

Sukumar Mukherjee Ors. vs State Of West Bengal And Another on 27 July, 1993

Equivalent citations: AIR1993SC2335, JT1993(4)SC308, 1993LABLC2035, (1994)ILLJ94SC, 1993(3)SCALE260, (1993)3SCC723, [1993]SUPP1SCR339, AIR 1993 SUPREME COURT 2335, 1993 (3) SCC 723, 1993 AIR SCW 2772, 1993 LAB. I. C. 2035, (1993) 4 JT 308 (SC), 1993 (2) UJ (SC) 654, 1993 SCC (L&S) 1004, (1993) 4 SCT 155, (1994) 1 LABLJ 94, (1993) 4 SERVLR 592, (1993) 25 ATC 326, (1993) 2 CURLR 437

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Bench: P.B. Sawant, S. Mohan

ORDER

P.B. Sawant, J.

Leave granted in all the Special Leave Petitions.

1. This group of appeals is directed against the decision of the High Court dated 31st January, 1992 dismissing the appellants' appeals against the verdict of the learned Single Judge in a group of writ petitions. Both the learned Single Judge and the Division Bench in appeal, by their decisions in question have upheld the validity of the West Bengal State Health Service Act, 1990 (the 'Act') which was challenged mainly on three grounds, viz.,

(a) that the State legislature did not have the competence to pass the Act and hence the Act was passed in violation of Article 252 of the Constitution.

(b) the Act imposes an unreasonable restriction on the fundamental right of the writ petitioners to practise guaranteed by Article 19(1)(g) of the Constitution.

(c) the Act was arbitrary and unreasonably and, therefore, violative of Article 14 of the Constitution.

Hence these appeals.

2. In order to appreciate the contentions of the appellants in this Court, it is necessary to trace the history of the West Bengal Health Service and the events which have occurred till date which have a

bearing on the said contentions.

Prior to 1958, the Health Service of the State of West Bengal consisted of different cadres, viz., (i) West Bengal Higher Medical and Health Services (Gr.I); (ii) The West Bengal Higher Medical and Health Services (Gr. II); (iii) The West Bengal Medical and Health Services including its Rural Branch; (iv) Gazetted Posts of Medical Officers not included in any of the above cadres; (v) The West Bengal Junior Medical and Health Services including its Rural Branch; (vi) Post of Licentiate Medical Officers not specifically included in the cadre of the West Bengal Junior Medical and Health Services but carrying the time scale of pay of that Service. It does not appear that these different cadres were constituted by rules made under Article 309 of the Constitution.

It was in 1958 that the West Bengal Health Service (WBHS) was first constituted with a unified cadre of doctors under the West Bengal Health Service (Cadre, Pay and Allowance) Rules, 1958. These rules also do not appear to have been framed under Article 309 of the constitution. Under these Rules, the doctors were classified into three broad categories, viz., (a) those who were engaged primarily in teaching along with the duties at the hospital to which the teaching institutions were attached, (b) those engaged on the curative side and attached to various hospitals and medical centers throughout the State and who were not engaged in teaching, (c) those who were primarily involved in administrative work.

No doctor was allowed to practise privately, whatever the category to which he belonged. Thus, private practice for Government doctors belonging to the WBHS was totally prohibited.

However, in 1965, the State Government passed an order relaxing the rule prohibiting private practice and permitted private practice to doctor occupying some of the posts in the WBHS subject to certain conditions. Those who opted for private practice had to forego certain pecuniary benefits such as non-practising allowance. They were further to submit their option in a prescribed form declaring that they had no claim or right as such to private practice and were liable to be transferred to any post in which private practice was not permissible. This step of allowing restrictive private practice was taken as a temporary and experimental measure. It was made clear that the position would be reviewed in the future in the light of the experience gained. Pursuant to the relaxation of the rule prohibiting private practice, those doctors who opted for private practice gave signed declarations and undertakings that they would not thereby deem to have acquired any right to private practice or appointment only to posts where private practice was permitted and that they were liable to be transferred to any post in the WBHS whether practising or non-practising, if the exigencies of the service so required.

After an experience of about 25 years of the relaxation of the rule prohibiting private practice, the State Government came to the conclusion that the system was not operating satisfactorily, and in particular, the quality of medical education in the State had deteriorated considerably. The main reason for the deterioration in the standards of education was that the doctors who were holding teaching posts were indulging in private practice taking advantage of the relaxation of the Rules. As a result, they were found largely absent from the class-room and were also found neglecting their duties in the hospitals attached to the teaching institutions. With a view, therefore, to arrest the

deteriorating standards of medical education in the State, and to improve the same, the State Government decided as a matter of policy to bifurcate the existing unified Service and to create a separate Service known as the West Bengal medical Education Service (WBMES) for doctors exclusively engaged in teaching who would be debarred from private practice. This policy of the State Government was also in accord with the views expressed by the Medical Council of India from time to time and its resolution passed in 1973 which in terms stated that "the teaching staff of all departments of a medical college shall be whole-time and non-practicing". The policy was also largely in conformity with the National Health Policy declared by the Government of India in 1983, which among other things, stated that it was desirable for the State Government to take steps to phase out the system of private practice by the medical personnel in Government service. The policy was, further, supported by a report of the Standing Committee of the West Bengal Legislative Assembly on Health which attributed the fall in the standard of medical education in the State, among other things, to the fact that the medical teachers in the State were devoting considerable part of their working time to their private practice. As a result, the present Act viz., the West Bengal State Health Service Act, 1990 was passed. Some amendments were later effected to the Act.

Under the Act, two separate services were proposed to be constituted, viz., West Bengal Medical Education Service (WBMES) and West Bengal Health Service (WBHS). Section 3 of the Act gave power to the State Government to constitute the said two Services at different times. Section 12 of the Act gave option to the doctors of the former WBHS, who were holding teaching posts, to opt for WBMES or WBHS. The Section also made it clear that if (those holding teaching posts and administrative posts in the former WBHS did not exercise any option, they shall be deemed to have opted for WBHS and for its Public Health-cum-Administration Unit respectively. The WBHS was, however, not constituted at that time.

On and from 25.5.1990, WBMES was constituted under Section 3 of the Act. It gave 90 days' time to the doctors holding teaching posts to exercise option either to continue to hold the teaching posts or to join WBHS. It appears that former WBHS comprised about 6,600 doctors who were not assigned teaching work as against about 1400 doctors who were assigned the teaching work, and about 500 doctors who were detailed for the public health-cum-administrative work.

Pursuant to the option given, about 1200 doctors exercised their options for WBMES. Out of the remaining 200 teacher-doctors, 5 teacher-doctors and the West Bengal Health Service Association filed the writ petitions in question which have given rise to the present appeals.

3. It appears that the judgment of the Division Bench appealed against has been implemented insofar as the teacher-doctors who exercised their option in favour of WBMES are concerned. During the pendency of the present proceedings, the State Government on 3rd March, 1993 constituted the new WBHS under Section 3 of the Act, and also framed on the same date, the West Bengal Health Service Rules, 1993 (the 'Rules') and the West Bengal Health Service (Pay and Allowances, Superannuation and Pension) Rules, 1993.

It may be mentioned here that the Special Leave Petitions from which the present appeals arise, were heard on an earlier occasion when neither the new West Bengal Health Service was constituted

nor the Rules for the same were framed. It was to enable the respondent-State Government to constitute the new WBHS that the matter was adjourned then till 9th February, 1993. This was without prejudice to the contentions of both sides in the Special Leave Petitions. When the matter reached hearing on 6th April, 1993, it was adjourned to enable the appellants to challenge the Rules. Accordingly, before us, the appellants have advanced their arguments challenging the provisions both of the Act and the Rules.

4. The contentions advanced on behalf of the appellants were as follows:

(1) The Act is repugnant to the Indian Medical Council Act, 1961, in so far as it prohibits private practice by doctors and therefore void by reason of Article 254 of the Constitution.

(2) Section 9 of the Act is violative of Article 19(1)(g) of the Constitution, since it prohibits those occupying posts in WBMES from carrying on private practice.

(3) Section 9 of the Act is violative of Article 14 of the Constitution since by reason of Section 11 of the Act, a member of the former WBHS appointed to a post included in the cadre of new WBHS other than the post in the public health-cum-administration, shall continue in such post on the same terms and conditions as were in force immediately before the coming into force of the Act. So also, by virtue of Section 18, the holders of the contractual posts on the same terms and conditions of the Service. The classification made between the members of the WBMES and those of the new WBHS and the holders of the contractual posts so far as the private practice is concerned, is not a reasonable classification and has no rational nexus with the object sought to be achieved by the Act. Even if the classifications between the members of WBMES and WBHS is valid on the ground that the former are teachers whereas the latter are not, the classification made between the members of the WBMES and the holders of the contractual posts, is not valid inasmuch as both may be teachers.

(4) The Act is unconstitutional since it does not protect the appellants' status after the exercise of option to join WBHS. For the same reason Rule 7 of the Rules is also unconstitutional.

(5) Rules 8 and 1.0 of the Rules are ultra vires Section 6(2) of the Act since having exercised the option for the WBHS, the said Rules entitle the Government to post the appellants even on the posts in WBHS which are non-practising.

(6) The decision with regard to the posting of the appellants is mala fide as is demonstrated by the fact that the said posting orders were issued even before the expiry of 30 days from the coming into force of the Rules, though such notice is required by Rule 5(ii) of the Rules.

(7) The provision contained in Section 16 read with Rule 8 of the West Bengal Health Services (Pay & Allowances, Age of Superannuation and Pension) Rules, 1993 is discriminatory. The age of retirement for the members of WBHS is 58 years whereas that of the members of the WBMES is 60 years with option for re-employment upto 65 years.

(8) Section 4(3) of the Act is arbitrary and, therefore, unconstitutional since it confers an absolute power on the Government to transfer appellants to a post in public health-cum-administration which is non-practising.

(9) Under Rule 7(1) of the Rules all the former teacher-doctors who opt for WBHS are either called Medical-Officers or Specialists. As a result, a senior professor with say 20 years of experience and one who has just qualified to become a Specialist would both be designated as Specialists and will be treated on par. Further the nature of duty, work, functioning and status would also be the same. This amounts to demotion to the seniOrs.

(10) The Act is discriminatory inasmuch as it does not apply to (i) Honorary and Emeritus Professors (ii) Ex-Management teachers (iii) Teachers belonging to the Dentistry.

(11) Section 6(2) makes a distinction between the doctors who held teaching posts and those who held non-teaching posts in institutions which are to be declared under the said provision as non-practising institutions. Those who held teaching posts on terms and conditions of practice are not to be allowed to hold such posts on terms and conditions of practice the moment the teaching institutions are declared as non-practising institutions. However, those who held non-teaching posts in such institutions on conditions of practice are given an option of practice or non-practice without any change of post or designation. If they exercise option for non-practice, they are given six months' time from the date of exercising the option for winding up practice and if they do not exercise any option or exercise option for practice, they are to be transferred to a post in any other hospital on terms and conditions of practice. On the other hand, teacher-doctors who opt for WBHS for the sake of practice are neither guaranteed by the Act nor by the Rules their right to practise inasmuch as by virtue of Rule 10(1) of the Rules they are liable to be transferred to a non-practising post and by virtue of Rule 10(2) their privilege to practise can be withdrawn at any point of time. Thus, it is contended, it is a discrimination between the holders of teaching and non-teaching posts in the erstwhile institutions, violative of Article 14.

(12) There is also a discrimination between the teacher-doctors and other doctors inasmuch as no equivalence of posts and designations is guaranteed to the former when they opt for the WBHS as is guaranteed to the others, viz., (a) the doctors who were in the Public Health-cum-Ad-ministration of the former WBHS vide Rule 6(3); (b) former teacher-doctors who opt for WBMES; (c) non-teaching doctOrs. The

former teacher-doctors opting for WBHS are merely called either Medical Officers or Specialists.

Rule 7(2) of the Rules is arbitrary and violative of Articles 14 and 19(1)(g) and is also ultra vires the Act inasmuch as it actually demotes persons like Professors, Assistant Professors or Readers who opt for WBHS since they would all come within the category of Specialists. Under the Rules they will all get a minimum basic pay of Rs. 3700 since the special selection post carries the said basic minimum salary. Hence Rule 7(2) is clearly arbitrary.

(13) Rule 10 of the Rules is ultra vires Section 6(2) of the Act inasmuch as the Rule takes away right to practise given by Rule 6(2).

(14) The option given to the doctors is illusory and is rendered nugatory inasmuch as a teacher-doctor who wants to practise and, therefore, opts for WBHS may be transferred to Public Health-cum-Administration Unit. Under Section 4(3) of the Act, the posts in the said Unit are non-practising and once a doctor is transferred to the said Unit, he can never be transferred back as there is no provision either under the Act or the Rules to transfer such doctor back to any other Unit. In other words, such doctor loses his right to practice forever. This provision is likely to be utilised for victimisation.

(15) There is a contradiction between the 4th and 5th provisos of Section 12 and the two provisos being self-contradictory cannot co-exist. Under the 4th proviso a person holding post in the former Public Health-cum-Administration who did not exercise any option shall be deemed to have exercised option for WBHS where practice is permissible. However, under the 5th proviso, a person holding the administrative post in the former WBHS who did not exercise any option is deemed to have exercised option for Public Health-cum-Administration Unit which is a non-practising post vide Section 10 of the Act.

(16) Section 14(2A) makes no sense inasmuch as under the said Section, non-teaching doctors of the former WBHS who may not be required to exercise any option under Section 12 shall be appointed to a teaching post in the WBMS even if they do not have requisite teaching qualifications. Even factually there are 6100 such doctors whereas the teaching posts do not exceed 1400 in number. The provision is, therefore, self-defeating.

(17) Since improvement in the standard of teaching and patient-care is the object for making the WBMS as a non-practising service, the grant of right to practise to 6100 doctors belonging to WBHS defeats the said object. There is no evidence of the deterioration in the standards of teaching in the medical institutes of the State inasmuch as in the All India Medical Entrance Test conducted by the Medical Council of India, about 25 to 30% of the candidates belonging to the State were selected during the last 3 years.

(18) The Constitution of WBHS is bad also on account of the fact that the members of the said Service have no scope for promotion as they will be stagnated only as Specialists.

With the introduction of the unified cadre of WBHS in 1958, the designations "Civil Surgeon", "Assistant Surgeon", "Sub-Assistant Surgeon" etc, were abolished and all officers of the cadre were called Medical Officers and were designated according to the post held by them in their respective cadre. The hierarchy of the integrated cadre consisted of 3 grades: (i) Basic; (ii) Selection; (iii) Special Selection in the ascending order. The doctor appointed in the basic grade was called Medical Officer. The next promotional post to the Medical Officer was of selection grade, and on specialisation in a particular subject and acquisition of prescribed qualifications and experience, the Medical Officer was further promoted as Specialist and became entitled to additional pay of the Specialist.

A doctor became eligible to promotion in the teaching hierarchy only after acquiring post-graduate qualification in the concerned discipline. After working for 3 years as Basic Teacher, he became eligible for promotion to the post of a Lecturer and after 5 years of total teaching experience out of which at least 2 years as the Lecturer, the Lecturer was promoted to the post of an Assistant Professor. After 7 years of total teaching experience out of which 2 years had to be as an Assistant Professor, the Assistant Professor was elevated as a Reader and the Reader became eligible for promotion to the post of the Associate Professor after 9 years of total teaching experience out of which 2 years' experience had to be as a Reader. The next post of promotion was that of the Professor which required 11 years of total teaching experience out of which 2 years' experience had to be as an Associate Professor. The next promotions were that of the Principal and Director of Medical Education. The Specialist Medical Officers possessing recognised post-graduate qualifications in particular subjects, even though they had no past teaching experience, were also considered for appointment as Lecturers in the concerned disciplines provided they had served in the District, Sub-Division or any other State hospital as Specialist for at least 4 years.

Under the present Rules no equivalent posts for WBHS have been created. All members of WBHS (excluding those appointed to the posts in Public Health-cum-Administration Unit) are sought to be designated under Rule 7(1) of the Rules either as Medical Officers or as Specialists.

(19) Under Section 12 of the Act while option has been provided to the doctors who had held teaching posts, no such option has been provided to those who did not hold the teaching post although they have either acquired the requisite post-graduate qualifications and had undertaken basic training and were qualified to be appointed as teachers and in particular to those who had also been empanelled for being promoted to the teaching hierarchy.

Whereas 80% of the members in Service were denied the right to join WBMES, a large number of doctors appointed to the post of "Basic Teachers" in non-clinical discipline and who do not possess the requisite eligibility qualification, viz., post-graduate degree in the relevant subject have been provided with option to join WBMES.

(20) The seniority of the members of WBMES has not been protected due to the introduction of "Pay to Post" rule and by the abolition of "Pay to Person" rule under the former WBHS, Under the former WBHS, the seniority of the doctor was protected due to the fact that the pay and seniority were attached to person wherever he moved and not to the post he happened to occupy at any

period of time during his service. As a result of the introduction of the new rule in the cadre of WBMES, the senior doctors who opted for the WBMES were seriously prejudiced inasmuch as they were compelled to sacrifice their seniority and pay-scales earned through long years of service. The senior members of the former WBHS drawing higher pay-scales but possessing lower teaching posts are being placed in junior posts with lesser pay than that of their junior in service who were promoted to higher posts earlier but were drawing lesser pay in the former WBHS. The junior doctors have all of a sudden become eligible to be placed in the higher posts with higher pay than that of their seniOrs.

(21) The non Constitution of the WBHS prior to calling upon the doctors who held teaching posts to exercise their irrevocable one-time option without having any opportunity to weigh the pros and cons of both the services, was mala fide. The commission to constitute WBHS prior to requiring the teacher-doctors to exercise their option has led to the following result: (i) A large number of senior doctors by opting for the WBMES are now compelled to sacrifice their seniority and pay-scales earned through long years of service and junior doctors have all of a sudden become senior to them. No protection of pay and seniority has been provided for in the Act. (ii) The members of the former WBHS who could not or had not exercised option for WBMES are being posted in the junior posts which they had held at the threshold of their service-career on in the non-existent posts, (iii) Some doctors where not able to exercise their option because the promotions due to them to special selection grade and higher academic rank such as Professor, prior to the coming into force of the Act were not given to them and they had sought clarifications from the Government whether they would be given their said ranks in the WBMES. But no clarifications were forthcoming. They are entitled to a fresh opportunity for exercising the option to choose between WBMES and WBHS. (iv) In any case, all the doctors affected by the orders of transfer should be deemed to have been denied the opportunity to exercise their option, since they were asked to exercise the option before WBHS was constituted. All the said doctors should be given a fresh opportunity of exercising their option now that the WBHS has been constituted. (v) The seniority position and status of the members of the WBHS should be maintained. (vi) Those who held teaching posts in the former WBHS have been transferred to such non-teaching hospitals where they are placed to work under the control of their junior officers appointed as Superintendents of the said hospitals. (vii) Whereas under new WBHS, the hierarchy is created for Public Health-cum-administration Unit to protect seniority and status, no such hierarchy is created for the other members of WBHS. (viii) There is no provision for promotional opportunity in the new WBHS as there was in the former WBHS. (IX) By summary orders of transfers, the members of former Health Service are being sought to be transferred and reappointed to either feeder posts or non-existent posts under threats and humiliation. (x) A number of doctors appointed in the cadre of WBMES though senior were transferred to posts lower than of their juniors. (xi) Although the Act provides that persons not exercising option in the cadre of WBMES shall be deemed to have exercised option for the cadre of WBHS, some doctors who did not exercise option have been absorbed in the posts of WBMES by notification dated 6.9.1992. (xii) Although the Act specifically provides that no appointment in the cadre of WBMES shall be made except through Public Service Commission by number of orders, the respondents have appointed persons in the cadre of WBMES on their own and Specialist doctors of the WBHS have been transferred to District or Sub-Divisional hospitals and centers which do not have the required infrastructure to utilise their expertise.

5. As regards the first contention viz., that the Act is repugnant to Section 27 of the Indian Medical Council Act, 1956, the argument is that the Central Act is relatable to Entry 26 of the Concurrent List which reads as "legal, medical and other professions". Insofar as the Act relates to the rights of the Medical Officers to practise, it is also relatable to the same Entry. Section 27 of the Indian Medical Council Act provides that every person who is enrolled as a medical practitioner on the Indian Medical Register shall be entitled, according to his qualifications, to practise in any part of this country, and to recover in due course of law in respect of such practice, any expenses, charges in respect of medicaments or other appliances or to any fees to which he may be entitled. Since the Act imposes on the members of the WBMES as well as some members of the WBHS restriction on their right to practise, it is repugnant to the Central Act and, therefore, void under Article 254(1) and (2) of the Constitution.

This argument ignores the basic objects of the two legislations which are distance. The object of the Central act is (a) to give representation to licentiate members of the medical profession, (b) to provide for the registration of the names of citizens of India who have obtained foreign medical qualifications, (c) to provide for the temporary recognition of medical qualifications granted by medical institutions in the countries outside India, (d) to provide for the formation of the committee of postgraduate medical education of the purpose of assisting the Medical Council of India to prescribe standards of post-graduate medical education for the guidance of universities and to advise universities in the matter of securing uniform standards for post-graduate medical education, and (e) to provide for the maintenance of an All India Register by the Medical Council of India.

It is in this context that provisions of Section 27 have been enacted, prescribing privileges of the persons who are enrolled in the Indian medical Register. That does not mean that those who give up the said privileges voluntarily, can continue to enjoy the same under Section 27 of the Act. Those who are enrolled on the Indian Medical Register are not compelled to seek service either private or public. However, once they seek employment, they have to abide by the terms and conditions of the employment. Section 27 does not prevent persons enrolled in the Indian Medical Register from seeking employment on such terms and conditions as they may choose to secure it nor does it prohibit agreements of service which entail giving up of the privileges mentioned in it.

In view of this position in law, it is really not necessary to go into the question whether both the Central and the present State Act occupy the same field of legislation or not. The same may, however, be dealt with here. The object of the Act is to create different Health Services and to regulate the conditions of service of the members of the said services with a view to improve their functioning, the utility. The Act does not regulate the rights and privileges of the members of the medical profession in general. The Act has obviously been enacted under entry 41 of the State List which empowers the State to constitute State Public Services and read with Article 309 of the Constitution, vests power in the State Government to lay down conditions of service of the members of the Services so constituted. Hence the subject of the two legislations, and the area occupied by them are different. That the Act incidentally restricts the privileges of those who join the services (sic) under it does not make it a legislation laying down or governing the privileges of all those who are enrolled on the Indian Medical Register. There is thus no conflict between the provisions of the two and hence there is no repugnancy between the two under Article 254 of the Constitution.

The reliance placed in this connection, on H.S Srinivas Raghavachar etc. etc. v. state of Karnataka and Ors. , is equally misplaced. In that case, Sub-section (8) of Section 48 of the Karnataka Land Reforms Act, 1962 which prohibited legal practitioners from appearing in the proceedings before the Tribunals was held to be unconstitutional being repugnant to Section 30 of the Advocates Act, 1961, and to Section 14 of the India Bar Council Act. The legal practitioners appearing in the proceedings before the Tribunals under the Karnataka Land Reforms Act were not members of any service-private or public -and had not given up their right to practise in lieu of accepting the benefits of services. That obviously is not the case before us. The doctors in question have voluntarily become members of the State Health Service and have subjected themselves to its terms and conditions, one of the terms being that they will have no right to practise privately. This being the case, it is difficult to see how the decision in question is relevant to the facts of the present case.

6. As regards the second contention, viz., that Section 9 of the Act is violative of Article 19(1)(g) of the Constitution since it prohibits the members of the WBMS from practising privately, the contention has only to be stated to be rejected. In the first instance, the Act does not prohibit private practice by medical practitioners as such. The Act is not enacted to regulate practice of the medical practitioners in general. It is only those medical practitioners who choose to become members of the Service constituted under the Act including the WBMS who are prohibited from practising privately. As has been pointed out earlier, since 1958 to 1965 no member of the former WBMS - whether he held the teaching or non-teaching post, was allowed to practise privately. It was only in 1965, by a memorandum dated 1.4.1965, that temporarily and as and by way of an experiment the relaxation was made and the members of the former WBMS were granted the privilege to practise subject to certain terms and conditions. It was then made clear that the relaxation shall not confer upon the Medical Officers any claim for appointment to any of the posts on practising terms. While making the said relaxation, it was also made clear that the position would be reviewed in future in the light of the experience gained. What is more, each member of the Service who opted for private practice had to give a signed declaration that he shall not acquire any claim for appointment only to practising post in future and that he shall continue to be liable to be transferred to any post in the cadre, practising or non-practising, in the exigencies of public service. This position continued till the end of 1989, when on the basis of the experience gained, the State Government came to the conclusion that the system was not working satisfactorily and in particular the quality of the medical education in the State has deteriorated considerably. That led to the present Act and the Rules.

What is further of importance to note is that the right to private practice is not given to the Government Medical Officers in most of the places since it conflicts with the duties of such officers as Government servants. Article 19(1)(g) confers on citizens right to practise any profession, or to carry on any occupation, trade or business for their individual benefit. It does not create an obligation to do so. It is for the citizen to exercise or not his said right. Further, the Article does not oblige a citizen to practise any particular occupation, business or trade. He is free to follow any occupation and on such terms and conditions as he chooses. It does not prevent him from accepting its discipline including such rights and obligations as flow from it. As in the present case, those who join the Government service with the full knowledge that they will have no right to practise the profession privately, agree to give up their right as private practitioners in consideration of the security, status and privilege as a Government servant. The Government service is also an

occupation and those who choose it cannot complain of its discipline or insist upon pursuing it on their terms. Nobody compels them to join it if they want to practise their profession privately. They are free to leave it at any time. The restriction imposed by Section 9 is not on the freedom to practise the medical profession but on such practice while one continues to be the member of the State Service. Article 19(1)(g) does not give a citizen a right to carry on any profession irrespective of the fact that he has voluntarily accepted restrictions on his said right in consideration of other rights, as in the present case. In the circumstances, it is not even necessary for the State to invoke the provisions of Clause (6) of Article 19(1)(g) which permits the State to impose reasonable restrictions on the exercise of the right in the interest of the general public. The present Act constitutes health services for the State. The State has a right to recruit officers to such services on such terms and conditions as it deems desirable to make the services beneficial to the members of the public. The restriction imposed on the members of such service that they shall not be entitled to private practice so long as they continue in the State Service is a reasonable restriction on the officers of the State being in the interest of the general public, as explained earlier. Those who join the Service are bound to abide by it, being a condition of service voluntarily sought by them.

What is more, Section 9(2) also makes provision to grant non-practising allowance to the members of the WBMS which is obviously in lieu of the right to private practice. This allowance is of course in addition to the salary, other allowances and perks and privileges including a higher superannuation age of 60 years and re-employment upto the age of 65 years. It is, therefore, difficult to understand the contention that Section 9 contravenes the fundamental right of the members of WBMS to practise their profession privately.

The contention further that the restriction is unreasonable because the members of the other service, viz., WBHS (excluding those attached to the Public Health-cum-Administration Unit) have been extended the right to practise is also unsustainable. In the first instance it is not correct to say that the members of the WBHS have been given a right to practise. On the other hand, the provisions of the Act as well as the Rules make it clear that what is extended to them is only a privilege to practise which may be withdrawn at any time. Further even this privilege is not extended to all posts and the members of the Service are transferable from the posts with the privilege to practise to the posts without such privilege. Secondly, the service conditions in the two Services differ. There is a hierarchy of posts in the WBMS, higher superannuation age with a right to re-employment, non-practising allowance etc. with advantages are not available to the members of the WBHS. Lastly, the purpose of the two services is different. While the WBMS is constituted for imparting medical education and incidentally to take health-care of the patients in the hospitals attached to the teaching institutions, the WBHS is constituted to make available the service in the Government hospitals to the members of the public. According to the present review of the situation and the considered opinion expressed by the expert bodies, private practice does interfere with the work of the teacher-doctors both in the class-room as well as in the hospital. There is, therefore, a need to stop the same in the interests of both the improvement of the standards of the medical education as well as the betterment of the health-care service in the teaching hospitals. The ban on private practice will make available to the teacher doctors the time required for reading and research which is absolutely essential for their main profession as teachers. For the members of the WBHS, the time for reading and research is not essential. Hence, there is nothing unreasonable in

prohibiting practice for the members of the WBMES while not prohibiting it for the members of the WBHS.

7. The third contention which seeks to attack the provisions of Section 9 on the ground that it is violative of Article 14 of the Constitution is advanced thus. Under Section 11 of the Act, a member of the former WBHS who is appointed to a post in the new WBHS, other than the post in the Public Health-cum-Administration Unit, shall continue in such post on the same terms and conditions as were in force immediately before the coming into force of the Act. So also, by virtue of Section 18, the holder of the contractual posts in the former WBHS, will continue to hold such posts on the same terms and conditions of service. The important term and condition of service of both is the right to practise privately. Hence the classification made between the members of the WBMES and those of the new WBHS and the contractual holders of posts so far as private practice-is concerned, is not a reasonable classification and has no rational nexus with the object sought to be achieved by the Act, viz., improvement of the quality of teaching as well as of the hospital care. The non-teaching doctors responsible for hospital care are also expected to be available on duty for 24 hours of the day. However they are permitted to carry on private practice. It is further urged that even if the classification between the members of WBMES and WBHS is valid on the ground that the former are teacher whereas the latter are not, the classification made between the member of WBMES and the holders of the contractual posts is not valid inasmuch as both may be teachers.

As pointed out earlier, the purposes of the two services and the duties and functions of their members are different. Hence, their service conditions also differ. The two services, therefore, cannot be compared. The ban on private practice is intimately connected with the nature of the duties the members of the WBMES are called upon to discharge. It is unnecessary to emphasise that the teacher-doctors if they are to be true their profession, must undertake studies and research and be upto date in their subjects. Medicine is one of the fast growing faculties and is making advances at an ever increasing pace. It is not difficult to appreciate that those who have their private practice to look after, find no time for studies and research and thus to be upto date in their subject. That was also the experience of the State Government who found that the teacher-doctor were concentrating on their private practice to the neglect of their duties as teachers. It is for this reason that it was felt necessary to constitute a separate cadre of teacher-doctors with separate service conditions. It is not, therefore, proper to compare the duties of the non-teacher-doctors who are members of the WBHS with those of the member of the WBMES. It is true that the members of the WBHS are also supposed to be available for work 24 hours of the day. It is, however, common knowledge that the doctors have their duty shifts, and their services are requisitioned outside their shift-hours only if they are found necessary. When their services are so requisitioned, they are bound to and do in fact attend to the call of duty whether they hold practising or non-practising posts. Secondly, since they do not have the duty of teaching, they are not required to devote their time to study and research as the teacher-doctors are, although every doctor whether teacher or non-teacher, is expected to remain reasonably abreast of the general developments in medical science. The non-teacher doctor when he practices privately outside his duty hours only carries on the same kind of work which he does during his duty hours. He does not have to change the nature of his work. Hence when the privilege of practising privately is extended to him, when it need not be withheld from him, the work in the Government hospitals need not necessarily suffer. However, the

Government has, under Rule 10(2) of the Rules, taken care, as stated above, to reserve to itself the power to withdraw even that privilege if the Government finds that on account of the facility given to practise privately, the work in the hospitals is affected. The privilege further is extended only to the select posts and not to all the posts in the WBHS. That also shows that the privilege is granted either where it is not likely to interfere with the regular work or where the medical service is not available to the people otherwise outside the duty-hours in the hospital.

As regards the holders of the contractual posts, again there cannot be any comparison between them and the members of WBMES. The terms and conditions on which their services are engaged are materially different from the terms and conditions of service of the members of the WBMES. Section 18 of the Act saves such contracts which are entered into prior to the coming into force of the Act. As has been pointed out by the State Government, the holders of such contractual posts are professors, assistant professors, surgeon or physicians in the leaching institutions. They are engaged on contractual basis because the Government finds that otherwise their services which are essential for running the teaching institutions cannot be procured, and for want of their services, the leaching institutions would suffer. The persons so appointed are limited in number and they will continue to serve till the expiry of the tenure or their contracts. There cannot, therefore, be any comparison between the members of WBMES which is a regular service constituted by the State and the holders of the contractual posts which are not governed by any service rules but by the terms of their contracts and who are engaged for specific purposes. Section 18 of the Act, in terms, states that the provisions of the Act shall not apply to such persons. There is, therefore, no merit in the contention that Section 9 of the Act is discriminatory and violative of the provisions of Article 14 of the Constitution because, it makes distinction between the members of the WBMES and the members of the WBHS and those holding the contractual posts.

8. Underlying the fourth contention is the premise that the Act has been enacted to create the posts of "equivalent" status in the two services viz., WBMES and WBHS and the privilege to practise privately attached to some posts in WBHS is right. Both the premises are incorrect. The Constitution of the WBMES is obviously of a different genre than that of the WBHS. The hierarchy of the posts in the teaching service is bound to be different from that in the health service. It is unreasonable to expect that the designations, hierarchy and the qualifications for the posts would be the same in the two Services. This being the case, it is unprofitable to search for equivalence in posts in the two services. Since those holding teaching posts are given option either to join WBMES or WBHS, on their opting for the WBHS, they cannot complain if they are posted, according to the qualifications as Medical Officers or Specialists. Since these are the only posts available there, the Government cannot be expected to create as many hierarchical posts in the new WBHS as there were in the teaching faculty in the former WBHS.

Rule 7 of the Rules makes it abundantly clear that members of the WBHS (excluding those appointed to the posts in the Public Health-cum-Administrative Unit) shall be either designated as Medical Officers or declared as Specialists. Sub-rule (2) of Rule 7 prescribes qualifications for the posts of the Medical Officer and Specialists. Sub-rule (3) further states that the Specialists will not be posted at institutions mentioned in items (a), (b) and (f) of Schedule II of the rules which are rural primary health centers and block primary health centers, rural hospitals and medical colleges

and other teaching institutions declared to be non-practising institutions. Thus Rule 7(3) in terms protects the Specialist' interests by providing that they will be posted only at institutions mentioned in (c), (d) and (e) which are sub-divisional and district hospitals, specialised hospitals in T.B., leprosy and mental and infectious diseases (excluding those hospitals declared as non-practising institutes) and all State general hospitals and State hospitals situated in the districts and at Calcutta. Hence, there is no discriminatory treatment being accorded to the former teaching doctors on their exercising option for the WBHS on account of the fact that the so-called equivalent posts are not created in the WBHS to accommodate them.

9. The assumption underlying the fifth contention is that the person holding a non-teaching post in the teaching institution in the former WBHS who opts for a post in the new WBHS where private practice is permitted, cannot be posted to a post where private practice is not permitted. That assumption itself is incorrect since the provisions of Section 6(2) are subject to the provisions of Section 4(3), 4(4), 5 and 11 of the Act. Under Section 4(1), except the basic level teachers, no other member of the WBMES can be transferred to WBHS. Under Section 4(2), no person appointed to WBHS can be transferred to WBMES. Under Section 4(3), any person appointed to a post in WBHS (other than the post in the cadre of the public Health-cum-Administrative Unit) may be transferred to a post in the Public Health-cum-Administrative Unit. It may be mentioned here that the posts in the Public Health-cum-Administrative Unit are non-practising. Under Section 4(4), the State Government has the right to transfer any person from one post to another subject to the provisions of Sections 4(1) and 4(2). In other words, the State Government has the right to transfer a person from any post to any other post, so long as there is no transfer of a member of WBMES (except the teacher holding the basic level post) to WBHS, and of a member holding post in the WBHS to the WBMES. Section 5 further empowers the State Government to appoint any person to hold two or more separate posts on such terms and conditions as may be prescribed. Section 11 makes it clear that any person of the former WBHS who is now appointed to a post in the new WBHS (other than to a post in the Public Health-cum-Administration Unit) shall continue in such post on such terms and conditions as were in force immediately before the coming into force of the Act. On the day the Act came into force, the new WBHS was not formed and the Rules governing the new WBHS were not in existence. On the formation of the new WBHS and the formulation of the Rules for the same on 3rd March, 1993, the Rules governing the former WBHS stood repealed and the new Rules viz., the Rules under discussion, came into force, and have become applicable to the new WBHS by virtue of Section 3 of the Act. Hence, Rules 8 and 10 of the Rules have taken the place of the Rules which were governing the posts in the WBHS on the date the Act came into force. The earlier rules had also not vested the posts in the WBHS with any right or permanent privilege of private practice. The privilege was liable to be withdrawn at any time. The incumbents of the post were also transferable from the practising to the non-practising posts. In view of the said position, there is no conflict between Section 6(2) and Rules 8 and 10 of the Rules. It is true that the last proviso to Section 6(2) states that persons holding non-teaching posts on terms and conditions of practice in the institutions which are declared non-practising under the Act have a right to opt for practice or non-practice without any change of post or designation and when any such persons do not exercise option or exercise option for practice, they are to be transferred to a post in any other hospital on terms and conditions of practice. Since however, as explained above, they had even earlier i.e., prior to the coming into force of the Act, held the practising posts in question subject to the Government's

right to transfer them to a non-practicing post and since further the facility to practise was not a right but only a privilege which could be withdrawn by the government any time, the provisions of Section 6(2) read also in the light of the other provisions of the Act, have to be construed to mean that those who do not exercise any option or opt for practice, are to be accommodated as far as possible in the posts which carry the privilege of practice. This position obtainable under the various provisions of the Act referred to above, is crystallised in Rules 8 and 10. Rule 8 states that those members of the WBHS who are posted in the health centers, rural hospitals and teaching hospital mentioned in items (a), (b) and (f) of schedule II of the Rules, shall not engage in private practice. By implication, the members of the WBHS who may be holding posts with the privilege of practice are liable to be transferred to the said non-practising posts. Rule 10(1) further makes clear what is otherwise implicit in Rule 8, viz., that those members of the WBHS who hold posts in institutions mentioned in items (c), (d) and (e) of Schedule II of the Rules which are practising posts, although they opt for the same posts, will not have any right but only a privilege to engage in private practice and that they may be transferred to any post in the WBHS where private practice is not permitted including the posts in institutions in item (a), (b) and (f) of the said Schedule. Rule 10(2) further makes it clear that even the privilege of private practice carried with the post including the posts in the institutions mentioned in item (c), (d) and (e) of the said Schedule, may be withdrawn by the State Government at any time if it is considered necessary or desirable in the public interest. The contention is thus a product of the misconception firstly that every post belonging to the WBHS carries a right or a permanent privilege to practise and that the members of the WBHS are not transferable from the practicing to the non-practising posts in the said Service. Hence, the same has to be rejected.

10. The sixth contention is advanced against the posting orders dated 15.3.1993 of the appellants which were issued even before the expiry of 30 days from the coming into force of the Rules which is in contravention of Rules 5(ii) of the Rules. Apart from the fact that the contention is directed against the legality of the transfer orders which have nothing to do with the vires of the Act or the Rules, there is nothing to show that the appellants have suffered any prejudice on account of the said orders. The fact remains that the appellants did not exercise their option even within 30 days prior to the coming into force of the Act and for that matter at any time thereafter. If they had in fact exercised their option to join the WBMES during the period given to them under Rule 5(ii), the transfer orders would have been rendered nugatory. Since they had not exercised their option, under the 5th proviso to Section 12, they are deemed to have exercised option for WBHS. None prevented them from exercising their option for WBMES during the stipulated period and had they done so they could not have been transferred to WBHS. It is difficult to accept the contention that merely because the transfer orders were issued before the expiry of the stipulated period, the transfer order were a mala fide exercise of power. They could not have been given effect to, before the expiry of the stipulated period, and as stated earlier, the right of the, appellants to exercise their option within the stipulated period was not taken away by the said orders. The contention has, therefore, to be rejected.

11. The seventh contention that the enhanced age of superannuation prescribed for the members of the WBMES under Section 16 of the Act is discriminatory is difficult to under stand. The two services being distinct and their duties and functions being different, different service conditions

can be prescribed for the members of the two services. The WBMES is constituted separately to improve the quality of the medical education in the State. Ordinarily, the members of the teaching staff in all the disciplines retire at the age of 60 years and that is for a valid reason. In view of the knowledge acquired and the research made in the particular subject in which the teachers are specialised in a discipline like the medicine, there is nothing wrong, if the State Government should desire to utilise the services of the teacher-doctors for a longer period, in the public interest. That is why the superannuation age of the members of the WBMES is fixed at 60 years as against the superannuation age of 58 years fixed for the members of the WBHS including for those posted in the Public Health-cum-Administration Unit. It is with the same intention that a provision had also been made under Section 16, for re-employment of the members of the WBMES upto 65 years of after superannuation. There is, therefore, no merit in the contention.

12. The eighth contention need not detain us long in view of what is explained above. All posts in the WBHS do not carry the privilege of private practice. There are some posts which do not carry such privilege. Further, even those posts which carry the privilege of private practice, do so only temporarily since the State Government has reserved to itself the power to withdraw the said privilege at any time. The Act and the Rules also make it clear that the members of the WBHS are liable to be transferred from the practising posts to the non-practising posts and vice versa depending upon the exigencies of the service. The Public Health-cum Administration Unit of the WBHS has only non-practising posts. There is, therefore, no merit in the contention that a person who opts for the WBHS should not be transferred to the post in Public Health-cum-Administration Unit because it is a non-practising post. Since there is no right of private practice attached to any post, the contention that under Section 4(3) a person opting for the WBHS is liable to be transferred to a post in the Public Health-cum-Administration Unit and that, therefore, the said provision is arbitrary cannot be accepted. The transfers are a matter of executive policy and are made as directed by the exigencies of the service. Section 4(3) incorporates no more than the said policy.

The ninth contention is obviously based on a misconception of the structure of the WBHS. Under Rule 7(1), the WBHS (excluding the Public Health-cum-Administration Unit) consists of members who are either Medical Officers or Specialists. There are no other Posts or designations. Rule 7(2) states that a member of the WBHS who holds post-graduate degree and has at least 5 years' experience as a Medical Officer or a member of the said Service who holds a diploma but has at least 8 years' experience as a Medical Officer may be declared as Specialist. It further says that the diploma holders with 8 years' experience as Medical Officers may be declared as Specialists only in the dearth disciplines, viz., Radiology, Anestheology, Opthamalogy, Paediatric, Dermatology, Vernal diseases, Psychiatry and Otorihnolaringology. Rule 7(3) then states that no Specialist shall be posted in any of the Health centers, Rural Hospitals or Teaching Hospital mentioned in items (a), (b) and (f) of Schedule II of the Rules. The rule lays down qualifications to become a Specialist and all those who satisfy the said qualifications may be declared as Specialists. It is difficult to understand as to how a grievance can be made against declaring all those who have put in qualifying period of service as Specialists. This is bound to happen in any Service and seniors cannot make any grievance that the juniors who qualify are also called specialists along with them. Underlying this contention is a grievance that there are no more hierarchies in the WBHS. The fact that both juniors and seniors are declared as Specialists does not in any way lessen the importance of the senior Specialists. The mere

number of years in service does not give anyone a higher status in Service. The status depends upon the quality of the person's work. It may happen that the quality of a junior's work may be better than that of his senior. The contention must, therefore, fail.

The tenth contention is equally frivolous. The contention is that the Act is discriminatory because it does not apply to (i) Honorary and Emiretus Professors: (ii) Ex-management Teachers and (iii) Teachers belonging to the Dentistry. None of them belonged to the former WBHS. The "Emiretus Professors" as the expression itself denotes, are eminent teacher-doctors who have retired from the Health Service. They are paid for their service a token conveyance allowance of about Rs. 250 per month. They are, therefore, a class by themselves and cannot be compared with the regular members of the WBMES or the WBHS. The Dental Doctors or Surgeons belong to a separate service known as the West Bengal Dental Service and their service conditions are determined by the rules of the said Service. They are also, therefore, a distinct class. As regards the Ex-management teachers who are about 10 to 15 in numbers at present, their service conditions as explained by the respondent-state Government are governed by the provisions of Taking-over of the Management Act under which the management of some private institutions was taken over by the State Government. Thus all the three categories belong to separate classes which have nothing in common with either of the two services, viz., the WBMES or the WBHS. It can, therefore, be hardly contended that the Act is discriminatory because it does not apply to the said three classes.

The eleventh contention has been broadly dealt with earlier. Section 6(2) does make a distinction between those who held teaching posts and those who held non-teaching posts in the teaching institutions and the hospitals attached to them where formerly private practice was permitted. The Section states that all those who held posts in such institutions on the condition of practice will cease to hold such posts on such condition after the institutions are declared as non-practising ones. To those who held non-teaching posts in such institutions with the condition of practice, it gives an option for posts with practice or without practice. In either of the cases, they are not to suffer a change of their posts or designation if they exercise their option within the stipulated time. It also says that if such a person does not exercise any option or exercises option for practice, he shall be transferred to a post in any other hospital on terms and conditions of practice. However, neither the post or designation nor the right to practise of those who held teaching posts in such institutions is protected. Hence the Section is not discriminatory. The contention misses the purpose of (the) provisos to Section 6(2). The said provisos deal with only those who held non-teaching posts in the institutions in question on terms of practice and who have to be transferred from there to the other institutions on exercise by them of their option. It is sections 12 and 13 which deal with the appointment of the teacher-doctors to the non-teaching institution on their exercising or not exercising their option. What is further to be noted is that the non-teaching posts continue in the institutions concerned but without the right to practise. It was, therefore, necessary to give the option in question to the holder of the non-teaching posts between the practising and non-practising posts, since the only alternative before them, after the institutions were declared non-practising, was either to continue in the said institutions or move out to other posts in the WBHS itself which consisted of both practising and non-practising posts. There was no option for them to join the WBMES as was open to those who held the teaching posts. Their designations whether working in the Administration Unit or otherwise needed no change for they were being transferred from

non-teaching posts to non-teaching posts. Even those who held teaching posts did not suffer any change in their posts or designations since they continued to hold their posts in the new dispensation subject to the only condition that they would cease to practise from the date the institutions were declared as non-practising. However, if they choose to opt for posts in the cadre of the WBHS they could do so, and could be posted either to the practising posts or to the non-practising posts according to the exigencies of the service. So also those who held non-teaching posts could be posted to the posts in the WBHS which are practising as well as non-practising since their posting is also subject to the other provisions of the Act. Since 6(2) does not confer on those who held non-teaching posts with the condition of practice a right to practise or a right to a practising post. Consistent with the scheme of the Act, It merely provides that the persons who held non-teaching posts with the condition of practise earlier may be transferred to a practising post as far as possible since they are not given an option to join the WBMES. That, however, does not mean that the said Section confers on the holders of the non-teaching post a right to practise or a right to a practising post. There is thus no discrimination between those who held teaching posts and those who held non-teaching posts.,

13. The twelfth contention is only to be stated to be rejected. A part of it has already been dealt with earlier. The teaching posts have their own designations and require appropriate qualifications for appointment to them. It is unreasonable to expect that posts and designations equivalent to the said posts should be created in the WBHS to accommodate the former teacher-doctors opting for the WBHS. In the WBHS excluding its Public Health-cum-Administration Unit, the only posts are, as stated earlier, those of Medical Officers and Specialists. The former teacher-doctors when they opt for the cadre of the WBHS would either be Medical Officers or Specialist depending upon their Qualifications specified in Rule 7(2). The Public Health and Administration of the former WBHS has become a separate Unit of the new WBHS. Therefore, there is no question of changing either the posts or the designations in the new Unit and those who belonged to the former Public Health and Administration would now occupy the same posts and designations in the new Unit. Hence the mere fact that the members of the former Public Health and Administration shall be appointed to the equivalent posts in the new Unit does not spell out discrimination in their favour as against the teacher-doctors opting for the WBHS. In their case, there is no change in the nature of duties and functions. The old service stands as if transferred to the new WBHS. Hence, there is no need to create any new posts and designations. There is also no similarity between former teachers who opt for the WBMES and those who opt for the WBHS. The former would continue in the teaching service and, therefore, would continue in the same posts with the same designations. In their case also there is non change in the duties and functions. The latter would, however, have to be appointed either as the Medical Officers or the Specialists depending upon their qualifications, as stated earlier. As regards the non-teaching doctors of the former WBHS, they would also occupy either of the said two posts in the new WBHS depending upon their qualifications. Their cases also cannot be compared with the former teacher-doctors who opt for the WBHS and a grievance be made that whereas the former non-teaching doctors have the protection of their earlier posts and designations or have an appointment to the equivalent post in the WBHS, the former teacher-doctors do not have such advantage. There is thus nothing arbitrary and violative of Articles 14 and 19(1)(g) of the Constitution in Rule 7(2) of the Rules on that account. Nor is the said Rule ultra vires the Act. There is no demotion of the former ProfessOrs. Assistant Professors or Readers

who opt for the WBHS merely because they would all come within the category of the Specialists when they join the new WBHS. There is no gradation among the Specialists. It is the actual work performed which grades a specialist in the eyes of the people. A mere designation as a Specialist does not by itself upgrade the work of the medical practitioner. The pay of Rs. 3700 is the minimum basic pay attached to the special selection post. It does not mean that whatever the salary which was received by the professors, Assistant Professors or Readers earlier would not be protected when they opt for the posts in the WBHS if the said salaries are higher than the minimum basic pay.

The thirteenth contention is a repetition of the earlier contentions. As has been explained in detail earlier, neither Section 6(2) nor any other provision of the Act confers any right to practise on any post in the cadre of the WBHS. It is only a temporary privilege which can be withdrawn by the Government at any time. The members of the WBHS are further liable to be transferred from the practising posts to the non-practising posts. The WBHS consists of both the said posts. Rule 10 of the Rules is, therefore, non ultra vires Section 6(2) of the Act.

The fourteenth contention has also been dealt with earlier. The contention that Section 4(3) enables the Government to transfer a person appointed to a post in the WBHS, to a post in the Public Health-cum-Administration Unit and is, therefore, arbitrary, has to be rejected. The transfer is a matter of executive policy and the Act makes the services of persons transferable from one post to another, whether practising or non-practising, to meet the exigency of the service. No exception can, therefore, be taken to the provision which enables the government to transfer a person from the posts in the WBHS to the post in the Public Health-cum-Administration Unit where all posts are non-practising. It is also not correct to say that those who are posted in the Public Health-cum-Administration Unit cannot be transferred outside the said Unit. Apart from the fact that the said Unit is an integral part of the WBHS, Section 4(4) gives power to the government to make transfer from one post to another which will also include transfer from the said Unit to a post outside it. It is, therefore, incorrect to say that once a person is transferred to a post in the said Unit, he loses for ever an opportunity to be transferred to a practising post. Since there is only a privilege of practice associated even with the practising posts, and the said privilege can be withdrawn at any time, and since the persons are transferable from practising posts to non-practising posts and back, it is incorrect to contend that the option given to join the WBHS is illusory.

It is also incorrect to contend that the said provision is bad because it is likely to be utilised for victimisation. If a transfer is motivated by a desire to victimise any person, the specific transfer can always be challenged in a court of law. However, no provision can be struck down on the ground that although it is valid, it is likely to be used for an unauthorised purpose.

The fifteenth contention is that there is a contradiction between provisos 4 and 5 of Section 12 of the Act. Proviso 4 states that those holding posts in the Public Health or Administration in the former WBHS who do not exercise any option would be deemed to have exercised option for the new WBHS and their posting will be made in WBHS in phases. The 5th proviso, however, states that such persons would be deemed to have exercised option for the Public Health-cum-Administration Unit of the new WBHS. This is only an apparent contradiction since the legislative intent is clear, namely that the persons holding posts in the former Public Health or Administration should be posted to

the new Public Health-cum-Administration Unit which is an integral part of the WBHS. While the 4th proviso generally states that they will be posted in the new WBHS, the 5th proviso specifies the part of the Service to which they will be posted. However, it must be stated that in view of the 5th proviso, the 4th proviso is redundant and has survived only as a piece of careless drafting.

14. The sixteenth contention is that under Section 14(2A), the doctors of the former WBHS who may not be required to exercise any option under Section 12, shall be appointed to the teaching posts in the basic level or to a post of lectures or to any other teaching posts, as the case may be in the WBMES. Such doctors are those who were holding non-teaching posts in the former WBHS. Section 14(2A), therefore, makes no sense in that the non-teacher doctors even though they do not possess the requisite qualifications, shall be appointed to the teaching posts in WBMES. One the admission of the respondent-State Government, there are about 6100 non-teaching doctors and there are only about 1400 teaching posts. What is further, the said provision goes counter to the very object of the Act, viz., to improve the standard of medical education in the State. The learned Counsel appearing for the State Government pointed out that in view of the provisions of the first proviso to Section 14(1), for the first five years the recruitment to the teaching posts in the basic level of the WBMES can only be made from among the persons having the requisite qualifications in the WBHS. In order to meet the exigencies of service, in case sufficient number of doctors are not available to man the posts in WBMES, the said provision in Section 14(2A) has been made and the State Government is vested with the power to meet the contingency by appointing non-teacher-doctors of the former WBHS to the posts in the WBMES. He, further, stated that keeping the said intention in mind, the word "shall" in Section 14(2A) has to be read down to mean "may". In this connection, he pointed out that the High Court has also construed the word "shall" to mean "may", taking into account the intention of the legislature in that behalf.

Keeping in view the object of the Act and the purpose for which the said provision has been made, the course adopted by the High Court appears to be the proper one. To construe it otherwise would not only defeat the object of the Act, but negate the entire scheme incorporated in it. Further, the intention of the legislature in enacting the said provision was obviously to enable the Government to meet the contingency where the personnel to man WBMES would not be available in the requisite number and hence, there was need to appoint members of the WBHS in the circumstances. It will have, therefore, to be held that Section 14(2A) has to be read to mean that the non-teaching doctors of the former WBHS "may" be appointed to teaching post in the WBMES. Thus read, there is no inconsistency between the said provision and the other provisions of the Act or the Rules made thereunder.

15. The seventeenth contention, viz., that the grant of right to Practise to 6100 non-teacher doctors belonging to the WBHS defeats the object of the Act to improve the health-care, suffers from a basic misunderstanding. As has been repeatedly explained earlier, no right to practise has been given to the non-teaching doctors. Further, not all the posts in the WBHS are practising posts. The privilege to practise privately which has been given to persons manning some posts, is temporary and is likely to be withdrawn at any time. If the State Government finds that the extension of the said privilege even to some posts affects the patient-care, the State Government is free to withdraw even the said limited privilege. There is also no substance in the contention that there was no evidence of the

deterioration in the standards of teaching in medical institutes of the State, since in the All India Medical Entrance test conducted by the Medical Council of India, allegedly 25-30 per cent of the successful candidates during the last three years belonged to the State. Assuming the said figure to be correct, it would not by itself indicate that the standard of the medical education in the state has not deteriorated. On the other hand, the experience of the State Government of the temporary relaxation of the prohibition against private practice for 25 years from 1965 to 1990 showed that the teacher-doctors were neglecting both teaching and the attendance to the patients in the hospitals attached to the teaching institutes. The Medical Council of India also held the same view and ultimately passed a resolution in 1973 insisting that the teaching staff of all departments of a medical college should be whole-time and non-practising. The National Health Policy declared by the Government of India in 1983 also pointed to the desirability of prohibiting private practice to the Government medical personnel. The Standing Committee of the State Legislative Assembly on Health also in its report attributed the fall in the standard of medical education in the State, among other thing, to the fact that the medical teachers were devoting considerable part of their working time to their private practice. It is, therefore, incorrect to say that there was no evidence before the State Legislature of the deteriorating standards in the medical education in the State. Further, even if there was no evidence, the State Government was competent to lay down as one of the service conditions for its Medical Officers, that they would not have the right to practise privately. That being a matter of policy, strictly rests within the exclusive jurisdiction of the State Government.

16. The eighteenth contention has been already dealt with earlier. The members of the new WBHS cannot make a grievance that in the new dispensation, they have no scope for promotion as they will be stagnated only as Specialists. In the medical profession, it is difficult to conceive of a post higher than that of a Specialist. Since the new WBHS has only two grades, viz., the Medical Officer and the Specialist, the non-teaching doctors can be fitted either in one or the other according to their qualifications. The designations such as Surgeon, Assistant Surgeon, Sub-Assistant Surgeon, etc. which were in existence prior to 1958 were abolished in 1958 when a unified cadre of the Medical Officers were created. Since under the Act, two separate Services have been created, viz., WBHS and WBMES, no promotions could be given to the members of the WBHS in the WBMES. Whatever may be the case under the 1958 Rules which created the unified cadre both of the teaching and the non-teaching doctors and under which the promotion from one to the other was possible since the Act has bifurcated the Services, it is difficult to envisage as to what posts could have been created in the new WBHS equivalent to the teaching posts such as Basic Teacher, Lecturer, Assistant Professor, Reader, Associate Professor, Professor and Principal. One may venture and suggest a hierarchy in the WBHS, such as Medical Officer, Senior Medical Officer, Junior Specialist, Senior Specialist and so on. That is a matter which has to be left exclusively to the executive policy. Even so, it is difficult to understand how the equivalence of the posts between the WBMES and the WBHS could have thereby been achieved. There is, therefore, no merit in the contention that because the equivalent posts are not created in the two Services, the Act or the scheme under it is bad in law.

17. The nineteenth contention is directed against the non-extension of the option to the non-teaching doctors of the former WBHS. It is contended that whereas those who held teaching posts in the former WBHS have been given option to join either the WBMES or the WBHS, those who held non-teaching posts have not been given such option. Hence the Act is discriminatory. In

support of the very same contention, it is pointed out that even those were empanelled for being promoted to the teaching hierarchy were not given such option and they had to be content with the non-teaching posts in the new WBHS.

As has been emphasised earlier, the Act envisages the creation of an exclusive cadre of teaching posts and, therefore, has created a separate education service viz., WBMES. While constituting such Service, it was necessary to give option mainly to those who were then holding the teaching posts, since the main condition attached to the new teaching posts was that they would carry no right to private practice. There was no question of giving such a choice to those who did not hold teaching posts. Such doctors had not joined the education stream even when the teacher-doctors were given the privilege of practising. If they were serious about teaching, they would have joined it much earlier and not waited till the present Act was enacted. Even now, under Section 14(1), for a period of five years from the date of coming into force of the Act, there is a provision for recruiting members of the WBHS to the basic level teaching posts in the WBMES giving due weightage to their service in the WBHS. Clause (a) of the second proviso to the said section states that for a period of five years, recruitment to the teaching posts in the basic level in the WBMES shall be made from amongst the persons appointed to the WBHS who had rendered two years' service in the WBHS in the rural areas. Clause (b) to the said proviso says that on the expiry of the said period of five years, recruitment to the posts in question in WBMES shall be made through the State Public Service Commission giving due weightage to persons who have rendered two years' service in the rural areas. Similarly, the sixth proviso to Section 14(1) states that similar weightage for service in the rural areas, shall be given to the persons who apply for the posts of Lecturer and Assistant Professor in the WBMES. It must, further be kept in mind that promotions, transfers and affording options are the exigencies and the incidence of service. There is no vested right of an employee in them. The provisions of the Act or the Rules which bring about such change are not vitiated or rendered illegal on that account. Further, the mere empanelment for being appointed to the higher post does not vest the persons empanelled with a right to be posted to the higher post. Hence the grievance made that some of the non-teaching doctors who had been empanelled for being promoted to the teaching hierarchy were also not given the option to join WBMES and, therefore, the Act and the Rules are bad in law has no merit in it. There is no data on record to show that, as alleged, a large number of doctors appointed to the posts of the basic teachers in non-clinical discipline and who did not possess requisite eligibility qualifications viz., post-graduate degree in the relevant subject, have been provided with an option to join the WBMES.

18. There is also no merit in the twentieth contention either, viz., that seniority of the members of the WBMES has not been protected due to the introduction of the "Pay to Post" rule and by the abolition of "Pay to Person" rule which was prevalent in the former WBHS. The said contention is based on various misconceptions. In the first instance, the introduction of the rule of "Pay to Post" does not involve either the loss of seniority or the loss of pay for any person. When the members of the former WBHS opt for the WBMES, they carry with them their seniority as well as their salary. If in the former WBHS, senior member failed to earn promotions, there is nothing wrong if the junior members of the service who were promoted to the higher posts, start getting higher pay in the new WBMES which pay goes with the higher posts to which the juniors stand promoted. It is difficult to understand as to how the higher posts in the former WBHS were carrying less salary than that of the

lower posts. If it was on that account that the seniors, though having failed to find a promotional post, were still getting higher salary than their juniors promoted over them to the higher posts, there seems to be some thing radically wrong with the pay structure in the former WBHS. If the averments of the appellants are correct, it only means that in the WBMES, pay-scales have been rationalised as they ought to be. Secondly, the members of the WBMES would be governed by their rules which include "Pay to Post" and the members of WBHS would be governed by their separate rules which include the rule of "Pay to Person". The two services are different and, therefore, their service conditions are governed by different rules. Thirdly, as has been pointed out on behalf of the State Government, the seniority in the teaching stream or attainment of the senior post in the teaching stream depends on the dates of appointment on the teaching side. A doctor may have attained the qualification to enter the teaching stream by obtaining his M.D. or M.S. degree but he may not have chosen to join the teaching stream immediately whereas another doctor might have joined the teaching stream immediately after obtaining the eligibility qualification. In that case, the latter will be senior to the former on the teaching side and will attain higher post earlier than the former. Hence there is no substance in the said grievance.

19. The last contention is based upon the premise that it was necessary to constitute the new WBHS before the teacher-doctors of the old WBHS asked to exercise option either join the new WBMES or to hold the non-teaching posts in the WBHS which remained after the bifurcation of the teaching posts from the non-teaching posts. The contention is that the non Constitution of the new WBHS deprived the doctors from exercising their option effectively.

This contention ignores the fact that under the Act, the choice was to be exercised by the doctors who held teaching posts in the former WBHS. No choice was to be exercised by those who held non-teaching posts. The choice before the teacher-doctors was whether they would join the WBMES which was a non-practising service or would remain with the former WBHS in which there were some and not all posts with the privilege of private practice. The Act itself further made it clear that the two services, viz., the WBMES and the WBHS may be constituted on different dates. The Act had also incorporated in it all the important features of the new WBHS such as the Constitution of a separate Public health-cum-Administration as a separate Link, Government's right to transfer the member of the WBHS to any post including the post in the Public Health-cum-Administration Unit which has all non-practising posts, the prohibition of transfer of a person appointed to the WBHS to the WBMES except under Section 14(1) and 14(2A), the existence of posts in the WBHS without the privilege of practising, the continuation of a person appointed in the cadre of the new WBHS on the same terms and conditions as were in force immediately before the coming into force of the Act etc. It is, therefore, difficult to understand the grievance that in the absence of the Constitution of the new WBHS, those who had held teaching posts in the former WBHS had no effective opportunity to exercise their option.

The specific grievance made on account of the non Constitution of the new WBHS before the teacher-doctors were asked to exercise their option may now be dealt with -

(i) The grievance that a large number of senior doctors are compelled to sacrifice their seniority and pay scales is not borne out by the facts. In fact, both the salary and the seniority of the said doctors

in the WBMES is protected. If the juniors were promoted to higher posts in the earlier service and if on that account, they are now holding posts higher than their seniors, the senior, doctors cannot make grievance on that account.

(ii) The grievance that the teacher-doctors who had not exercised their option for the WBMES are being posted in the junior posts in the WBHS, which posts they had held at the threshold of their service career is not correct as pointed out on behalf of the State Government. In the first instance, as has been stated in Rule 7(3), no Specialist shall be posted in any of the Health centers, rural hospitals or teaching hospitals mentioned in items (a), (b) and (f) of Schedule II of the said Rules. If they are posted to other institutions, viz., institutions mentioned in items (c), (d) and (e), no grievance can be made by them since the institutions mentioned in (c), (d) and (e) stand on a higher footing than the institutions mentioned in (a), (b) and (f). Secondly, even when the seniors are posted as Specialists to the institutions mentioned in items (c), (d) and (e), they would not be posted to the same post to which they were posted at the threshold of their career but to the senior posts with their seniority and the salary being protected.

(iii) The third grievance is in respect of some particular doctors who had not exercised their option because the promotions due to special selection grade and higher academic grades such as Professor, prior to coming into force of the Act, were not given to them and they were waiting for a clarification from the Government in that behalf. It is difficult to understand this grievance. When the new Act came into force changing the whole pattern of service and creating a new service in the form of the WBMES, it was not open for the said doctors to ask for such clarification. As stated earlier, no employee can have a vested right in promotion, and if the old dispensation gives way to the new, it was all the more unwarranted on the part of those whose promotions were due under the old dispensation to expect that whatever the altered conditions under the new dispensation, they would be given promotions on the same terms and conditions as obtained under the old dispensation.

(iv) Since, as stated earlier, the Constitution of the new WBHS did not bar the option to be exercised by the teacher-doctors of the former WBHS, it is not understood as to how those who exercised as well as those who did not exercise the option can be said to have been denied the opportunity to exercise the option.

(v) There is nothing either in the Act or the Rules which disturbs the seniority and the status of the members of the former WBHS. Hence this grievance has no meaning.

(vi) The grievance that the former teacher-doctors who exercised their option for the new WBHS have been posted in non-teaching hospitals where they are placed to work under the control of their junior officers appointed as Superintendents of the said hospitals has been specifically denied by the State Government. It has been pointed out that each and every doctor who has been transferred to various non-teaching hospitals is holding independent charge of his respective job and the seniority, pay, allowances and other benefits including his power to admit, operate and allocate beds to the patients under his control is fully protected.

(vii) The grievance that the hierarchy is created for public Health-cum-Administration Unit to protect the seniority and status of those who earlier worked in the Public Health and Administration has already been dealt with earlier. No such hierarchy is created for the other members of the WBHS. The Public Health-cum-Administration Unit is a separate unit, the hierarchy in which needs no change since the earlier Public Health-cum-Administration stood transferred as a Unit to the new WBHS. It has remained as it is. This was not with the deliberate intention of protecting the hierarchy of the posts in the said Unit. It is an incidental consequence of the creation of the new services. There is, therefore, no discrimination. The posts in the said Unit had since 1958 all along been separate from the rest of the posts in the WBHS.

(viii) This grievance has been dealt with earlier. The former WBHS was a unified service whereas the new WBHS is independent of the education service. Hence, the same ladder of promotions and promotional opportunities cannot be expected in the new WBHS. As stated earlier, the new WBHS has only two posts, viz., Medical Officer and Specialist.

(ix) There are no details given of the grievance made that the members of the former Health Service are being sought to be transferred and appointed either to the feeder posts or non-existent posts under threats and humiliation. It is not, therefore, necessary to deal with this allegation. In any case, such instances, if any have to bearing on the vires of the Act and the Rules.

(x) The tenth grievance is in respect of particular persons which can be looked into by the State Government provided the said persons have joined the posts.

(xi) This Grievance has not been replied to on behalf of the State Government. If it is true, it is against the provisions of the Act. The appellants have not stated the result of the legal redress they had sought in the matter. If the grievance is not yet redressed the State Government should rectify the same immediately by rescinding the notification in question. The concerned doctors should be given time of at least two weeks from the rescission of the notification to exercise their option .

(xii) The last grievance consists of two parts. The first part relates to the alleged appointment in the cadre of WBMES other than through the Public Service Commission. As has been pointed out earlier, Clause (a) of the second proviso to Section 14(1) requires the State Government, for a period of five years, to recruit to the basic level teaching posts in the WBMES, persons appointed to the WBHS who have rendered two years' service in the rural areas. There is no data before us which will show that the appointments in question fall outside the purview of the said provision. It is, however, difficult to understand as to how such a grievance can be made in the present appeals which seek to challenge the vires of the Act and the Rules.

As regards the second part of the grievance, viz., the Specialist doctors of the WBHS being transferred to districts or sub-divisional hospitals and health centers which do not have the required infrastructure to utilise their expertise, the learned Counsel for the State Government has assured us that such cases if any would be reviewed by the State Government provided the persons concerned first join the posts and make specific representations. However, if they are transferred to such institutions, with a view to organise the infrastructure for the requisite specialist service proposed to

be made available at those institutions, the persons concerned cannot make any grievance in that behalf. In fact, they are the proper persons to be posted to such institutions for the purpose.

S. Mohan, J.

20. Though I am in entire agreement with my Learned Brother Savvant, J. I wish to add the following:

21. My learned Brother has dealt with the facts and the circumstances leading to these appeals. So it is unnecessary to trace the same. The matter may be considered with reference to the following:

- (i) The scope of the Act and the Rules;
- (ii) Rules-whether ultra vires ?
- (iii) Whether there is a fundamental right to practise ?
- (iv) Orders of transfer - whether actuated by mala fide ?
- (i) The scope of the Act and the Rules.

22. Though a synopsis has been set out in the beginning of the judgment of my learned Brother it is necessary to trace the full background leading to the impugned Act namely the West Bengal Health Service Act, 1990 (West Bengal Act VII of 1990) and the rules made thereunder.

23. In the State of West Bengal in 1958, a unified cadre of government doctors known as the West Bengal Health Service was constituted. The doctors who were the members of this service fell broadly into three categories, namely:

- (i) Doctor engaged primarily in teaching along with duties of the hospital to which teaching institutions were attached.
- (ii) Doctors engaged on the curative side attached to various hospitals and medical centers throughout the State but were not engaged in teaching and;
- (iii) Doctors primarily involved in administrative work.

24. In the said unified service as originally constituted, private practice by government doctors was totally prohibited.

25. In the year 1965, a Government Order was passed relaxing the said Rules prohibiting private practice and granting permission to engage in private practice in some of the posts in the West Bengal Health Service subject to certain conditions. The doctors who opted for private practice had to forego certain pecuniary benefits such as non-practicing allowance. They were required to submit

an option in the prescribed form. That contained declaration to the following effect:

(i) They had no claim or right to private practice;

(ii) They were liable to be transferred to any post where private practice was no permissible.

26. The permission to engage in private practice was given purely on temporary basis under an experimental measure. It was made clear that the position would be reviewed in future in the light of experience gained.

27. Towards the end of 1989, having studied this system for nearly 25 years, the Government of the West Bengal felt that the existing system was not satisfactory. It had found, in particular that, the quality of medical education in the State had deteriorated considerably. One of the reasons for this was that the doctors engaged in teaching were paying more attention to private practice with the result, they were found to be largely absent from the lecture rooms. They were neglecting their duties towards the hospitals attached to the teaching institutions. There was a lack of devotion to the teaching side. This brought about the lowering of the standard of medical education in the State.

28. In view of the deteriorating standard of medical education in the State and in order to improve its quality the Government of West Bengal decided, as a matter of policy, to bifurcate the existing unified service and to create a separate service known as West Bengal Medical Education Service for doctors engaged in teaching. They would be known as non-practising doctOrs. This policy of the State Government was formulated in the light of the views of the Medical Council of India. In its resolution adopted in 1973, it stated that "teaching staff of all departments of a medical college shall be whole-time and non-practising". The National Health Policy was published in the year 1983 by the Government of India. In the National Policy Studies published in the year 1990 by the Government of India, it is stated:

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.

29. A Standing Committee on Health of West Bengal Legislative Assembly also submitted a report to the same effect. While analysing the cause of the falling standard of medical education in West Bengal, it stated that medical teachers were devoting a considerable part of their working time in private practice. According to the Committee, amongst the important factors responsible for this situation were that "the teachers are busy for their commercial benefit using Medical Colleges as their publicity platform and socio-political power". "Consequently the students are keen to get the degree by any means without being keen to learn their subjects and social orientation in their training". It also stated: "it observed that West Bengal has the best organisation for Health, so as far

its infrastructure is concerned. But it failed to maximise the benefit of such huge infrastructure. One of the reasons of this failure, the Committee surmised, lay in the respective system of medical education". The report stated "it was noted that most of the teachers and principals agreed that the standard of medical education has uniformly degenerated in all the medical institutes". The Committee took evidences of the Presidents and Secretaries of Students's Unions of all the Medical Colleges. All of them agreed about the pitiable situation of medical education. Their main complaint was that teachers were mostly busy in their private practice and least concerned about the training of students. The statements of the Director of Medical Education and the Vice-Chancellor, the Dean, the President of Medical Association and the Principals corroborate that there is a need for overall changes in the system of medical education. The report noted "that the medical education in our State is not only in disarray but in distress." The Committee made several recommendations to remedy this state of affairs, amongst which were:

(a) Effective implementation of separate teaching cadre should be done immediately and proper infrastructure and superstructure be created for its function.

(b) Teaching cadre must be made non-practising. No medical personnel with practising facilities will be allowed to be attached in a medical college

30. On the basis of the policy decision of the Government, an Ordinance was promulgated known as West Bengal Health Service Ordinance, 1990. The said Ordinance was thereafter replaced by West Bengal Health Service Act, 1990 (West Bengal Act VII of 1990). The Statement of Objects and Reasons reads as follows:

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 meaning of the Teaching posts, specially in the dearth 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.

31. Therefore, it was proposed that the existing health service should be bifurcated. A separate service called West Bengal Education Service should be created for the medical teachers only. The said service shall comprise of 1400 teaching posts. The service is to be compulsorily non-practising with the expectation that the standard of medical teaching and care to the patients in our medical colleges and hospitals including other teaching hospitals will be improved. There will be no dearth of teaching in most of the disciplines within a near future.

32. A Public Health-cum-Administration Unit within the limits of West Bengal Health Service has been proposed. The administration unit will consist of about 500 Medical Officers who will be entirely in-charge of administration as Administrators. It is envisaged that with a training and experience such group of Medical Officers would prove themselves as good administrators in the proposed unit which also will be entirely non-practising.

33. The said West Bengal Health Service cadre excepting the proposed Public health-cum-administration Unit will, as a result, consist of Medical Officers who will be involved in patients care only. It was in this background that the impugned Act came to be passed.

34. Section 2 is the definition Section.

35. Section 4 states that a person appointed to the West Bengal Medical Education Service shall not be transferred to West Bengal health service. Likewise, a person appointed to a post in the Health Service may be transferred to a post in Public Health-cum-Administration Unit as a operate unit. However, the State reserves the right to transfer any person from one post to another. Section 12 lays down the option to be exercised. In the unified service, if a person held a teaching post, he may exercise an option either for West Bengal Medical Education Service or West Bengal Health Service. Upon exercise of such option, he is deemed to be appointed to 'he post to which he is deemed to have exercised his option.

36. Under Section 6, the State Government is empowered to declare any under-graduate or post-graduate from medical college or other teaching institution together with the hospital (if attached) to be a non-practising institution. Upon such declaration, the right to indulge in private practice will cease.

37. This is subject to three Provisos:

(a) A person holding a non-teaching post may exercise an option for practice or non-practice. Such option is to be exercised:

(1a) By a person holding non-teaching post;

(1b) Such option could be exercised within a period of 90 days from the date of coming into force of this Act or within the extended period;

(ii) Where the person exercises an option for non-practice, he is allowed six months time to wind up his practice.

(iii) If the option is not so exercised, he can be transferred to any other hospital on such terms and conditions for practice.

38. Sections 7 and 8 talk of cadres in Education Service and Health Service respectively. The Health Service is to include a separate cadre for Public Health-cum-Administration Unit. The former consists of teaching posts while the latter consists of non-teaching posts.

39. Section 9 makes clear that the posts included in the cadre of West Bengal Education Service shall be non-practising. As a compensatory measure for deprivation of practice, a non-practising allowance is provided.

40. Section 10 applies the same formula of non-practice to Public Health-cum-Administration which, as stated above, is separate unit of Health Service. Here again, a non-practising allowance is provided.

41. Section 11 preserves the right of those appointed to a post in the cadre of West Bengal Health Service. In that, he will continue on such post as he occupied in the former West Bengal Health Service. This, of course, will not apply to a person posted in the Public Health-cum-Administration Unit.

42. Section 12 as has already been noted deals with the exercise of option. The said Section is subject to five provisos. They require to be carefully seen.

43. First proviso does not cause much difficulty. It says if a person appointed or deemed to have been appointed to a teaching post in the basic level in the Education Service if he is not selected for promotion or recruitment as a lecturer, he is liable to be transferred to a non-teaching post. The period within which he has to qualify for promotion or such recruitment is five years from the date of appointment to the teaching post.

44. The second Proviso lays down where a person opts for West Bengal Medical Education on such appointment to the teaching post, he has to perform his duties in hospital in addition to his duties as teacher of the discipline.

45. The third Proviso deals with a person holding a post connected with Public Health or Administration in the former West Bengal Health Service. He may exercise an option either to the West Bengal Health Service or the the Public Health-cum-Administration. This is qualified by the fourth proviso which states that the persons holding posts connected with Public Health or Administration in the former West Bengal Health Service who did not exercise any option shall be deemed to have exercised option for West Bengal Health Service where practice is permissibly.

46. The last of the provisos states that if the persons holding administrative post in the former West Bengal Health Service who did not exercise any option shall be deemed to have exercised the option either for West Bengal Health Service or for Public Health-cum-Administration respectively.

47. Section 13 fills up the newly created West Bengal Health Service in phases by transfer of such of those persons holding the teaching posts but who had not opted for Education Service.

48. Section 14 talks of recruitment to all teaching posts through Service Commission. The Proviso deals with fixation of quota. Sub-section (2A) of this Section which came to be introduced (by amending Section West Bengal Act XIII of 1990) states that a person who is not required to exercise option shall be appointed to a teaching post in the basic level or to a post of lecturer or to any other teaching post in the Education Service. Section 16 fixes the age of retirement of those in the Education Service at 60 years with a possibility of re-employment until the age of 65 years. The only other Section which remains to be seen is Section 20 which says that the Act shall have overriding effects.

49. By a Notification dated 25.5.1990, West Bengal Medical Education Service Cadre and Age of Retirement Rules 1990 were framed.

50. On 13.5.1990, the West Bengal Medical Education Service Pay and Allowance Rules 1990 came to be framed.

51. On 3.3.1993, the West Bengal Health Service Rules were framed, on which date the Rules came into force. Rule 3 emphasises that the Health Service shall consist of a separate unit known as Public Health-cum-Administration Unit. This is in accordance with Section 10. Rule 5 in cataloguing as to the members of the West Bengal Health Service specifies the following five categories of persons:

(i) All members of the former West Bengal Health Service who have not joined the West Bengal Medical Education Service:

(ii) Persons who hold teaching posts in the former West Bengal Health Service who have not joined Medical Education Service but who have opted to join Health Service (this option is to be exercised within 30 days from 3.3.1993);

(iii) Persons who hold posts connected with different health or Administration in the former West Bengal Health Service and who have opted for Health Service or the cadre of Public Health-cum-Administration (here again the option is to be exercised within 30 days from 3.3.1993);

(iv) Those falling under Clauses (ii) and (iii) who had not exercised the option for the West Bengal health Service and who are deemed to have exercised as option for the West Bengal Health Service or for the cadre for Public Health-cum-Administration by a deeming clause.

(v) All persons newly recruited through Service Commission.

52. Rule 6 talks of eligibility of a person to be appointed to a post in public Health-cum-Administration Unit provided the option is exercised as stated above. Here again, the emphasis that all posts in Public Health-cum-Administration are to be non-practising. This again is not in accordance with Section 10.

53. Rule 7 talks of the grades in West Bengal Health Service:

(i) Medical Officers;

(ii) Specialists.

The qualifications for declaration as a Specialist are:

(a) a post-graduate degree, and

(b) at least 5 years as Medical Officer or

(a) a diploma and

(b) at least 8 years experience as Medical Officer.

54. In the latter case, declaration as a Specialist will be only in dearth discipline as mentioned in the said Rule.

55. A Specialist cannot be posted in any of the Health centers, Rural Hospital or Teaching hospital as mentioned in items (a), (b) of (f) Schedule II.

56. Rule 8 is positive in its terms. It states that persons posted in rural health centers, rural hospitals and teaching hospitals shall be engage in private practice. In contradistinction, Rule 9 says that such of those belonging to West Bengal Health Service and who hold posts in (i) all specialised hospital for treatment of T.B., Leprosy and Mental and infectious diseases; (2) all State General Hospitals and State Hospitals situated in the District of Bengal; and (3) all State General Hospitals and State Hospitals in the Districts and City of Calcutta, would be entitled to practice provided the option is exercised in this regard. Here again, the qualification of private practice is not conferred as of right but only a privilege since notwithstanding the option the doctor may be transferred to a post where private practice is not permitted. However, the privilege of private practice could be withdrawn by the Government if it is desirable in public interest. This is confirmed in Rule 10.

57. Rule 11 states the consequences should a doctor opt for private practice like a deduction of 50 per cent of salary, denial of house rent allowance etc.

58. The above is the analysis of the Act and the Rules. Mr. Soli J. Sorabjee argued that without the Constitution of the West Bengal Health Service, the option available under Section 12 would be illusory but as on now the position has changed completely since on 3rd of March, 1993 the State Government constituted the West Bengal Health Service.

(ii) Rules: whether ultra vires?

Rule 8:

The first attack by the appellants is that Rule 8 of the Health Service Rules is ultra vires of Section 2. Rule 8 prohibits private practice altogether where a doctor is posted to the health centers, rural hospitals and teaching hospitals mentioned in Items a, b and f of Schedule II. This is stated to be in conflict with Section 6(2) of the Act. A careful reading of Section 6 clearly discloses that it does not confer a right to practise upon transfer from a teaching institution or a hospital. Rule 8 when read in conjunction with Rule 9 would disclose the differentiation between two categories of posts. Under Rule 8 the bar of private practice is underscored while under Rule 9 permission to private practice is envisaged. If the entire purport of the Act and the

Rules is to reduce private practice to a privilege how could such a right be insisted upon by the exercise of option to join the Health Service. There is a point in barring private practice in the case of such of those doctors posted in primary health centers; rural hospitals. One can even take judicial notice of the fact that the medical facilities in rural areas are scarcely available. As citizens of free country the rural population of India would legitimately expect the Government to give reasonable medical facilities. Such of those in villages and rural areas could only turn to these primary health centers or rural hospitals. The heavy dependence of the rural population on these medical centers should require the doctor to engage his full attention. If private practice is allowed the unfortunate rural folks would be deprived of even the small facility of primary health centers or rural hospital.

59. Category F of Schedule II stands apart. They are educational institutions where medical education will have to flourish on proper lines. If private practice for those professors or teachers is allowed the neglect of such education would only lead to deteriorating standard.

60. At this stage, duties of the teachers may be emphasised.

Every teacher-doctor must endeavour to make his institution a brighter institution - a fragment of Heaven on earth, an El dorado of peace, joy and wisdom. After all, an institution is what its teachers and professors make it even as a nation is what its patriots make it, a religion is what its prophets make it and a home is what its women make it. Without a band of devoted men of medicine who are inspired by a holy zeal, an institution with the paraphernalia of modern conveniences will be like without the spark of life; without soul. When there are all the advantages, it is no virtue if tolerable work alone is turned out. But it is only when there are handicaps mocking at enterprise should the human spirit triumph and establish that the will is an all-conquering force. The greatest men of medicine of the past and the present who have profoundly influenced men's minds have been indomitable spirits who have struggled against tremendous odds.

Inner strength which is not cowed down by adversities, is what is required. If that noble quality is to be nurtured one must have tremendous faith in one's mission. To practise medicine is not a craft but a calling; not a profession but a vocation.

Sincerity of purpose and earnestness of endeavour are the two wings that will bear one aloft to the tower of success. Given these virtues, other qualifications will follow of their own accord.

It is a cold and irresistible fact of logic that doctors exist for the institution and that the institution does not exist for their convenience and profit. It sustains and nourishes them, and it is up to them to cling to it with steadfast loyalty and to toil to promote its highest interests.

"From good to better, daily self-surpassed," has to be our motto. The nature of the profession is such that it definitely demands a spirit of service and sacrifice. After all what lends dignity to any person is his attitude to work and not the emoluments of his office.

"Honour and shame from no condition rise
Act well thy part : there all the honour lies"

The duty of a true teacher-doctor is to instruct, inspire and illumine.

Rules 9 and 10:

To such of those cases to which Rule 9 applies, private practice is permitted on exercise of option. Those are categories of cases falling under Items c, d and e of Schedule II. These non-teaching doctors, who have the privilege of private practice, do so in view of the undertakings and declarations given by them while exercising the option that he shall not acquire any claim for appointment only to practising post in future and that he shall continue to be employed by transfer to any post in the cadre, practising or non-practising, in the exigencies of public service. Therefore, having given an undertaking and being conscious of the implication, the doctor cannot be made to wriggle out and insist upon private practice as of right. It is important to note, in this connection, as to what was the position prior to the Act which is preserved by the saving provision of Section 19. Prior to the Act the former West Bengal Health Service constituted a unified service, under the terms and conditions of the service there was no right to private practice. The Memorandum bearing No. 1Estt/2007/2S-120/64 dated 1st April, 1965 issued by the Government of West Bengal also emphasises this aspect of the matter. In that, no right to private practice as such was conferred.

61. As regards the arguments that upon transfer the status of the doctor is not protected and, therefore, the Act and Rule 7 are arbitrary, unreasonable, there is no substance. Where a teacher-doctor who had not opted to join West Bengal Medical Education Service is transferred to West Bengal Health Service, there is no loss of seniority at all, nor even, is there any loss of pay. It may be, he is posted to some place or institution falling within Items (c) (d) or (e) of Schedule II. It may be even outside Calcutta. He might have even worked earlier in that Station. But important point is that he is not posted to the same post which he occupied earlier but he is transferred to a senior post carrying a higher status with full protection of seniority and emoluments. Besides, in the West Bengal Health Service there is no hierarchy in contradistinction to the Education Service or the Public Health Administrative Unit of West Bengal Health Service. If really, a doctor wanted to remain in the hierarchy he should have chosen to remain in the Education Service. Therefore, in the absence of hierarchy there cannot be loss of status. Then again, the Health Service talks of Medical Officer and a specialist. Therefore, only to either of these categories a person joining West Bengal Health Service could be posted.

62. In view of the above, the two services could be created at different times. Therefore, as a matter of policy, the act seeks to bifurcate the existing health service into two separate services:

(i) dealing with doctors engaged in teaching in the 13 teaching institutions in the State;

(ii) doctors engaged on the curative side and with public health and administration who were not concerned with teaching.

63. Thus, it is obvious that the teaching doctors belonging to West Bengal Medical Education Service would be debarred from private practice.

64. Section 4(3) of the Act is attacked as unconstitutional as it confers an absolute power to the Government to transfer the doctors after having exercised their option for the West Bengal Health Service. From that service they could be transferred to Public Health-cum-Administration Unit which Unit is non-practising. In the absence of any guidelines the exercise of statutory power would be arbitrary in nature. The short answer to this attack is, as stated above, the Public Health-cum-Administration Unit is a part of the Health Service. If transfers are warranted in the exigencies of service and in public interest it cannot be stated that the power conferred under Section 4(3) of the Act is arbitrary. Then again, if private practice is only a privilege and not a right, one can have hardly any complaint.

65. Further contention of Mr. Kapil Sibal, learned Counsel, that under Section 18 the Act is not applied to some teachers like ex-Management Cadre, Emeritus Professor and Dental Surgeons and, therefore, it is discriminatory. It is not so. None of the aforesaid categories of teachers belong to former West Bengal Health Service. The service conditions of a few teacher-doctors of Ex-Management Cadre would obviously be governed by the terms of taking over of the Management. Dental Surgeons belong to a separate service known as the West Bengal Dental Service. Their service condition is guided by the terms and conditions of the said service. It is well-known that Emeritus Professors or eminent teacher-doctors who have retired from the Health Service their services are utilized in view of their eminence and the being paid an honourarium. Therefore, there is no discrimination at all.

66. The argument of Mr. Nariman, learned Counsel that the combined effect of Sections 6, 9, 10 and 11 is to protect private practice which is taken away under Rules 9 and 10. These Sections, in our considered view, provide for total prohibition of private practice in the 13 institutions. Even prior to the impugned Act private practice was allowed to holders of some posts purely on an experimental measure; nor again, was any right to continue in a post which would enable a doctor to have private practice. In the exigencies of service he could always be transferred to a post where private practice is impermissible.

67. With regard to Section 12 it has already been noted as to what exactly is the scope of 4th and the 5th provisos.

68. The 4th proviso deals with persons connected with Public Health and Administration. In the former West Bengal Service those who had not exercised their option would be accommodated in the Health Service in phases while the 5th proviso deals with those holding teaching posts and administrative posts in the former West Bengal Health Service. In the absence of exercise of option they are deemed to belong to the West Bengal Health Service or public Health-cum-Administration Unit. Therefore, to different categories of persons are dealt with. The situation is brought about by

non-exercise of the option

69. Section 14(2A) of the Act uses the word "shall", which no doubt, cannot be construed as mandatory but it should be directory as held by the Calcutta High Court in the impugned Judgment.

70. The argument of Mr. Ganguli is in the unified cadre the system was "pay to the post" while in the newly constituted service a teacher-doctor junior in service will get higher pay. This argument is unacceptable. The post and the designation of the teacher under 1958 Rules was dependent on his entry in the teaching service. The late entry may be due to many reasons:

1. Because of attaining eligibility subsequently.
2. Not to enter the teaching service early.
3. Not being found fit for the Leaching service.

71. As a result, one who had joined earlier in the "Teaching stream" will attain the higher designation earlier than that of a person who had joined at a later stage. By virtue of "pay to the post" as now provided in the new service he is entitled to the scale of his designation. There is no anomaly or discrepancy or unreasonableness as contended.

72. The prescription of different ages of retirement viz. 58 years in WBHS and 60 years for WBMES and a possibility of extension upto 65 years, do not constitute any discrimination, since they belong to different services.

73. In the final analysis, it is difficult to uphold the challenge to the provisions of the Act and the Rules. These provisions merely try to restore the old position of banning private practice with reference to holders of posts in the 13 teaching institutions. Whether there should be a total ban or not is a matter of State Policy with which the Court has least concern. The authorities are uniform in this regard. We would only refer to reserve bank of india v. N.C paliwal . At page 393 it is observed thus:

It is entirely a matter for the State to decide whether to have several to decide whether to have several different cadres or one integrated cadre in its services. That is a matter of policy which does not attract the applicability of equality clause. The integration of non-clerical with clerical services sought to be effectuated by the Combined Seniority Scheme cannot in the circumstances be assailed as violative of the constitutional principle of equality.

(Emphasis supplied)

(ii) Whether there is a fundamental right to practise?

74. No Government doctor can claim right to private practice. Even otherwise, it is a reasonable restriction in the interest of public as held by the High Court of Allahabad in *Dr. Y.P. Singh v. state of U.P.* . At pages 449-59 it is stated thus:

It was submitted on behalf of the petitioners that the field of public health is being served by these petitioners and if they are restrained from doing so, public will be deprived of their services which would not therefore, be in public interest. I do not find any merits in this contention. The petitioners do not give (service) after office hours without charging fees. Their fees cannot be paid by hungry, indigent persons. 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 hospital and dispensaries set up by the Government for public benefit. The right of the petitioners to practise 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 and draws salary from public exchequer he shall not be entitled to do private practice for pecuniary consideration in cash or kind while remaining in Government service. The restriction imposed by the impugned rules merely prescribed conditions which must be observed if the petitioners want to remain in Government service. No medical graduate is entitled to practise as of right unless his name is entered in the rolls of doctors maintained under the Indian Medical Council Act. He can practise if under the relevant existing statute he is registered and granted a certificate to practise as such. He is thereafter entitled to apply for a Government job if there is a vacancy and if he gets that job, he has to abide by the terms and conditions thereof and the rules and regulations governing the employment under the State. For the maintenance of discipline and for social good the rule may prohibit him from private practice for pecuniary consideration in cash or king. It may be that the staff in the Government hospitals and dispensaries may not be sufficient to attend to all the patients who visit the same in large number but that would not mean that those poor patients who remain unattended should be driven to private clinics of these Government doctors to be attended to only on payment of fabulous fees. A rule prohibit in exploitation of the misery of the people by the privileged doctors is in the preponderant interest of the society. It has come in counter-affidavit that teachers of the Medical Colleges have been paying their attention to their private patients which has obstructed the discharged of their duties in teaching Medical students as well as in attending to the patients in the hospitals. To say that if the petitioners would not be allowed to do private practice, they would lose their incentive is to speak against their competence and efficiency as teachers and Government doctOrs. The time which they devote in their private clinics can better be utilised for making researches and further studies in medical science. The reports of the aforesaid Committees point out that private practice has been responsible for neglect of essential parts of the duties of these Government doctors and teachers. It has been stated in para 14 of the counter affidavit that the State Government has been cognizant of the fact that private

practice by the teachers in the Medical Colleges distracts in the Medical Colleges distracts their attention from the task assigned to them, their time and energy is devoted in attending to their patients at private side and the patients who can afford to pay on the private side receive greater attention from them than those who do not possess such means and resources. It was also said that hospital equipment, medicines, laboratory test facilities and the like are diverted and utilised for the treatment and care of the patients in whom the teachers of the Medical Colleges are interested in private side.

The fact that the petitioners' private earnings would be adversely affected in no valid ground to hold that the restriction is not in public interest or is unreasonable. These petitioners are in the employment of Government and they cannot claim as of right to earn any additional income by resorting to private practice. The various reports referred to hereinabove submitted to the government furnish sufficient evidence to come to the conclusion that private practice by the medical practitioners employed in State service would not be beneficial to the interest of general public and to the cause of medical education. It seems that the situation had become so appalling that even the Medical Council of India in its resolution of 24th March, 1976 had to recommend to the State Governments that all posts of teachers of Medical Colleges should be declared full-time and non-practising in order to ensure high standard of medical education and research. The Medical Council consist of experts who lay down curriculum for medical education and provide guidance to teachers and medical practitioners in the matter of medical education. There was no reason for the Government to ignore the aforesaid recommendation of the Medical Council.

75. While agreeing to the above dictum it may only be added that the Health Service of the Government deals with very sensitive issues, the services are concerned with the well-being of the poorer sections of the community. The State Government has endeavoured its best to implement the National Health Policy and the decision of the Medical Council of India. It has also given shape in the form of this Act to the recommendations of the Standing Committee on Health of the West Bengal Assembly.

76. The impugned orders of transfer are not in any way actuated by mala fides but have been passed to effectuate the provisions of the Act the only policy being to provide proper medical facilities as stated above.

77. In view of the above discussion, all the civil appeals will stand dismissed.

78. In the view taken by us, we dismiss all the appeals with costs.

79. We further direct that if there are any proceedings pending in any court including the High Court in which the Provisions of the West Bengal State Health Service Act, 1990 or the provisions of the West Bengal Health Service Rules, 1993 are under challenge, they shall all stand dismissed.

80. The appellants in Civil Appeals Nos. 3394-97 arising out of S.L.P. Nos. 4176, 4192, 4184 and 4185 of 1992 are granted time upto the 10th of August 1993, to exercise their option join the WBMES.