IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

WRIT PETITION NO.1936 OF 2020

1. **Hospitals' Association, Nagpur**,
through the President,
Dr. Ashok Arbat,
Krims Hospitals, Ramdaspeth,
Central Bazar Road, Nagpur,
Maharashtra,
Mob: 9822466640.

2. **Dr. Pradeep Arora**
S/o Brij Kumar,
Aged 63 years,
301, Milestone Park front,
NB Khare Marg,
Opposite Dhantoli Garden,
Dhantoli, Nagpur,
Maharashtra 440012,
Mob: 9823042247. **... Petitioners**

Versus

1. **Government of Maharashtra**,
through the Principal Secretary,
Public Health Department,
G.T. Hospital Compound,
10th Floor, New Mantralaya,
Mumbai 400001.

2. **The Municipal Commissioner,**
Nagpur Municipal Corporation,
Nagpur, Maharashtra 440001. **... Respondents**

Dr. Pradeep Arora, Petitioner No.2, in person.
Shri Subodh Dharmadhikari, Senior Advocate, assisted by Shri Deven Chauhan, Advocate, as *Amicus Curiae*.
Shri Ashutosh Kumbhkoni, Advocate General, assisted by Shri Anand Deshpande, Additional Government Pleader, Shri Manish Bable and Shri Akashy Shinde, Advocate for Respondent No.1.
Shri Jemini Kasat, Advocate for Respondent No.2.
Shri Shreerang Bhandarkar, Advocate for Proposed Intervenor(s).
Shri D.J. Deshpande, Advocate, holding for Shri Anand Parchure, Advocate for Intervenor(s).

CORAM : R.K. DESHPANDE & PUSHPA V. GANEDIWALA, JJ.

DATE OF RESERVING THE JUDGMENT : 6th OCTOBER, 2020

DATE OF PRONOUNCING THE JUDGMENT : 23rd OCTOBER, 2020

JUDGMENT (Per : R.K. DESHPANDE, J.) :

1. The entire world is under the shadow of unprecedented atmosphere and situation, which has arisen due to Coronavirus disease (COVID-19) pandemic outbreak. The disease has spread its tentacles all over the world, which is fighting a war against it. The World Health Organization (WHO) has declared COVID-19 as pandemic on 11-3-2020. Three major challenges were pitted and those were - (i) to prevent the spread-over of the disease, (ii) to detect the persons infected with the disease and its source, i.e. contact tracing, and (iii) to treat the patients of the disease. The WHO has issued interim guidance on 19-3-2020, laying down the laboratory test guiding principles for the patients, who meet the suspected case definition, and the protocol to meet the aforesaid three challenges. On similar lines, the Indian Council for Medical Research (ICMR) in the Department of Health Research, Government of India, has issued the guidelines on 4-4-2020, 9-4-2020, 17-4-2020, 24-4-2020 and 18-5-2020. The guidelines were also issued by the Government of India, Ministry of Health and Family Welfare, on 15-4-2020.

2. The only organ of the Constitution, which shouldered the responsibility to fight this war against COVID-19, is the executive, which was required to formulate the policy for the better prevention of the spread of the dangerous epidemic disease of COVID-19. The executives at the Centre and the States invoked the provisions of the Epidemic Diseases Act, 1897 **(the ED Act)**. Section 2 therein empowers the State Government to take special measures and prescribe regulations as to dangerous diseases. The twin tests need to be satisfied to attract this provision - (i) that the State or any part thereof is visited by, or threatened with, an outbreak of any dangerous disease, and (ii) that the ordinary provisions of the law for the time being in force are insufficient for the purpose. It further empowers the State Government to take or require or empower any person to take any such measures and to prescribe temporary regulations to be observed by the public or any person or class of persons as it deems necessary to prevent the outbreak of such disease or to spread thereof. It further empowers the State Government to determine in what manner and by whom any expenses incurred (including compensation if any) shall be defrayed.

3. In exercise of the power conferred by sub-section (1) of Section 2 of the ED Act, the Maharashtra COVID-19 Regulations, 2020 **('COVID Regulations'**, for short**)**, framed on 14-3-2020, declaring the 'Coronavirus Disease' as dangerous epidemic disease. Regulation 3 therein empowers the appointment of all Divisional Commissioners of Revenue Divisions and all Collectors and Municipal Commissioners as 'Empowered Officer' under sub-section (1) of Section 2 of the ED Act to take such measures as are necessary to prevent the outbreak of COVID-19 or the spread thereof within their respective jurisdictions. The respondent No.2- the Municipal Commissioner, Nagpur, is, therefore, an Empowered Officer for Nagpur. Regulation 4 therein states that all hospitals (Government and Private) should have separate corners for screening of suspected cases of COVID-19. Clause 10 under the said Regulation deals with the implementation of the containment measures stated therein, but not limited to these, in order to prevent spread of the disease.

4. The Parliament has enacted the Disaster Management Act, 2005 **(the DM Act)** to provide for the effective management of disasters and for matters connected therewith or incidental thereto. Section 20 therein deals with the constitution of State Executive Committee, Section 22 deals

with the functions of the State Executive Committee and Section 24 deals with the powers and functions of State Executive Committee in the event of threatening disaster situation. Similarly, the District Authority is also constituted with the powers and functions mentioned under Sections 30 and 34 therein. Section 65 therein deals with the power of requisition of resources, provisions, vehicles, etc., for rescue operations, etc. Section 66 deals with the payment of compensation.

5. On 30-4-2020, the Public Health Department of the State Government issued a notification containing reference to - (i) The Epidemic Diseases Act, 1897, (ii) The Disaster Management Act, 2005, (iii) The Maharashtra Essential Services Maintenance (Amendment) Act, 2011, (iv) The Maharashtra Nursing Home (Amendment) Act, 2006, and (v) The Bombay Public Trusts Act, 1950. On 21-5-2020, this notification was modified/amended by issuing another notification. The said notification is reproduced below :

" NOTIFICATION

No.CORONA -2020 C.R. 97Aro-5
Public Health Department
G.T. Hospital Compund, 10th Floor,
New Mantralaya, Mumbai 400 001.
Dated - 21st May, 2020

References:

1. *The Epidemic Diseases Act, 1897*
2. *The Disaster Management Act, 2005*

3. The Maharashtra Essential Service Maintenance (Amendment) Act, 2011
4. The Maharashtra Nursing Home (Amendment) Act, 2006
5. Bombay Public Trusts Act, 1950 (for short "B.P.T. Act')
6. Public Health Department Notification No. CORONA-2020/C.R.97/ Aro-5 Dated 30 April, 2020

Whereas the State Government is satisfied that the State of Maharashtra is threatened with the spread of Covid-19 epidemic, already declared as a pandemic by World Health Organization;

Whereas the public Charitable Trusts registered under the provisions of the Bombay Public Trusts Act, 1950 (for short 'B P. T. Act') which are running Charitable Hospitals, including nursing homes or maternity homes, dispensaries or any other center for medical relief and whose annual expenditure exceeds Rs.5 Lacs are "State aided public trust" within the meaning of clause 4 of section 41AA;

Whereas the public Charitable Trust covered by aforesaid paragraph are under legal obligation to reserve and earmark 10% of the total number of operational beds for indigent patients and provide medical treatment to the indigent patients free of cost and reserve and earmark 10% of the total number of operational beds at concessional rate to the weaker section patients as per the provisions of section 41AA of the B.P.T. Act;

Whereas a large number of persons including those affected by Covid-19 are in need of treatment and various Hospitals, Nursing Homes, Dispensaries (hereinafter referred as Healthcare Providers) registered under Bombay Nursing Home (Amendment) Act, 2006 are treating such patients;

Whereas many Healthcare Providers in Mumbai, Thane, Navi Mumbai, Panvel and Pune have specific agreements/understanding with General Insurance Public Sector Associations (GIPSA) as a member of Preferred Private Network (PPN) regarding rates of various treatment packages and some Healthcare Providers in Mumbai are not part of GIPSA-PPN;

Whereas many Health Providers situated in State of Maharashtra are not part of GIPSA-PPN and have their own specific agreements/ understanding with various Third Party Administrators (TPA) regarding rates of various treatment packages among various TPAs operating in that Healthcare Provider;

Whereas some hospitals in the State of Maharashtra are neither part of GIPSA-PPN nor having agreements/understanding with any TPA;

Whereas expenses towards treatment of persons insured for IRDA approved healthcare products treated in GIPSA-PPN or network of hospitals empanelled by various TPAs at specific package rates agreed by them are borne by the insurer. However the persons who are not covered by any health insurance

product or who have exhausted their health insurance cover are being charged exorbitantly causing hardship to public in general during the pandemic situation;

Whereas large number grievances regarding exorbitant amount of money being charged by the Healthcare Providers registered under Bombay Nursing Home (Amendment) Act, 2006 causing hardship to the public in general during the COVID-19 pandemic are received;

Whereas section 2 (a) (iii) of the Maharashtra Essential Services Maintenance Act, 2005 defines any service connected with the maintenance of Public Health and Sanitation including hospitals and Dispensaries as Essential Service;

Hence, Now Government of Maharashtra has decided to amend the notification No.CORONA-2020/C.R. 97/Aro-5 Dated 30 April, 2020 and issue the addendum and modification to the extent mentioned below:

Therefore, in exercise of the powers conferred as per the enabling provisions of all the above referred Acts, to redress the grievances regarding exorbitant amount of money charged by Healthcare Providers from the patients who are not covered by any health insurance product or any bilateral agreement/MOU between any hospital and private corporate group and who have exhausted their such health insurance cover, all the Healthcare Providers functioning in the State of

Maharashtra are hereby directed that:

1) The charitable Trusts registered under the provisions of the B.P.T. Act which are running Charitable Hospitals, including nursing home or maternity home, dispensaries or any other center for medical relief shall make all possible efforts to discharge their obligations as per provisions of section 41AA of the B.P.T. Act before applying any charges to any eligible patient.

2) Healthcare providers shall make all attempts to increase their bed capacity [subject to norms prescribed in The Maharashtra Nursing Home (Amendment) Act 2006] to accommodate maximum number of patients. 80% of total operational bed capacity (excluding beds of PICU, NICU, day care, maintenance hemodialysis) will be regulated by rates prescribed below. This applies to both Isolation and Non Isolation beds. That means 80% of Isolation beds available with any Healthcare provider under this notification should be regulated by State Govt./District Collectors/Municipal Commissioners and so also the 80% of Non Isolation beds. Healthcare Providers may charge their rack rates to the remaining 20% beds.

3) Patients belonging to both categories (80% and 20%) can take treatment in NICU, PICU, daycare and hemodialysis at the respective applicable rates on first come first serve basis.

4) For Covid Patients treated at any of the Hospital/Nursing homes/Clinics covered under this notification across Maharashtra, rates shall not be more than rates prescribed in Annexure-C. ***For non-Covid patients rates will be as per Annexure-A read with Annexure-B (if applicable).***

5) There shall be no difference in the quality of treatment being meted out to patients treated against 80% beds (regulated beds) or 20% beds.

6) The Healthcare Providers situated in Mumbai, Pune, Navi Mumbai, Panvel, Thane having agreements/ understanding as member of GIPSA-PPN are prohibited from charging more amount than that applicable to lowest bed category irrespective of availability of bed in the lowest category agreed in their respective GIPSA-PPN agreement /understanding.

7) Many Healthcare Providers are not a part of GIPSA-PPN and have agreements/ understandings with various Third Party Administrators (TPAs) pertaining to package rates for different treatments. Such Healthcare Providers having different package rates for similar treatment with different TPAs shall provide the treatment at lowest package rate prevailing among different TPAs in its facility.

8) Healthcare providers who are not a part of GIPSA-PPN or who do not have any agreement with TPA will not charge more than the rates prescribed in Annexure-A read with Annexure-B as per location and bed strength. These rates shall be different depending upon location of the hospitals (Districts) and number of operational beds. The maximum rates are prescribed as per Annexure-A. The applicable rates for particular hospital depending on its location and bed capacity are as per Annexure-B. Illustration I- For a particular package Hospitals with more than 100 beds in Mumbai, Mumbai Suburban, Thane, Palghar shall not charge more than 100% of the rate prescribed in Annexure A. However Hospitals with more than 100 bed capacity in Pune shall not charge more than 85% of the rate prescribed in Annexure A. Illustration II- For a particular package Hospitals in Pune with 99 to 50 bed capacity shall not charge more than 76.5% of the package rate while Hospitals in Pune city less than 49 bed capacity shall not charge more than 68% of the prescribed package rate as per Annexure-A.

9) Items/Services including Intraocular Lenses (IOL), Pacemaker, Ortho prosthesis, stents, staplers, Guide-wire Catheter, balloon, medical implants, PPE kit etc. which are not part of GIPSA-PPN or TPA package rates, shall not be charged more than 10 percent markup on Net Procurement cost incurred. If any of the items mentioned here are used for more than one

patient then the prescribed cost may be divided among such patients.

10) The Healthcare Providers shall display at a prominent place number of permitted beds [permitted as per The Maharashtra Nursing Home (Amendment) Act 2006], operational beds status of availability of beds as per section 41AA of the B.P.T.Act, 80:20 division of beds i.e. numbers of beds regulated under this notification against which patients as referred by respective District Collectors and Municipal Commissioner would be admitted as well as number of unregulated beds and status of occupancy against all beds in regulated (80%) and non-regulated (20%) category.

11) Healthcare Providers shall display at prominent place the details of rates applicable as per this notification. It is the duty of the concerned Healthcare Provider to explain to the patient/ relatives of the patient details of all types of charges. The Healthcare Provider shall provide this information to Competent Authorities (respective Municipal Commissioner/ District Collector) at a frequency prescribed by them. Municipal Commissioners and District Collectors are advised to develop an online digital platform to update and disseminate occupancy position of beds in various categories.

12) The package rate fixed in this Notification for charging patients is inclusive of Doctors' fees & the Healthcare Provider concerned has the right to call such of its visiting Doctors to render the required services & pay such amount as it decides for the said services out of the package amount so charged. Any denial by the doctors will attract penal action under various Statutes referred to in this Notification including cancellation of MMC Registration.

13) Nursing and other support staff working in the Healthcare Provider shall give full support and extend wholehearted cooperation for the smooth functioning of the Healthcare Provider which comes under Maharashtra Essential Services Maintenance Act, 2005. Any group or union activities against the smooth function of the Healthcare Provider will attract penal provisions under the said Act.

14) Healthcare providers may levy additional charges of not more than five percent (5%) on total bill excluding items mentioned in direction 9 above.

15) The rates prescribed at Annexure A are available for non-Covid patients. For Covid patients rates prescribed as per Annexure C shall be applicable. The rates in Annexure-C shall apply to Covid positive or suspected Covid positive patients referred by competent authorities against

regulated beds (80% of total Isolation beds) in each of the healthcare provider.

Therefore for implementation of the above provisions, the competent authority at the State level shall be the Chief Executive Officer, State Health Assurance Society, Public Health Department, The competent authority at District Level (for areas excluding Municipal Corporations) shall be District Collector and in Municipal Corporation areas the concerned Municipal Commissioner shall be competent authority to take appropriate action as provided in The Epidemic Diseases Act, 1897, The Disaster Management Act, 2005 The Maharashtra Essential Service Maintenance (Amendment) Act, 2011 The Mumbai Nursing Home (Amendment) Act, 2006, The Bombay Nursing Home Registration (Amendment) Act, 2006 and The Bombay Public Trusts Act, 1950 for any violation of these directions.

This notification shall come in effect immediately and would remain in operation till 31st August, 2020.

By order and in the name of Governor of Maharashtra.

Sd/-
(Dr. Pradeep Vyas)
Principal Secretary to Government"

6. In this petition, we are concerned with the following two categories of private hospitals/health care providers and

nursing homes, covered by the notifications dated 30-4-2020 and 21-5-2020 **(**called as **“the notifications in question”)**.

(A) All health care providers situated in the State of Maharashtra other than those in Mumbai, Thane, Navi Mumbai, Panvel and Pune, which are neither part of GIPSA-PPN nor having their own specific agreements/understanding with various Third Party Administrators (TPAs) regarding rates of various treatment packages.

(B) The health care providers in the State of Maharashtra registered under the Bombay Nursing Home (Amendment) Act, 2006, which are neither part of GIPSA-PPN nor having agreements/understanding with any TPA.

7. The directions in the notifications in question in respect of the aforesaid categories of the private hospitals, health care providers **(**called as **“the impugned directions”)** are as under :

(1) The hospitals/health care providers in the State of Maharashtra, which are neither part of GIPSA-PPN nor having agreements/understanding with any TPA shall not charge more than the rates prescribed in Annexure-A read with Annexure-B of the notification dated 21-5-2020 as per the location and bed strength.

(2) For non-COVID patients treated by any hospital, nursing home or clinic covered by the notifications across Maharashtra, the rates will be as per Annexure-A read with Annexure-B (if applicable).

(3) Items or services, including intraocular lenses (IOL), pacemaker, orthoprosthesis, stents, staplers, Guide-wire Catheter, balloon, medical implants, PPE kit, etc., which are not part of GIPSA-PPN or TPA package rates, shall not be charged more than 10% markup on Net Procurement cost incurred. If any of the items mentioned here are used for more than one patient, then the prescribed cost may be divided amongst such patients. The health care providers may levy additional charges of not more than five per cent (5%) of total bill, excluding these items.

(4) The rates prescribed at Annexure-A shall be available for non-COVID patients. For COVID patients, the rates prescribed as per Annexure-C shall be applicable. The rates in Annexure-C shall apply to COVID +ve or suspected COVID +ve patients referred by the competent authorities against regulated beds (80% of the total isolation beds) in each health care provider.

8. The first notification dated 30-4-2020 to remain in force till further orders and the second notification dated 21-5-2020 states that it would remain in operation till 31-8-2020. It is

informed that this date is further extended up to 30-11-2020. We put a specific question to Shri Kumbhkoni, the learned Advocate General, as to whether there is any possibility of extending operation of these notifications beyond 30-11-2020, the response in lighter vein is that he will have to ask 'Corona' for that. We understand this to mean that it is not possible for him to make any positive statement in this regard. We would not have taken up this matter if the statement had been that the operation of the notifications may not be extended beyond 30-11-2020. However, uncertainty in the situation has compelled us to proceed further in the matter to deal with on merits.

9. We have heard Dr. Pradeep Arora, the petitioner No.2, who appeared in person before us. When we initially heard the matter on 13-8-2020, we thought that the assistance of lawyer is required and, therefore, we requested Shri Subodh Dharmadhikari, the learned Senior Advocate, assisted by Shri D.V. Chauhan, to act as *Amicus Curiae*. Some intervention applications have also been filed bearing Civil Application No.899 of 2020 and Civil Application Stamp No.8972 of 2020 in support of the petitioners and the same are allowed. We have heard the learned counsels Shri S.P. Bhandarkar and Shri D.J. Deshpande, holding for

Shri Anand Parchure, Advocate, for intervenors. We have an advantage of hearing Shri Ashutosh Kumbhkoni, the learned Advocate General, assisted by Additional Government Pleader Shri Anand Deshpande and Advocates Shri Manish Bable and Shri Akshay Shinde.

10. On the competency of the State Government to issue such notifications, it is urged by Dr. Pradeep Arora, supported by Shri Subodh Dharmadhikari, the learned *Amicus Curiae*, that though the notifications in question refer to the provisions of the ED Act, the DM Act, the Maharashtra Essential Service Maintenance (Amandment) Act, 2011, the Maharashtra Nursing Home Registration (Amendment) Act, 2006 and the Bombay Public Trusts Act, 1950, there is no specific reference to any particular provision under these Acts, indicating the source of power to regulate the rates in respect of Non-COVID patients. Inviting our attention to Entry 6 regarding public health and sanitation; hospitals and dispensaries in List II (State List) under Schedule VII as well as to the provision of Section 2 of the ED Act regarding power to take special measures and prescribe the regulation as to the dangerous epidemic diseases in the ED Act and the provision of Section 65 of the DM Act regarding power of requisition of resources, provisions, vehicles, etc., for rescue operations, etc., it is urged that none of these provisions

empower the State Government to regulate the rates recoverable by the private hospitals for providing medical services to Non-COVID patients. The notifications in question are, therefore, beyond the competence of the State Government.

11. It is further urged by them that the Parliament has enacted the Medical Council of India Act, 1956 in exercise of the power under Entry 26 – Legal, medical and other professions in List III (Concurrent List) under Schedule VII of the Constitution. The State Legislature has enacted the Maharashtra Essential Service Maintenance (Amendment) Act, 2011 in exercise of its power conferred under Entry 6 – Public health and sanitation; hospitals and dispensaries in List II (State List) under Schedule VII of the Constitution as also the Maharashtra Nursing Homes Registration Act, 1949. All these enactments are in force, exhausting the power of the Parliament as well as the State Legislature to enact the laws on the concerned subjects. The field is already occupied and, therefore, the State has no competence to issue the notifications in question concerning any of the Items covered by the subjects.

12. It is urged by them that the fundamental right to practice any profession or to carry on any occupation, trade or business under Article 19(1)(g) of the Constitution includes right to charge rates, reasonable, proportionate to or commensurate with the nature and quality of the medical treatment and allied services rendered to Non-COVID patients, which may differ from hospital to hospital. The rates prescribed in Annexure-A read with Annexure-B in the notifications in question are unreasonably low and to insist upon providing the said treatment and services to Non-COVID patients at such rates cannot be justified under Article 19(6) of the Constitution of India. It is further urged that if at all reasonable restrictions are required to be imposed under Article 19(6), it can only be done by a law to be made by the State Legislature and the notifications in question cannot be described as a 'law' under Article 13(3)(a) and (b) of the Constitution of India.

13. Shri Kumbhkoni, the learned Advocate General, submits that Entry 6 in List II (State List) of Schedule VII as well as the provisions of Section 2 of the ED Act and Section 65 of the DM Act empower the State Government to regulate the rates chargeable by the private hospitals to Non-COVID patients also. According to him, there is a medical emergency situation prevailing in the country due to outbreak of COVID-19 and the

death rate is on rise. He submits that during this pandemic situation, the issue of providing medical treatment and allied services to COVID is inherently and intimately connected with Non-COVID patients and no distinction can be made between them. If the State Government has power to regulate the rates charged by the private hospitals to COVID-19 patients, the power to prescribe the rates for Non-COVID patients is also inherent.

14. Shri Kumbhkoni further submits that the rates specified in Annexures- A and B to the notifications in question are the same rates which are part of the Insurance Regulatory and Development Authority (IRDI) approved health care product treated in GIPSA-PPN or network of hospitals empanelled by various TPAs at specific package rates agreed by them and borne by the insurer. Hence, it cannot be said that the same are unreasonably low. According to him, the rates are model, reasonable and competitive. Once the rates are found to be reasonable and competitive, then there is no violation of fundamental right under Article 19(1)(g) of the Constitution of India. He further submits that in the situation prevailing, the Court should refuse to exercise discretionary and extra-ordinary jurisdiction under Article 226 of the Constitution of India.

15. Inviting our attention to the authority to issue notifications in question at the bottom, as “By order and in the name of Governor of Maharashtra”, it is the submission of Shri Kumbhkoni that the executive power of the State Government under Articles 162 and 166 of the Constitution of India is co-extensive with the legislative power under Entry 6 of List II (State List) under Schedule VII of the Constitution of India and the notifications in question can, therefore, be called as the ‘law’ under Article 13(3)(a) and (b), putting reasonable restrictions under Article 19(6) of the Constitution. The reliance is placed upon the decision of the Apex Court in the case of *Association of Medical Superspeciality Aspirants and Residents and others* v. *Union of India and others*, reported in *(2019) 8 SCC 607*.

16. Before proceeding to deal with the controversy on merits, we would like to state the parameters of our jurisdiction in this petition as under :

(A) The notifications in question empower the State Government or the Empowered Officer to regulate 80% isolation and non-isolation beds in the private hospitals/ health care providers, nursing homes, etc., for COVID-19 patients. Such regulations include charging the rates not more than those specified in Annexure-C

to the notifications in question to COVID-19 patients and also taking measures specified therein. **This is not challenged.**

(B) The notifications in question exclude the power of the State Government or the Empowered Officer from regulating remaining 20% isolation and non-isolation beds in the private hospitals/health care providers, nursing homes, etc., for Non-COVID patients. However, as per the impugned directions, the rates chargeable by such hospitals to Non-COVID patients will be as per those specified in Annexures- A and B therein and there is capping put on the rates of items/services specified in the notifications in question for Non-COVID patients along with certain allied directions in relation thereto, called as “the impugned directions”. **This is the extent of challenge in this petition with which we have to deal.**

(C) The first question, which we consider, is whether Entry 6 in List II (State List) of Schedule VII under the Constitution of India dealing with the subject of public health and sanitation; hospitals and dispensaries, empowers the State Legislature to enact any law capping or regulating the rates chargeable by the private hospitals to Non-COVID patients, as has been done by the impugned directions. In other words, the question is regarding the competency of the State Government or the Empowered Officer to issue impugned directions.

(D) The second question, which we propose to deal with, is whether the doctrine of occupied field is attracted in this case, in respect of Entry 6 of List II (State List) under Schedule VII of the Constitution of India, and the notifications in question can be treated to have been issued under Articles 162 and 166 so as to consider the same, as having a 'force of law' under Article 13(3)(a) of the Constitution of India, imposing reasonable restrictions under Article 19(6) therein.

(E) Shri Kumbhkoni, the learned Advocate General, has urged that the impugned directions do not violate the fundamental rights of the petitioner under Article 19(1)(g) of the Constitution of India to practise any profession, or to carry on any occupation, trade or business. We have, however, no hesitation to reject this argument at this stage only and we hold that the impugned directions violate the guarantee of the petitioners contained under Article 19(1)(g) of the Constitution of India.

(F) The entire argument in defence is that the notifications in question put reasonable restrictions under Article 19(6) of the Constitution of India and, therefore, such arguments will have to be tested on the basis of the competency of the State Government or the Empowered Officer.

(G) We do not propose to enter into the controversy as to whether the rates chargeable by the private hospitals/health care providers, nursing homes, etc., to Non-COVID patients in 20% isolation and non-isolation

beds, as specified in Annexures- A and B to the notifications in question, are fair and reasonable. The reason being obvious that in writ jurisdiction, it is not possible for us to enter into the disputed questions of fact, particularly when the petitioners are coming forward with a case that such rates are unreasonably low.

(H) We further proceed to test the competency of the State Government or the Empowered Officer, as the case may be, to justify the action impugned in this petition on the basis of the provisions of Section 2 of the ED Act and Section 65 of the DM Act. Hence, the question would be whether the impugned directions can be protected as one providing for the better prevention of spread of dangerous epidemic disease of COVID-19 or for the effective management of disasters and for the matters connected therewith or incidental thereto.

17. The first question, which we consider, is whether Entry 6 in List II (State List) of Schedule VIII under the Constitution of India dealing with the subject public health and sanitation; hospitals and dispensaries, empowers the State Legislature to enact any law capping or regulating the rates chargeable by the private hospitals to Non-COVID patients? None of the learned counsels appearing for the parties could bring to our notice, though put a specific question, any decision either of the Supreme Court or of the High Court throwing light

on this question. We have gone through Items 1 to 66 in List II. Entry 3 therein includes the fees taken in all Courts except the Supreme Court, Entry 23 therein deals with the power of regulation of mines and mineral development, Entry 32 deals the regulation and winding up of corporations, Entries 46 to 62 deal with the taxes and tolls, Entry 63 relates to rates of stamp duty in respect of documents, and Entry 66 relates to the fees in respect of any of the matters in the List. Similar such entries, including of price control, we find in List I (Union List) and List III (Concurrent List).

18. Thus, we find that wherever the Constitution intended to confer a power on the Parliament or the State Legislature to fix the taxes, tolls, rates, charges, fees or duties, a specific power is conferred, making an entry under the State or Union or Concurrent List, as the case may be. Similarly, wherever the Constitution intended to confer power to regulate any trade, business or profession or such activities or any part of it, such power is specifically conferred under such List upon the Parliament or the State Legislature. Therefore, in our view, Entry 6 regarding public health and sanitation; hospitals and dispensaries in the State List is neither an entry to regulate or control, the charges, fees or rates, nor it can be read to include the power to prescribe or regulate the charges, fees or rates in

respect thereof. **We, therefore, hold that the State Legislature is, therefore, not competent either to frame any law in that respect or to issue any notification regulating the rates chargeable by the private hospitals to Non-COVID patients.**

19. The second question we consider is whether the legislative field covered by Entry 6 in List II of Schedule VII of the Constitution of India, is occupied? In exercise of the power conferred by Entry 6 in List II under Schedule VII, in our view, the State Legislature has enacted the law, i.e. the Maharashtra Essential Services Maintenance Act, 2017 (“MESMA”), to provide for the maintenance of essential services and the normal life of the community and the matters connected therewith or incidental thereto. Section 2 therein defines the term ‘essential service’ in clause (a) to mean and include any service connected with the maintenance of public health and sanitation; hospitals and dispensaries, in sub-clause (iii) therein. Similarly, the another enactment, i.e. the Maharashtra Nursing Homes Registration Act, 1949 (“Nursing Homes Act”) was brought into force containing the definition of ‘nursing home’ under sub-section (4) of Section 2 therein, which we reproduce below :

> ***"2.*** *In this Act, unless there is anything repugnant in the subject or context--*
>
> *...*
>
> *(4) "nursing home" means any premises used or intended to be used, for the reception of persons suffering from any sickness, injury or infirmity and the providing of treatment and nursing for them and includes a maternity home; and the expression "to carry on a nursing home" means to receive persons in a nursing home for any of the aforesaid purposes and to provide treatment or nursing form them.**"***

Both the aforestated enactments are in force in the State of Maharashtra covering the subject in Entry 6 of List II of Schedule VII under the Constitution and the legislative field is already occupied on this subject.

20. We now proceed to consider the question as to whether the notifications in question in question can be treated to have been issued under Articles 162 and 166 so as to consider the same, as having a 'force of law' under Article 13(3)(a) and (b) of the Constitution of India. It is not the stand of the respondents in reply that the notifications in question are issued in exercise of the executive power of the State

Government under Article 162 and 166 of the Constitution of India. Be that as it may, Article 162 states that the executive power of the State extends to the matters with respect to which the State Legislature has power to make laws. The proviso below it, however, states that any matter with which the Legislature of a State has power to make laws, the executive power of the State shall be subject to and limited by the executive power expressly conferred by the Constitution or by any law made by the Parliament or authorities thereof.

21. In our view, once it is held that the State Legislature has enacted a law on the subject of Entry 6 of the State List and the same is in force, the impugned directions putting cap on or regulating the rates chargeable by the private hospitals in accordance with Annexures- A and B to Non-COVID patients, to be called as ‘reasonable restrictions’ under Article 19(6) of the Constitution of India, need to be justified on the basis of any provision of law contained in these two enactments of MESMA and Nursing Homes Act or the rules and regulations, if any, framed therein, so as to call it a ‘force of law’ under Article 13(3)(a) of the Constitution of India. We have not been pointed out any such provision contained in these aforestated two enactments to justify the impugned directions. Merely because at the bottom of the notifications in question it

is written as “By order and in the name of Governor of Maharashtra”, it would not carry a force of law, in view of a proviso below Article 162 of the Constitution of India.

22. We, therefore, hold that the impugned directions made applicable to Non-COVID patients, cannot be treated to have been issued in exercise of the executive power under Articles 162 and 166 read with Article 13(3)(a) of the Constitution of India, having a ‘force of law’, by which reasonable restrictions under Article 19(6) of the Constitution of India can be validly imposed.

23. The third question we consider is whether the extent of challenge to the notifications in question can be justified on the basis of the provisions of the ED Act? The object of the ED Act is to provide for the better prevention of the spread of dangerous epidemic diseases. Section 2 therein deals with the power to take special measures and prescribe regulations as to dangerous epidemic diseases and it is reproduced below :

> ***“2. Power to take special measures and prescribe regulations as to dangerous epidemic diseases.--*** *(1) When at any time the State Government is satisfied that the State or any part*

*thereof is visited by, or threatened with, an outbreak of any dangerous epidemic disease, the State Government, if it thinks fit that the ordinary provisions of the law for the time being in force are insufficient for the purpose, may take, or require or empower any person to take, such measures and, by public notice, prescribe such temporary regulations to be observed by the public or by any person or class of persons as it shall deem necessary to prevent the outbreak of such disease or the spread thereof, and may determine in what manner and by whom any expenses incurred (including compensation if any) shall be defrayed.***"**

Section 2, reproduced above, confers a power to frame regulations declaring the dangerous diseases and special measures or measures required to be taken to prevent the outbreak of any disease or the spread thereof. The COVID Regulations declare the 'Coronavirus Disease' as dangerous disease and it has also been proved to be so. There cannot be any dispute that the provision of Section 2 of the ED Act is attracted.

23.1. The special measures or the measures, contemplated by Section 2 therein, are described in Regulation 10 of the COVID Regulations, which is reproduced below :

"10. *In the event of COVID-19 being reported from a defined geographic area such as village, town, ward, colony, settlement, the Collector of the concerned District / Municipal Commissioner of the concerned Municipal Corporation shall be competent to implement following containment measures, but not limited to these, in order to prevent spread of the disease.*

i. Sealing of the geographical area.

ii. Barring entry and exit of population from the containment area.

iii. Restricting Vehicular Movement in the area.

iv. Closure of schools, office, cinema halls, swimming pools, gyms, etc. and banning mass congregations, functions as may be deemed necessary.

v. Initiating active and passive surveillance of COVID-19 cases.

vi. Hospital isolation of all suspected cases and their contacts.

vii. Designating any Government or Private Building as a quarantine facility.

viii. Any other measure as directed by Public Health Department of Government of Maharashtra.

Staff of all Government Departments and Organisations of the concerned area will be at the disposal of Collector/ Municipal Commissioner for discharging the duty of containment measures. If required, Collector / Municipal Commissioner may requisition the services of any other person also."

23.2. On 31-8-2020, we passed an order directing the State Government to establish its competency to issue the impugned directions, including prescribing the rates for Non-COVID patients, as specified in the Annexure-A and B to the impugned notifications, to be charged by the private hospitals. In response to it, the stand is taken in the affidavit by the State that Section 2 of the ED Act empowers taking of all the 'special measures' or 'measures' to prevent the outbreak or spread of COVID-19 and issuance of the impugned directions, are some of the measures. It is urged by the learned Advocate General that all the Government Hospitals are blocked by COVID-19, as result, the Non-COVID patients entitled to free medial treatment in Government Hospitals are required to be admitted in the private hospitals, which are run on commercial basis and exploiting the poor patients. Reliance is placed upon the general observations of the Apex Court in Paras 71, 72 and 89 to 91 in the case of *Union of India* v. *Moolchand Khairati Ram Trust*, reported in *2018 (8) SCC 321*.

23.3. We have gone through the affidavit filed by the respondents. It is not the stand taken that all the beds in the Government Hospitals are blocked by the COVID-19 patients. It is not the stand taken that there is no space or bed available in

the Government Hospitals to treat the Non-COVID patients free of charge. It is also not the stand taken that the private hospitals are exploiting the Non-COVID patients. There is also no material produced before us to justify such stand which consists of disputed factual position. Be that as it may, we proceed on the footing that such stand is taken and the material to substantiate it, is produced.

23.4. The ED Act nowhere describes or defines the 'special measures' or 'measures' referred to in Section 2 therein. The COVID Regulations describe or define the same. In our view, both these terminologies under the ED Act relate to and is restricted only to COVID-19 patients, for whom the manner in which the expenses incurred (including compensation if any) are to be defrayed, needs to be determined under Section 2 therein. It cannot be extended to Non-COVID patients. If the argument of the State is to be accepted, that the impugned directions are also in relation to Non-COVID patients, it would create the financial burden upon the State Exchequer to incur the expenses for the treatment of Non-COVID patients and payment of compensation also. This, obviously, cannot be the intention of the Legislature. **We, therefore, hold that neither the ED Act nor the COVID Regulations empower the State Government to issue the**

impugned directions in relation to the Non-COVID patients in 20% isolation and non-isolation beds in private hospitals/health care providers and nursing homes.

24. The Parliament has enacted the Disaster Management Act, 2005 to provide for the effective management of disasters and for matters connected therewith or incidental thereto. The notifications dated 30-4-2020 and 21-5-2020 to the extent they are challenged in this petition, are also sought to be justified on the basis of the provision of Section 65 therein, dealing with the power of requisition of resources, provisions, vehicles, etc., for rescue operations, etc., and the same is reproduced below :

> ***"65. Power of requisition of resources, provisions, vehicles, etc., for rescue operations, etc.--****(1) If it appears to the National Executive Committee, State Executive Committee or District Authority or any officer as may be authorised by it in this behalf that –*
>
> > *(a) any resources with any authority or person are needed for the purpose of prompt response;*
> >
> > *(b) any premises are needed or likely to be needed for the purpose of rescue operations;*
> > *or*
> >
> > *(c) any vehicle is needed or is likely to be needed for the purposes of transport of resources from*

disaster affected areas or transport of resources to the affected area or transport in connection with rescue, rehabilitation or reconstruction,

such authority may, by order in writing, requisition such resources or premises or such vehicle, as the case may be, and may make such further orders as may appear to it to be necessary or expedient in connection with the requisitioning.

(2) Whenever any resource, premises or vehicle is requisitioned under sub-section (1), the period of such requisition shall not extend beyond the period for which such resource, premises or vehicle is required for any of the purposes mentioned in that sub-section.

(3) In this section, –

(a) "resources" includes men and material resources;

(b) "services" includes facilities;

(c) "premises" means any land, building or part of a building and includes a hut, shed or other structure or any part thereof;

(d) "vehicle" means any vehicle used or capable of being used for the purpose of transport, whether propelled by mechanical power or otherwise."

24.1. We need to ascertain the terminologies of 'affected area', 'disaster', 'disaster management', 'resources', etc., used under Section 65 and defined under Section 2(a)(d)(e) and (p) of the DM Act, which are reproduced below :

> ***"2. Definitions. -*** *In this Act, unless the context otherwise requires, –*
>
> *(a) "affected area" means an area or part of the country affected by a disaster;*
>
> *(d) "disaster" means a catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or man made causes, or by accident or negligence which results in substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or damage to, or degradation of, environment, and is of such a natural or magnitude as to be beyond the coping capacity of the community of the affected area;*
>
> *(e) "disaster management" means a continuous and integrated process of planning, organising, co-oridinating and implementing measures which are necessary or expedient for –*
>
> *(i) prevention of danger or threat of any disaster;*
>
> *(ii) mitigation or reduction of risk of any disaster or its severity or consequences;*
>
> *(ii) capacity – building;*

(iv) preparedness to deal with any disaster;

(v) prompt response to any threatening disaster situation or disaster;

(vi) assessing the severity or magnitude of effects of any disaster;

(vii) evacuation, rescue and relief;

(viii) rehabilitation and reconstruction;

(p) "resources" includes manpower, services, materials and provisions."

24.2. We can understand the power conferred by Sub-Section (1) of Section 65 reproduced above. Though the notifications in question are said to have been issued under the DM Act, no definite statement is coming forward from the respondents in response to our order dated 31-8-2020 stating that such an order has been issued or the notifications in question are infact issued or deemed to have been issued in exercise of the power under Sub-Section (1) of Section 65 therein. Be that as it may, in our view, scope of DM Act relates to and is restricted to the extent of requisitioning the resources, services, premises, vehicles and capacity building, as defined for the effective management of disaster and for the matters connected or incidental therewith and also to pay

compensation, as specified under Section 66 therein. This, however, does not include the power to issue impugned directions, putting cap on or regulating the rates chargeable to Non-COVID patients in private hospitals/ health care providers and nursing homes. **We, therefore, hold that the State Government is not competent to issue impugned directions in respect of Non-COVID patients under Section 65 of the DM Act.**

24.3. The notifications in question direct that 80% isolation and non-isolation beds in the private hospitals/health care providers and nursing homes shall be regulated for COVID patients by the State Government or District Collector or Municipal Commissioner, as the case may be. In our opinion, this is the combined effect of Section 2 of the ED Act and Section 65 of the DM Act. Section 2 creates a statutory obligation upon the aforesaid authorities to take special measures or measures to save the lives of the citizens from 'Coronavirus' and to determine in what manner and by whom any expenses incurred (including the compensation if any) shall be defrayed. The provision of Section 65 of the DM Act is complementary and supplementary to serve the object and purpose of the ED Act by providing for the effective management of COVID patients by requisitioning the resources,

services, premises, vehicles and capacity building, to overcome the pandemic situation. **The private hospitals/health care providers and nursing homes are denuded of their control and regulation over 80% isolation and non-isolation beds and to that extent they are to be compensated under Section 66 of the DM Act.**

24.4. The condition precedent to exercise the power and shoulder the statutory obligation under Section 2 of the ED Act and Section 65 of the DM Act is to pass an order or issue a notification directing regulation of beds for COVID patients in the private hospitals/health care providers and nursing homes. The notifications in question consciously exclude the regulation of 20% isolation and non-isolation beds, which are to be exclusively used for Non-COVID patients, and the control of it, is retained with such private hospitals. In respect of such beds, neither the State Government nor the Empowered Officer shoulder the statutory obligation under Section 2 of the ED Act or Section 65 of the DM Act. **The impugned directions in the notifications in question is clearly an encroachment over the fundamental rights of the petitioner under Article 19(1)(g) of the Constitution of India to practise any profession or to carry on any occupation, trade or business.**

25. We now proceed to deal with various decisions of the Apex Court, relied upon by Shri Kumbhkoni, the learned Advocate General, to buttress his argument.

25.1. In the decision of the Apex Court in the case of *Union of India* v. *Moolchand Kharaiti Ram Trust*, reported in *(2018) 8 SCC 321*, it was a case where the condition of providing free treatment to 10% Indoor Patients and 25% Outdoor Patients of poor strata of the society was imposed and it was challenged on the ground of violating Article 19(1)(g) of the Constitution of India, which is right to carry on profession, trade or business. It was urged that such condition counts to putting unreasonable fetters on the right of the hospital to carry on the profession. Our attention is invited by the learned Advocate General Shri Kumbhkoni to Paras 71 and 72 of the said decision, which are reproduced below :

> ***"71.*** *It is unfortunate that most of the hospitals are being run on a commercial basis and various ills have sunk in the noble medical profession. Right from wrong reporting, uncalled for investigation inclusive of invasive one, even as to heart and other parts of the body, which are wholly unnecessary, are performed, it is time for soul-searching for such big hospitals in and around Delhi, Gurgaon, etc. and other places. They*

must ponder what they are doing. Is it not a criminal act? Simply by the fact that action is not taken does not absolve the responsibility. Time has come to fix accountability and to set right the evils which have rotten the system. The medical profession had never been intended to be an exploitative device to earn money at the cost of patients who require Godly approach and helping hand of doctors. Every prescription starts from Rx, not from the amount of bill. Being big commercial international hospitals in and around Delhi, they are not above the ethical standards which they have to maintain at all costs even by extending financial help to the have-nots.

72. *The poor cannot be deprived of the treatment by the best physician due to his economic disability in case he requires it. It is the obligation on the medical professionals, hospitals, the State and all concerned to ensure that such person is given treatment and not deprived of the same due to poverty. That is what is envisaged in the Constitution also. On the making of a doctor, the State spends and invests a huge amount of public money and it is the corresponding obligation to serve the needy and the treatment cannot be refused on the ground of financial inability of the patient to bear it. To such an extent,the right and moral obligation can be enforced and that precisely has been done by issuance of the impugned directions to provide free treatment in IPD and OPD to economically weaker sections of society. They have suffered and they are deprived of equal justice and proper treatment due to lack of financial means. It is apparent from the policy*

decision dated 10-6-1949 and also the provisions contained in Section 2 of the Charitable Endowments Act, 1890 that running of hospitals is regarded as a charitable activity. The further rider in the Policy was that such institution claiming allotment should be secular and of non-communal character.

89. *The hospitals now-a-days have five-star facilities. The entire concept has been changed to make commercial gains. They are becoming unaffordable. The charges are phenomenally high,ad at times unrealistic to the service provided. The dark side of such hospitals can be illuminated only by sharing obligation towards economically weaker sections of the society. It would be almost inhuman to deny proper treatment to the poor owing to economic condition and when hospitals claim that they are doing charity at their own level. We find impugned order dated 2-2-2012 is simply an expression to the aforesaid activity which has been given at channelised form.*

90. *We are of the considered opinion that there was no necessity of enacting a law, as the policy/rules under which the land has been obtained, the hospitals were obligated to render free treatment as the land was allotted to them for earning no profit and held in trust for public good. Similar is the provision in the 1981 Rules and apart from that the regulations framed by the Medical Council of India also enjoins upon the medical profession to extend such help and in view of the object of the hospitals, trust, and missionaries it is apparent that there was no necessity of any legislation*

and the Government was competent to enforce in the circumstances, the contractual and statutory liability and on common law basis.

91. *The right to carry on the medical profession has not been restricted, however, what was enjoined upon the respondent hospitals to perform otherwise had been given a concrete shape. Thus, it was permissible to issue urged on behalf of the hospitals that they were doing a charitable work at their own, thus, it could not be said to be a restriction within the meaning contemplated under Article 19(6) for which a law was required. No new restriction has been imposed for the first time under Article 19(6) of the Constitution of India, as such in our opinion, there was no necessity for enacting a law, such guidelines could be issued under the executive powers.***”**

25.2. In our view, it was a case where the condition was imposed for providing free treatment to 10% Indoor Patient and 25% Outdoor Patient of the poor strata of the Society by the charitable hospitals, which were allotted lands by the State Government at highly concessional rates so as to involve them in achieving the larger social objective of providing health and education to the people. This is apparent from the facts before the Apex Court, stated in Para 3 of the said decision, wherein it is further observed that the policy of the Government was to include under the term ‘charitable institutions’, the non-profit

making bodies. The question was whether the imposition of such condition amounts to putting reasonable restrictions to carry on profession, trade or business under Article 19(1)(g) of the Constitution of India.

25.3. In Para 88, the Apex Court has held that it is not a restriction on the right to carry on medical profession, but the medical profession has obligated itself by such conditions by very nature of its professional activity and when the State land is being held which is for the public good with no profit motive, such land is held for the charitable purpose of public good. It is held that the charitable purpose would include the obligation of free treatment to the persons of economically weaker strata of the Society. The very purpose of existence of medical profession and very purpose of policy/Rules to grant land to institutions without public actions that would have fetched market rate and does not amount to putting any fetter to practice the medical profession or to carry on occupation.

25.4. Thus, it was a case where the obligation of providing free treatment to the extent of 10% Indoor Patients and 25% Outdoor Patients of the poor strata of the Society, was attached to the benefits conferred by the State upon the charitable hospitals. In the present case, before us, we are not concerned

either with the allotment of land at concessional rates or with the obligation attached to any such concession granted to the private hospitals. The decision is, therefore, not applicable to the facts of this case. After going through the paras, which Shri Kumbhkoni has pointed out to us, we put him a specific question as to the ratio of the decision, which can be culled out from it and applied to the facts of this case, candidly he submitted that these were the general observations of the Apex Court. **In our view, therefore, the decision has no bearing on the issue involved in the present writ petition, viz. the capping or regulation of rates chargeable by the non-charitable private hospitals to the Non-COVID patients.** But we have kept in mind the observations made by the Apex Court in its full force and accordingly proceeded to consider the matter.

26. In the decision of the Apex Court in the case of *Association of Medical Superspeciality Aspirants and Residents and others* v. *Union of India and others*, reported in *(2019) 8 SCC 607*, it was a case dealing with the controversy in respect of the compulsory bond to be executed for admission to post-graduate medical courses and superspeciality courses in the State of Maharashtra as well as in other States. Considering the challenge of imposition of condition that the

appellants before the Apex Court should serve in the Government Medical Colleges for a period of one year, failing which they have to pay a penalty, it was held by this Court that it is neither arbitrary nor unreasonable. It was observed that the State has a legitimate interest in ensuring the students who benefitted from the infrastructure created by it must contribute back to the community by public service. This decision was the subject-matter of challenge before the Apex Court.

26.1. In the aforesaid decision, the Apex Court noted that the subject of medical education is covered by Entry 25, List III of Schedule VII in the Constitution of India and it is subject to the provisions of Entries 63, 64, 65 and 66 of List I. The legislations can be made by the State Legislature relating to medical education subject to the legislation made by the Parliament. The Apex Court observed that there is no provision contained in the Medical Council of India Act touching upon the subject-matter of compulsory bonds and, therefore, the States are free to legislate on the subject-matter of medical bonds. It is held that the executive authority of the State Government is co-extensive with that of the legislative power of the State Legislature. Even in the absence of any legislation, the State Government has the competence to issue executive orders under Article 162 of the Constitution of India on the matters

over which the State Legislature has the power to legislate. It is held that the State Governments have taken into account the need to provide health care to the people and the scarcity of superspecialities in their State. Consequently, it is held that a policy decision taken by the State Governments to utilize the services of doctors who were beneficiaries of the Government assistance to complete their education, cannot be termed as arbitrary and violative of Article 14 of the Constitution of India.

26.2. On the question of challenge to such compulsory bonds on the touchstone of Article 19(1)(g) of the Constitution of India, the Apex Court has held that the conditions imposed for admission to a medical college will not directly violate the right of an individual to carry on his profession. It is held that the right to carry on the profession would start on the completion of the course and there is no right inheres in an individual to receive higher education. The violation of the guarantee under Article 19(1)(g) in a case pertaining to admission to a college does not at all arise. The condition imposed has a nexus with the professional activity of a doctor on completion of the course.

26.3. The aforesaid decision of the Apex Court clearly deals with the controversy in respect of the compulsory bond to be

executed for admission to post-graduate medical courses and superspeciality courses in the State of Maharashtra as well as in other States. The Apex Court noted that the subject of medical education is covered by Entry 25, List III of Schedule VII in the Constitution of India and the Parliament has enacted the Medical Council of India Act, which contained no provision regarding compulsory execution of bond. The subject being in the Concurrent List, the Apex Court held that the States are free to legislate on the subject-matter of medical bonds and the executive authority of the State is co-extensive with that of legislative power of the State Legislature. The Court has, therefore, held that the executive order issued under Article 162 of the Constitution of India on such aspect is competent. It is further held that the right to carry on profession would start on the completion of course and the violation of guarantee under Article 19(1)(g) of the Constitution of India in a case pertaining to admission to a college does not at all arise. **We are, therefore, of the view that the aforesaid decision of the Apex Court has no bearing on the controversy involved in the present case.**

27. Before the Apex Court, Writ Petition (Civil) No.863 of 2020 (*Sachin Jain* v. *Union of India)*, was filed by a practising Advocate seeking the issuance of an appropriate writ -

(i) directing the Union of India to regulate the cost of treatment of patients infected with COVID-19, at Private/Corporate Hospitals across the country, (ii) directing the Union of India to mandate the private hospitals set up on public land, allotted at concessional rates either on the ground that those hospitals are run by charitable institutions or otherwise, to treat COVID-19 patients either free of cost or on non-profit basis, (iii) directing the Union of India to bear the cost of treatment of COVID-19 patients at private hospitals, for the poor and vulnerable and who have neither the means nor the insurance cover, by expanding the coverage under the Public Health Schemes such as *Ayushman Bharat* and (iv) directing the Union of India to combat the commercialisation of health care by private health sector.

27.1. Considering the position of law and the medical emergency situation prevailing in the country, the Apex Court in its order dated 31-8-2020 passed in the said writ petition considered the question of treatment of COVID-19 patients in the private dedicated hospitals for treatment of such patients. The Court took cognizance of the reports of such hospitals exploiting the patients and the insurance companies objecting to inflated bills raised by the private hospitals. The Court observed that the ‘Health and Hospitals’ is a subject that falls in

Entry 6 of List II of Schedule VII of the Constitution. Though the Government of India prepared the Model Public Health Act dealing with the subject of 'Public Health', the State Governments did not act upon it. Following the mandate of WHO in t he form of International Health Regulations (IHP) of 2005 to which the India is signatory, the National Health Bill, 2009 was proposed by the Government of India, defining therein the first word 'affordable' and the words 'endemic', 'epidemic', 'health care establishment', 'health care provider', etc. The definition of 'health care establishment' included any private institution whether for profit or not, which is operated or designed to provide in-patient and/or out-patient healthcare.

27.2. The Apex Court took note of several provisions of the National Health Bill, including right to health, right to access, use and enjoy, right against discrimination, right to dignity, right to participation and information, right to justice, etc. Emphasizing the provision contained under sub-section (4) of Section 14 therein, which guarantees to every individual, a right to emergency treatment and care, irrespective of his inability to pay the requisite fee or charges, the Apex Court noted that even the Centre is unable to implement the National Health Bill for want of competence.

27.3. Keeping in view the aforesaid position, the Apex Court in the aforesaid PIL issued certain directions, which included the directions in Clauses (ii) and (v), contained in Para 18 of its judgment, which are reproduced below :

> ***"****(ii) In the said meeting, all the States and Union Territories, may be advised to come up, within 2 weeks of the first meeting, with a master plan, both legislative and executive, taking cue from the already existing Public Health Acts of various States and also taking cue from the National Health Bill, 2009, which focuses on the marginalized sections of society.*
>
> *(v) The States which already have Public Health Acts, may be advised to fine-tune their existing enactments, on the model of the National Health Bill, 2009.****"***

27.4. Though the aforesaid writ petition claims the relief of directing the Union of India to regulate the cost of treatment of the patients infected with COVID-19 at the private/corporate hospitals across the country and to combat the commercialization of health care by the private health centres, no directions are issued in that regard, either to the Union of India or to the State Government. **At any rate, the Apex Court was dealing with the cases of the patients**

infected with COVID-19 and admitted in the private/corporate hospitals for treatment. The Apex Court was not dealing with the cases of Non-COVID patients admitted in the private/corporate hospitals. We have not been pointed out anything by the learned Advocate General in regard to the steps which the Government has taken pursuant to the directions contained in Clauses (ii) and (v) in Para 18 of the aforesaid decision. Obviously, if any such steps had been taken to implement the decision of the Apex Court, we would not have any occasion to entertain this writ petition.

28. In view of the aforesaid position, we conclude our judgment by summarizing the points determined as under :

(1) The impugned directions in the notifications in question violate the fundamental right of the petitioners, contained under Article 19(1)(g) of the Constitution of India, to practise any profession or to carry on any occupation, trade or business. The competency of the State Government to impose reasonable restrictions under Article 19(6) of the Constitution of India is examined. **[Para 16(E) and (F)]**

(2) The Legislature of the State is not competent under Entry 6 regarding public health and sanitation; hospitals and dispensaries in List II (State List) of Schedule VII

under the Constitution of India either to frame any law or issue any direction putting cap on or regulating the rates chargeable by the private hospitals for Non-COVID patients. **(Paras 17 and 18)**

(3) The Maharashtra Essential Services Maintenance Act, 2017 and the Maharashtra Nursing Homes Registration Act, 1949, enacted by the State Legislature on the subject covered by Entry 6 of List II (State List) of Schedule VII under the Constitution of India, are in force and the legislative field on the subject is already occupied. **(Para 19)**

(4) The notifications in question cannot be treated to have been issued in exercise of the executive power under Articles 162 and 166 of the Constitution of India, having a 'force of law', as contemplated under Article 13(3)(a) of the Constitution of India, to impose reasonable restrictions under Article 19(6) therein. **(Paras 20 and 21)**

(5) Neither the Epidemic Diseases Act, 1897 nor the Maharashtra COVID-19 Regulations, 2020 empower the State Government to issue the impugned directions in the notifications in question in relation to Non-COVID patients in 20% isolation and non-isolation beds in the private hospitals/health care providers and nursing homes. **(Paras 22 to 22.4)**

(6) The State Government is not competent to issue the impugned directions, as contemplated in the notifications in question, in respect of Non-COVID

patients in exercise of the power under sub-section (1) of Section 65 of the Disaster Management Act, 2005. **(Paras 23 to 23.2)**

(7) The provisions of the Disaster Management Act are complementary and supplementary, serving the purpose and object of the Epidemic Diseases Act. Section 2 of the ED Act enables the better prevention of spread of the epidemic disease, whereas Section 65 of the DM Act provides for the effective management of the patients suffering from the epidemic disease. **(Para 23.3)**

(8) The provision of Section 2 of the ED Act enables taking of special measures and to determine in what manner and by whom the expenses incurred (including compensation if any) shall be defrayed in respect of the patients suffering from the epidemic disease, whereas Section 65 of the DM Act provides for the effective management of the patients suffering from the epidemic disease. None of the provisions, either of the ED Act or DM Act, create any statutory obligation upon the State Government to treat the Non-COVID patients or to take special measures in respect thereof. **(Para 23.3)**

(9) None of the decisions of the Apex Court, relied upon by the learned Advocate General, lay down a ratio governing the controversy decided by us in this judgment. **(Paras 24.1 to 26.3)**

29. Before parting with this judgment, we cannot forget to appreciate the co-operation extended by the petitioner No.2- Dr. Pradeep Arora, appearing in person; Shri Subodh Dharmadhikari, the learned Senior Advocate, assisted by Advocate Shri Deven Chauhan, appointed as *Amicus Curiae*; and Shri Ashutosh Kumbhkoni, the learned Advocate General, assisted by Shri Anand M. Deshpande, the learned Additional Government Pleader. We also appreciate the study and the efforts made by the petitioner No.2- Dr. Pradeep Arora in arguing the matter with proper understanding of law, though he is a doctor by profession. We express our gratitude to Shri Subodh Dharmadhikari, the learned Senior Advocate; and Shri Deven Chauhan, Advocate, for sparing their valuable time, their special guidance in the matter and throwing light on various provisions of the Constitution of India and the laws.

30. In the result, this writ petition is allowed and the following order is passed :

> (1) The notifications dated 30-4-2020 and 21-5-2020, (called as **'the notifications in question'**), issuing the directions (called as **'the impugned directions'**) contained in clauses (4), (8), (9), (11), (12), (13), (14) and (15) to the extent applicable to Non-COVID patients

in the private hospitals/health care providers and nursing homes, etc., are hereby quashed and set aside.

(2) Similar provisions, as are stated in Serial No.(1) above, contained in the order No.MC/94/2020 dated 4-6-2020, issued by the Empowered Officer, i.e. the Municipal Commissioner, Nagpur Municipal Corporation, also stand quashed and set aside.

31. Rule is made absolute in the aforesaid terms. There shall be no order as to costs.

(Pushpa V. Ganediwala, J.) **(R.K. Deshpande, J.)**

Lanjewar, PS

32. At this stage, Shri A.M. Deshpande, the learned Additional Government Pleader for the respondent No.1- State, makes a prayer for stay of the operative part of the judgment for a further period of four weeks. However, keeping in view the position prevailing, we do not find any reason to stay this judgment. The prayer for stay is rejected.

(Pushpa V. Ganediwala, J.) **(R.K. Deshpande, J.)**

Sumit Agrawal, PA