practice. Yet no Medical

college in the State is claimed to have been de-recognised by the Medical Council. In the circumstances we are unable to strike down the

impugned SRO on the basis of the provisions contained in Rule 2.

9. The SRO has been described as vague and ambiguous also. Through the SRO Rules designated as Jammu and Kashmir Government Doctors,

Relaxation of Restrictions of Private Practice Rules, 1987 have been promulgated. These Rules have been framed in exercise of the rule making

power conferred by Section 16 of the 1983 Act referred to herinabove. The preamble to the Rules refers to the enforcement of ban earlier by

order dated 31-5-1986, to the suggestion made in the judgment of this Court in Dr. S.N. Dhar's case, to the report of the Committee constituted

to go into the question of private practice and to the recommendations made by the Committee. Rule 2 defines the term 'Government doctors',

'Member of the ser-vice' and 'Service'. The Rule which lifts the ban is 3 which reads as follows:

3. Permission of private practice by members of the service and Government doctors:-- A member of the service and a Government doctor are

permitted to under- take private practice subject to the restrictions and conditions provided hereinafter in these Rules"".

The restrictions referred to in Rule 3 are mentioned in Rule 4 which reads as follows:

4. Restirctions, No person who is

A) A member of the service shall undertake, private practice,

i) During the office hours,

ii) On the day of admission of patients in his unit or attending to emergencies;

iii) If he is appointed to the teaching wing of the service after the commencement of these rules including Demonstrators except registrars;

iv) If he is, or she is appointed as, the Principal of any Medical College in the State;

(B) A Government doctor shall not undertake private practice

i) During office hours;

ii) On the day he is called on duty or emergency duty;

iii) On the day of admission of patients in the hospital;

iv) If he is or is appointed as

a) Director Health Services;

- b) Director General Health Services;
- c) Chief Medical Officer;
- d) Medical Superintendent of Government Hospital; or
- e) Any other post which may be specified by the Government from time to time.

The fee which a Government doctor doing private practice may charge is prescribed in Rule 5. The Rule prohibits Government doctors from

charging any fee in excess of that prescribed in the Rule. In respect of two items only it has been mentioned 'to be prescribed later on'. These items

are, 'Surgeries in private operation theaters of Nursing Homes', and 'for investigation, tests, X-ray etc. in private laboratories'. In our opinion mere

failure to prescribe the fee in the Rule itself in respect of these items and reserving right to do so subsequently does not render the Rules vague or

ambiguous. Obviously in the absence of a prescribed fee the Doctor can charge any fee. This is quite clear from the Rule itself. Accordingly we are

unable to uphold the petitioner's plea that the Rules are vague and ambiguous.

10. For submitting that the impugned Rule is immoral, violative of Article 21 of the Indian Constitution and Section 24 of the Jammu and Kashmir

Constitution, affects medical care and hygiene of the citizens and standards of medical education in the State, the learned counsel has relied heavily

on the judgment of the Division Bench of this Court in Dr. S.N. Dhar v. State of J. & K. 1986 KLJ 1. We may proceed to examine the nature of

the controversy involved in that case and the treatment given to it by the Division Bench.

11. As already indicated Dr. Dhar's case was not one of permission of private practice. It was on ban on private practice. This case primarily

concerned with the power of the Government to impose such a ban. Additionally, the constitutionality of the Government which imposed the ban,

viz. Government's rule was also challenged. In the present case we are not concerned with the constitutionality of the Government which has

imposed the ban. As appears from paragraph 27 of the report the plea of the petitioners was that the order impugned was a 'blanket ban order' for

which neither any authority existed nor had been disclosed in the order. To this challenge the submission of the State counsel was that the ban was

referable to the Rules and legislation governing the conditions of service and through the order impugned it was only informed that the provisions

will be strictly enforced. After referring to Rule 10 of the J. & K. Government Employees (Conduct) Rules, 1971. Rule 15 of the Jammu and

Kashmir Medical Education (Gazetted) Service Rules, 1979 and Section 13 of the Jammu and Kashmir Public Men and Public Services

(Declaration of Assets and other Provisions) Act, 1983 the Court held that the Rules which prohibit private practice by Government doctors found

legislative recognition when Section 13 was enacted and the impugned order did not intend to impose a prohibition which was not already in

existence. Validity of none of the provisions mentioned herein was challenged before this Court. The validity was challenged only of the order

saying that the ban will be strictly enforced.

12. Countering the argument of the petitioner's counsel that the Government doctors who are doing private practice in their spare hours and not

during duty hours and therefore it was unreasonable to put blanket ban on the practice, the Bench has observed in paragraph 43 of the report that

a Government doctor"" is a Government servant all the 24 hours of the day, round the clock and does not cease to be one during the spare hours

when he is away from duty"". This observation has been heavily relied upon by the petitioner's learned counsel in the present case for submitting that

allowing private practice at any time in the day is bound to affect the discharge of official duties by the Government doctors and therefore it is

unreasonable to allow them to do private practice. The observation of the Bench merely emphasises the status of a doctor who enters Government

service. According to the Division Bench his status does not change from hour to hour or minute to minute. He remains a Government servant

through all the 24 hours of day. We go a step further and say that the whole time of a Government servant including a Government doctor is at the

disposal of the Government. This would only mean that a Government servant, including a Government doctor cannot refuse to do a work

assigned to him merely on the ground that the office hours or the duty hours are over. It has nothing to do with the right of the Government to allow

private practice or private trade or to prohibit it. Nothing therefore turns on the observation relied upon by the learned counsel. No inference of

lack of power to allow private practice can be drawn from the said observation.

13. A Government doctor is a Government servant. His whole time, as observed

above, is at the disposal of the Government. Subject to the provisions of the Constitution it is open to the Government to frame rules regulating his service conditions. Whether a Government servant, apart from doing Government work will do any other work also, is a matter relating to his terms and conditions of service. The Government is as much entitled to prescribe as a term of the condition of service that the Government doctor may do private practice as it is entitled to lay down that the private practice shall not be resorted to.

14. The learned counsel next relies upon the disparaging remarks made by the Division Bench against Government doctors who neglected their official duties and mis-utilised hospital equipment and facilities to advance their private practice. On behalf of the State it was urged before the Division Bench that Government doctors utilise Hospital equipment and facilities for treatment of their private patients at the cost of the other patients in the hospital. In respect of this plea of the State it has been observed by the Division Bench in paragraph 44 -- ""This contention does not appear to be fanciful or base less. It is borne out by experience and common knowledge"" In paragraph 46, it has been observed,"" that the restrictions imposed by the impugned order being in public interest, are reasonable restriction saved by Article 19(6) and have a definite nexus with the object of achieving in the hospitals, better patient care, improvement in the medical education etc."" . Learned counsel submits that in view of the States own case and in view of the observations of the Division Bench, it is unreasonable for the State to turn about and permit private practice after previously prohibiting it. Learned counsel goes to the extent of invoking Article 21 of the Constitution to challenge the impugned SRO or the Rules.

15. Regarding violation of Article 21 the submission of the counsel may be put thus: A patient goes to Government hospital to obtain treatment for the disease he is suffering from. If the Government doctor is devoted to Government work only, he will treat the disease with dedication and in all likelihood the patient may be cured of the disease. If, on the other hand the Government doctor is not devoted to his official work alone, he may neglect to treat the, disease and in cases of serious ailment, the neglect may result in loss of life of the patient. That a Government doctor will

discharge his official duties with devotion and dedication or not is a factor which depends on the personal character of the individual doctor. A

Government doctor lacking in character may not devote himself with dedication to his official duties despite ban on private practice and similarly a

conscientious Government doctor may discharge the duties of his office with dedication despite permission of private practice. Every Government

servant, whether permitted to engage himself in any other trade or profession during his spare time or not is expected to discharge his official duties

with devotion and dedication. It is his obligation. Failure to discharge this obligation is not mere aberration but a misconduct for which he can be

appropriately punished in accordance with the procedure prescribed by law. By permitting private practice the Government has not: surrendered

this power. Therefore it cannot be said that the State has violated Article 21 of the Constitution.

16. There is another aspect of the matter. By allowing private practice the State has not minimised the facility of medical service or patient care. It

has provided an additional avenue therefor. It has not been disputed that some of the doctors in Government service are very competent. By lifting

the ban their services are available not only in Government hospital and health centres but outside also. To this, learned counsel submitted that poor

patients cannot afford to pay their fee. That may be so, but for such persons the Government hospitals are perhaps the only place for treatment and

they still remain available to them. To this it may be said that at the Government hospital the poor patient may not necessarily be treated by the very

competent doctors and his case may be handled by any one of the doctors posted there irrespective of the fact whether he is competent or not.

That may be so, but that position existed even prior to the enforcement of the impugned Rules and will continue even if the said Rules are quashed

and private practice is prohibited. The situation is not the result of the promulgation of the impugned Rules.

17. Before the Division Bench it was urged on behalf of the Government doctors that the Government hospitals and health centres did not have

proper infrastructure for catering to the needs of the citizens requiring medical care and by banning private practice the citizens of the State would

suffer great inconvenience and may even be denied medical care resulting, in serious consequences. On behalf of the Government action taken to

improve the medical facilities was indicated. The Government also pointed out that a technical committee of experts headed by Medical Secretary

had been constituted to report on the following matters:

a) The visits of the doctors/specialists when they are not on duty, to the residence of the patients in case of emergency, and the facilities and

allowance to be made available to them for such visits/services:

b) Setting up of pay clinics for such patients as are willing to pay for services rendered to them therein and the fee to be charged from them and its

distribution between the doctors and the Government;

c) Devising of a scheme under which patients who desire to be examined and treated by a particular doctor/expert in hospital/pays clinics after

duty hours, can do so and the fee etc, that may be charged from patients in such cases and its distribution between the doctors and the

Government

d) Any other matter that may be referred to the Committee by the Government"".

In paragraph 49 the Division Bench has appreciated the efforts of the Government and has observed that the said measures are related to Section

24 of the Jammu and Kashmir State Constitution which falls under the chapter dealing with Directive Principles of the State policy, In paragraph

50, it has been observed:

After the Committee submits its recommendations and those recommendations are accepted and implemented, there would definitely be

improvement in the existing situation which has resulted as a result of the enforcement of ban on private practice and the lack of adequate facilities

in the Government hospitals, primary health centres, and dispensaries etc. It is however not denied that at present there are a number of vacancies

of the doctors which are yet to be filled up and the process in that behalf has already been initiated, but the process of filling up the vacancies is

likely to take some time and till then the pressure on the existing staff would be there. Similarly, the setting up of sub-centres, primary health centres

and dispensaries etc. as reflected in the schemes noticed above is going to take some time and, therefore, the Government has to consider as to

what is required to be done during the intervening period. Moreover, till the pay clinics are set up even that facility would not be available. So far

the Committee constituted by the Government has not submitted the recommendations in that behalf. How the suffering citizens can be helped in the meanwhile is a matter which deserves consideration at the hands of the Government. Ways and means have to be found by the Government in that regard, bearing the realities of the existing situation like the lack of infrastructure, the shortage of man-power, inadequacy of the equipment, the pressure on the hospitals and the needs of the citizens in mind, which problems have come to surface because of the resolve of the Government to enforce the ban on private practice by the Government doctors.

From this statement it would appear that the enforcement of ban on private practice created some problems in the availability of patient care. After noticing these problems the Division Bench suggested ways and means to eliminate the sufferings of the patients. These suggestions included permission of private practice in a limited manner on prescribed fee. Certain suggestions had been put forward on behalf of the petitioners also.

The suggestion had been incorporated in a written statement filed before the bench. The suggestions have been reproduced at page 64 of the report and they are as follows:

1. That the petitioners voluntarily undertake to do their private practice between 5 P.M. to 8 P.M. except on Sundays.
2. That the petitioners undertake that they will not do private practice at any other point of time including morning hours except the time reserved for it in Clause (1) hereinabove.
3. That the petitioners undertake to charge the following fee from the patients:--
 - a) Sr. Consultants Rs. 30/- p. m. per patient;
 - b) Jr. Consultants Rs. 20/-p.m. per patient
4. As regards the doctors in the Health services it is suggested as under:--
 - i) that the doctors employed in the Health Department of the State undertake to do private practice between 7.30 a.m. to 9.00 a.m. only.
 - ii) The fee charged by the general practitioners would be Rs. 16/- per month per patient.
5. That the Government shall be at liberty to appoint a monitoring cell to ensure that the aforesaid terms and conditions/undertaking is strictly followed throughout the State.

6. That no non-practising allowance be granted to the Doctors who will opt for private practice on the conditions stated hereinabove.

In respect of these suggestions the Bench has observed in paragraph 51 thus:

The aforesaid suggestions do deserve proper consideration of the Government and particularly the committee set up vide order dated 23-7-1986

for their acceptance with or without modifications, so as to meet the existing situations, till proper facilities etc. are available and the existing

vacancies filled up. This course would be permissible u/s 13 of the 1983 Act, which authorise the State Government to nominate the prescribed

authorities for granting permission to a Government servant, including a Government doctor, to undertake private practice also. Indeed, Section 13

of the 1983 Act does not confer any right on the Government servant, to engage in private practice, but the section does empower the State

Government to relax the rigour of the 'ban order' to meet the exigencies of the situation by granting the necessary permission. The section,

however, does not contain any guidelines and it is not prescribed as to what factors would be taken into consideration by the prescribed authority

while granting or refusing permission. To make the decision workable guidelines have to be framed and the same can be provided in the rules to be

framed u/s 16 of the 1983 Act which empowers the State Government to frame rules for carrying out the object of the Act. Section 13 of the

1983 Act is of general application and applies to all Government servants and not merely to the doctors and, therefore, to make Section 13

workable it is even otherwise essential and desirable for the State Government to provide guidelines by the framing rules u/s 16 of the 1983 Act as

also to nominate the prescribed authorities who are in a position to apply their mind to individual cases keeping in view different areas of the State,

to grant or refuse permission to undertake private practice on such terms as may be prescribed by the authorities. While considering the request in

that behalf, the Government shall have to keep in mind the difficulties of far flung villages, hilly areas, difficult terrains and inaccessible areas etc.

where apart from the Govt. doctors serving in the primary health centres, sub-centres or the dispensaries etc. there may be no private medical

practitioner available to provide medical aid to the needy after the duty hours. It may serve the interests of the inhabitants of such localities better if

some way out could be found out to provide medical aid to them after the duty hours, by the Government doctors by diluting the rigour of the ban

order. Again, though in the bigger towns and cities, private medical practitioners may be available, but the possibility that in a particular discipline of

medicines or surgery etc. there may either to be no private doctor available or the number of the private doctors available in that particular

discipline is not adequate to cater to the needs of the people, who need their attention. The prescribed authority can, therefore, always consider u/s

13 of the 1983 Act, the need for the grant or permission to the doctors in those disciplines till such time as adequate facilities are more readily

available in the hospitals, dispensaries or even in the private fields. The instances that I have given above are only illustrative and not exhaustive and

there may be many more situations which may require the rigour of the ban to be diluted, and it could be for the committee constituted by the

Government vide order dated 23-7-1986 to look into all these aspects of the authorities to be prescribed under the 1983 Act to see how best can

the health care in the State be improved within the present framework so that patients needing care do not suffer avoidable hardship. It would be

necessary to see that the purpose sought to be achieved by the impugned order, is not frustrated or defeated of the lack of the infrastructure or the

available facilities. To obviate such a contingency some interim arrangement to last at least till such time as proper facilities be provided, vacancies

of doctors filled up, pay clinics etc. set up, would have to be found..... Since, the enforcement of the ban was conceived in the interest of the

general public, it is the paramount duty of the State Government to see that the ban does not work to the detriment of the general public or cause

hardships to them and to adopt such interim measures as may be considered expedient. I do hope that the State Government would pay its earnest

attention to this aspect of the matter and consider the suggestions made by the petitioners, as noticed in earlier part of this judgment, in their proper

perspective.

18. The above passage itself recommended to the State Government to relax the rigour of ban on private practice till health services in Government

hospitals and health centres improved. It is not the case of the petitioner that Government hospitals and health clinics have become perfect and they

can effectively and efficiently take up the work of patient care. The emphasised portion recognises the right of the administration to allow private medical practice.

19. The learned counsel for the State has placed before us a copy of the report of the Technical Committee. The Division Bench had

recommended to the Committee also to take note of the suggestions made by the petitioners. The Committee has considered teaching doctors and

other health service doctors separately. It has endorsed the regulations of the Medical Council of India that teachers in Medical Colleges should be

wholetime and non-practising. It recommends that the policy of the council be the policy of the health and Medical department of the State also.

The committee then states that it has reviewed the situation arising from the enforcement of the ban on private practice. It makes recommendations

taking into consideration the totality of circumstances, including possible hardships to some members of the public on account of nonavailability of

specialised care. The Committee recommended that the ban on private practice be imposed in three phases. The first phase is immediate and hits

three categories of doctors (1) new appointees to all teaching posts in Medical colleges irrespective of rank in the faculty (2) Principals of Medical

colleges and, (3) those likely to continue in service after attaining the age of 55 years in the event of age of superannuation being raised from 55

years to 58 years. In case of all these three categories the committee recommended immediate enforcement of the ban. In the next phase (1988-

89) the Committee recommended enlargement of the prohibited categories so as to include Heads of Departments in Medical Colleges. In the final

phase all teaching jobs in State Medical Colleges were recommended to be made non-practising.

20. Regarding the Health service doctors, the Committee recommended that the following posts should be made non-practising-

i) Director General, Health Services;

ii) Director, Health Services;

iii) Chief Medical Officers, and

iv) Medical Superintendents of all Government hospital. The Committee recommended private practice to doctors up to the level of Block Medical

Officer and not above it during restricted hours and on a prescribed fee only. The

Committee recommended even the fee to be allowed to be charged by Assistant surgeons, B-grade specialists and A-grade specialists. In the end the committee recommended that "suitable and effective mechanism should be evolved to ensure strict adherence and enforcement of the recommendations.

21. From the report of the Committee two things emerge (1) the enforcement of the ban on the earlier occasion created problems in the availability of medical care to the patients, and (2) difficulties were encountered in implementation of the policy of prohibiting private practice. The

Government knows better whether stage has been reached in the State when it can effectively and efficiently meet the problems mentioned herein.

The Courts have no means to know it. Accordingly the question of prohibiting private practice and time arid manner of doing it will have to be left

to the Government. Court's interference may create more problems than it may solve. Laudible thing is avilability of efficient health service. If it can

be achieved only by permitting private practice, let private practice remain. It is a matter of policy. Policy maker is the Government not the Courts.

Therefore, there is no occasion for this court to interfere with the impugned Rule. We only say that the previous judgment of this Court did not

deny to the State Government the right to relax ban on private practice or permit private practice. Rather it recommended to the State Government

and the Technical Committee to take note of the suggestions made on behalf of the petitioners of the previous case which included permission of

private practice with restrictions. In view of the recommendations of the Court it cannot be said that the promulgation of the impugned Rule is

contrary to the directions contained in the said judgment.

22. Before parting we may refer to certain authorities cited by the learned counsel for the petitioner.

23. Bandhua Mukti Morcha Vs. Union of India (UOI) and Others, was relied up to inform us as to how a petition in public interest may be heard.

In paragraph 13 on which reliance has been placed, their Lordships have indicated the amplitude of the power conferred under Article 32 and

have laid down that for securing to the citizen his fundamental rights guaranteed in the Constitution, it is not obligatory for the court in proceeding

under Article 32 to adopt adversarial procedure where each party produces his

own evidence tested through cross-examination by the other side and the judge sits like an umpire and decides the case only on the basis of such material as may be produced before him by both the parties. The power under Article 226 is wider than that under Article 32 and we are fully conscious of this fact. In the hearing of the case we have not insisted on any technicalities. We have heard petitioner's counsel patiently. We are not dismissing the writ petition on the ground that any fact of which we can take judicial notice, has not been stated by the petitioner on oath. This authority is therefore of no assistance to the petitioner.

24. Miss. Mohini Jain Vs. State of Karnataka and others, was a case relating to charging of capitation fee for admission in a private recognised

educational institution. Their Lordships held that right to education was a concomitant to Fundamental right and opportunity to acquire education

could not be confined to richer section of society. Their Lordships were dealing with the constitutional validity of a law enacted by the Karnataka

Legislature prescribing three different tuition fees which could be charged by the management of recognised private medical colleges from three

different categories of students seeking admission to medical courses in the said colleges. The fee prescribed was Rs. 2,000/- per year for those

admitted against Government seats, Rupees 25,000/- per year for students belonging to the Karnataka State not falling in the first category and Rs.

60,000/- per annum for others. The petitioner belonged to the third category and was unable to pay the sum of Rs. 60,000/-. She challenged the

validity of the law through petition under Article 32. The amount fixed and demanded was stated to be excessive. The validity of the Act was

challenged on the ground that right to education, although not specifically recognised as a fundamental right in the Constitution was the necessary

concomitant to fundamental right guaranteed under part III. This plea was accepted (See paragraph 14). In paragraph 12 it has been observed:

The right to education flows directly from right to life.

guaranteed under Article 21.

After holding this charging of exorbitant capitation fee was held to be arbitrary, therefore violative of Article 14. This authority has been relied upon

for the proposition that right to inexpensive medical care is also included in Article 21. We have no manner of doubt that Article 21 embraces

within it this right. Government hospitals giving free medical care to the poor are available. On the basis of this authority the utmost that the

petitioner could claim was that the fee prescribed in the Rules for doing private practice in spare hours is excessive, but that is not the petitioner's

case and we also do not find that the amount fixed is excessive. Rule 5 of the impugned Rules prescribes the fee. The fee prescribed for senior and

junior consultants is Rs. 30/- and Rs. 20/- per patient. For Assistant Surgeons the fee prescribed is Rs. 16/- per patient and for Specialists B-

grade and A-grade fee prescribed is Rs. 20/- and Rs. 30/- per patient. It is also mentioned that the fee prescribed shall be valid for first visit and

follow up visit by the patient at the clinic. This authority is also therefore of no assistance to the petitioner.

25. In Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., also right to life enshrined in Article 21 was held to include

right to education. In view of our observation hereinabove nothing further needs to be said about this case.

26. In Sukumar Mukherjee Ors. Vs. State of West Bengal and another, validity of the Act prohibiting private practice was upheld. We have held

hereinabove that Government is competent to bar private practice as well as allow it. There is nothing in this judgment which runs counter to our

finding.

SUMMATION

27. The legal position may be summed up thus:

Whether private medical practice should be allowed to doctors in Government service or not is a policy matter. Policy decisions have to be taken

by the Executive and not by Courts. Courts can only indicate the legal position. The legal position is that the State has power to ban private

practice as well to allow it. When it will allow and when it will ban it is for the Government to decide and not for the Courts.

In view of the above the writ petition lacks merit and is hereby dismissed but without any order as to costs.