

(1982) 12 KL CK 0001
In the High Court Of Kerala
Case No : O.P. No. 3064 of 1981

Dr. A. K. Sabhapathy

APPELLANT

Vs

The State of Kerala and Others

RESPONDENT

Date of Decision : 14-12-1982

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 254, 254(1), 254(2)

Citation : (1983) KLJ 45

Hon'ble Judges : V. Khalid, J;G. Balagangadharan Nair, J

Bench : Division Bench

Advocate : K. Chandrasekharan, P.N.K. Achan, K. Vijayan and N.N. Sugunapalan, for the Appellant; K. S. Rajamony, P. V. Cheriyan and Government Pleader, for the Respondent

Judgement

Khalid, J.—This original petition comes before us on a reference by a learned Judge of this Court, since the question of law involved is important and the impact of the decision on it on the medical profession would be serious. The petitioner is a member of the Kerala Branch of the Indian Medical Association, the Convenor of the I.M.A. Action Committee for Kerala and the Chairman of the Action Committee for Bihar DMS issue. It is in this representative capacity that he has approached this Court.

2. The first respondent is the State of Kerala and the 2nd respondent, the Union of India. The 3rd respondent represents the Bihar D.M.S-holders' Association of Kerala and the 4th respondent is a Bihar D.M.S. Holder, awarded by the Bihar State Board of Homeopathic Medicine. Respondents 5, 6, and 7 got themselves impleaded since they were vitally interested in the outcome of this original petition.

3. By Ext. P1 dated 8th April 1975 the Registrar of the Kerala University was informed that the Bihar D.M.S. holders could be treated on a par with the integrated D.A.M. of Kerala University for continuing in the profession only. The D.A.M. holders in Kerala, who are diploma holders in the integrated medicine

from the Government Ayurveda College, Trivandrum, had requested for practicing Allopathic course of treatment and Government issued a notification dated 4th May 1977 Ext. P2 by which the Government granted the request made by the Association. This was issued "by virtue of the proviso to section 38 of the Travancore-Cochin Medical Practitioners" Act, 1953 (Act IX of 1953) for short, the T.C. Act. By Ext. P2, the D.A.M. holders in Kerala were permitted to practice in Allopathic medicine. The State Government passed an order dated 28-9-1978, evidenced by Ext. P3, wherein it was stated that the D.M.S. awarded by the Government of Bihar will be held to be on par with the integrated D.A.M. of the Kerala University for continuing in the profession only. Thereafter the 3rd respondent approached the Government with a request for a notification similar to Ext. P2 in respect of Bihar D.M.S. holders also. This request was rejected by the Government order dated 28-9-1978. The request was repeated and the Government stuck to the stand by rejecting the request again by Ext. P4 dated 20-9-1978. The matter was taken up with the Kerala University also. The stand of the University was that the D.M.S of Bihar University had not been recognized as equivalent to Diploma course of Kerala University for purposes of higher course of studies. Thereafter respondents 3 and 4 filed O.P. No. 3661 of 1979 before this Court evidenced by Ext. P6, impugning the order of the Kerala University Registrar (Ext. P5). That O.P. was disposed of by this Court by Ext. P7 judgment with a direction to the first respondent to re-consider the question raised by the petitioner in their two representations and to pass appropriate orders. The State Government pursuant to the directions by this Court issued a Notification, Ext. P8, dated 13-4-1981 in exercise of the powers contained in the first proviso to section 38 of the T.C. Act, exempting Bihar D.M-S. holders from the provisions of that Act. The present O.P. is filed to strike down the first proviso to section 38 of the T.C. Act as unconstitutional and to quash Exts. P2, P3 and P8 orders,

4. The grounds urged in support of the contentions of the petitioner are as fallows. The medical practice and other professions are covered by Entry 26 in List II of the Seventh Schedule of the Constitution of India. The Indian Medical Council Act, 1956, for short the Central Act, passed by Parliament covers this field. Section 15 of the said Act refers to the right of persons possessing qualifications in the Schedules to that Act to be enrolled in a State Medical Register. Persons who are entitled to practice modern medicine and surgery have to be enrolled in a State Medical Register. The schedules in that Act do not take in Bihar D.M.S Diploma and therefore D.M.S. holders are not entitled to practice allopathy. The provisions of the T.C. Act can be implemented only subject to the provisions of the Central Act. Ext. P8 notification issued under the first proviso to section 38 of the T.C. Act offends section 15 of the Central Act. The inconsistency between laws made by Parliament and by the State Legislature is a matter directly covered by Article 254 of the Constitution of India. When there is inconsistency, the State law should yield place to the central enactment to the extent of repugnancy. The first proviso to section 38 of the T.C. Act, in so far as it

is repugnant to section 15 of the Central Act cannot therefore stand. In the absence of previous assent of the President, the first proviso to section 38 of the Act and Ext. P8 notification issued under it cannot have validity and cannot be enforced. The first proviso to section 38 of the T.C. Act does not contain any guidelines for its exercise. The proviso is thus arbitrary in nature and hence violative of the provisions in Article 14 of the Constitution. Exts. P2 and P3 are bad for the reason that they offend the provisions contained in the Central Act.

5. In the counter-affidavit filed by the first respondent, it is stated that the Government was under an obligation for a *denovo* consideration of the request made by the 3rd respondent since this Court by Ext. P7 judgment had directed it to do so. The Government felt that it was only just that the D.M.S. holders of Bihar should also be recognized since the D.A.M. of Kerala University was recognized by it. Since the D.A.M. holders of the Kerala University were permitted to practice modern medicine, the Government did not see any reason why the D.M.S. holders of Bihar should not also be permitted to practice modern medicine and exempt them from the operation of section 38 of the T.C. Act. Ext. P3 order was passed by the Government after mature consideration and in consultation with the University of Kerala and the Director of Indigenous Systems of Medicine. The Government paid due consideration to the allopathic subjects taught for the Bihar D.M.S. course. The exemption is limited to the practice of profession alone and it is not extended to other fields. The first proviso to section 38 does not confer any arbitrary power on the Government and it has been exercised only with due care and caution. It is further reiterated in the counter affidavit that in taking the decision with regard to holders of Bihar D.M.S. Diploma, the Government has been guided by the contents of the course undergone by them in matters like unemployment among medical personnel etc. raised in the writ petition. Ext. P2 notification was issued in 1977. The belated challenge of the petitioner against Ext P2 should not be entertained. If that be so, there is no reason why Bihar D.M.S. holders should be discriminated against the D.A.M. holders of Kerala.

6. In the counter-affidavit filed by the respondents 3 and 4, the stand taken by the Government has been endorsed. To the same affect is the averment contained in the counter-affidavit filed by the 5th respondent.

7. We will first dispose of the challenge by the petitioner against Ext. P2. Ext. P2 came into force on 4-5-1977. This writ petition is presented on 25th June 1981. The challenge against Ext. P2 cannot be accepted not only for the reason that the challenge is belated but for the additional and more important reason that no one who will be affected by the invalidation of Ext. P2 is before this Court. By Ext. P2, the D.A.M. holders of Kerala were exempted by the Government from practicing allopathic, medicine. In the absence of any such person on the party array, it is neither permissible nor lawful for this Court to adjudicate upon this question in exercise of its jurisdiction under Article 226 of the Constitution. We, therefore, decline the relief to quash Ext. P2 made by the petitioner in this

Original Petition.

8. What then remains is the challenge against Exts. P3 and P8. In this connection, it is necessary to understand the scope of the relevant provisions of the Indian Medical Council Act, 1956 and the T.C. Act. Section 2(f) defines "medicine" as modern scientific medicine in all branches and includes surgery and obstetrics but does not include veterinary medicine and surgery. Section 2(h) defines "recognized medical qualification" as any of the medical qualification included in the schedules. Section 2(k) defines "State Medical Register" as a register maintained under any law for the time being in force in any State regulating the registration of practitioners of medicine. This original petition and the contentions raised therein have to be disposed of primarily with reference to section 15 of the Central Act- Section 15(1) of the Central Act reads:

15. Right of persons possessing qualifications in the Schedules to be enrolled- subject to the other provisions contained in this Act, the medical qualifications included in the Schedules shall be sufficient qualification for enrollment on any State Medical Register

Section 15(2) (b) is also relevant, which is extracted:

(2) Save as provided in section 25, no person other than a medical practitioner enrolled on a State Medical Register.

(b) shall practice medicine in any State.

9. At the outset, we may state that the schedule to the Act does not contain any of the qualifications in homeopathy, Ayurveda, Unani or Siddha systems. In other words, the schedule to the Act concerns itself mainly with allopathic medicine. The learned counsel for the petitioner submits that this Act concerns itself only with modern scientific medicine which is the other name for allopathic, medicine. It has nothing to do either with homeopathic or other indigenous systems of medicine. Since respondents 3 to 7 were not enrolled as practitioners in allopathic medicine in the State Medical Register, they cannot u/s 15(2) be allowed to practice allopathic medicine in Kerala. The exemption granted by Ext. P8 notification is thus directly in conflict with the mandate contained in section 15(2)(b) of the Central Act.

10. The Government Pleader and the counsel for respondents 3 to 7 put forward a forceful fight to meet this contention saying that the definition of medicine in section 2(f) of the Central Act would take in both homeopathy and indigenous systems of medicine, for, it would be devaluing those systems to exclude them from the expression "modern scientific medicine." With this contention, they plead that if any one of them has been enrolled in the State Medical Register, they satisfy the conditions laid down in section 15(2) (b) which stipulates only enrolment in a State Register to practice medicine.

11. This question was debated at the bar at some length. This necessitated further investigation into this aspect of the case with reference to the

parliamentary debates when this Act was on the anvil. The learned counsel for the petitioner made available to us the Lok Sabha debates. We have gone through the debates fairly in detail. We find on a close study of the debates that the Indian Medical Council Act concerns itself only with the allopathic medicine and the modern scientific medicine that is contemplated by it is the allopathic medicine. Though the debate contained very valuable and useful speeches, trying to place other systems of medicines also on equal footing as the allopathic medicine, the ultimate result that emerges from the discussion is what we have indicated above. But this observation of ours cannot dispose of this petition. We will have still to examine how far the plea of repugnancy and the attempt of the petitioner to defeat the rights of respondents 3 to 7 could be sustained.

12. The question of repugnancy came up for discussion at the hands of the Supreme Court in a large number of cases. We do not think it necessary to refer to all of them but would rest content by referring to the latest pronouncement of the Supreme Court reported in *M. Karunanidhi Vs. Union of India and Another*, . In that decision, Fazal Ali J., speaking for the constitution Bench observed as follows at page 902 thus:

It would be seen that so far as clause (1) of Article 254 is concerned it clearly lays down that where there is a direct collision between a provision of a law made by the State and that made by Parliament with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the State law would be void to the extent of the repugnancy. This naturally means that where both the State and Parliament occupy the field contemplated by the Concurrent list then the Act passed by Parliament being prior in point of time will prevail and consequently the State Act will have to yield to the Central Act. In fact, the scheme of the Constitution is a scientific and equitable distribution of legislative powers between Parliament and the State Legislatures. First, regarding the matters contained in List I, i.e., the Union List to the Seventh Schedule, Parliament alone is empowered to legislate and the State Legislatures have no authority to make any law in respect of the Entries contained in List I. Secondly, so far as the Concurrent List is concerned, both Parliament and the State Legislatures are entitled to legislate in regard to any of the Entries appearing therein, but that is subject to the condition laid down by Article 254(1) discussed above. Thirdly, so far as the matters in List II, i.e., the State List are concerned, the State Legislatures alone are competent to legislate on them and only under certain conditions Parliament can do so. It is, therefore, obvious that in such matters repugnancy may result from the following circumstances:-

1. Where the provisions of a Central Act and a State Act in the Concurrent List are fully inconsistent and are absolutely irreconcilable, the Central Act will prevail and the State Act will become void in view of the repugnancy.

2. Where, however, a law passed by the State comes into collision with a law passed by Parliament on any Entry in the Concurrent List, the State Act shall

prevail to the extent of the repugnancy and the provisions of the Central Act would become void provided the State Act has been passed in accordance with clause (2) of Articles 254."

3. Where a law passed by the State Legislature while being substantially within the scope of the Entries in the State List entrenches upon any of the Entries in the Central List the constitutionality of the law may be upheld by invoking the doctrine of pith and substance if on an analysis of the provisions of the Act, it appears that by and large the law fall within the four corners of the State List and entrenchment, if any, is purely incidental or inconsequential.

4. Where, however, a law made by the State Legislature on a subject covered by the Concurrent List is inconsistent with the and repugnant to a previous law made by Parliament, then such a law can be protected by obtaining the assent of the President under Article 254(2) of the Constitution. The result of obtaining the assent of the President would be that so far as the State Act is concerned, it will prevail in the State and overrule the provisions of the Central Act in their applicability to the State only. Such a state of affairs will exist only until parliament may at any time make a law adding to or amending, varying or repealing the law made by the State Legislature under the proviso to Article 254.

So far as the present State Act is concerned, we are called upon to consider the various shades of the constitutional validity of the same under Article 254(2) of the Constitution.

The discussion is summed up by the learned Judge in paragraph 24 of the judgment, which reads:

It is well settled that the presumption is always in favor of the constitutionality of a statute and the onus lies on the person assailing the Act to prove that it is unconstitutional. Prima facie, there does not appear to us to be any inconsistency between the State Act and the Central Acts. Before any repugnancy can arise, the following conditions must be satisfied-

1. That there is a clear and direct inconsistency between the Central Act and the State Act
2. That such an inconsistency is absolutely irreconcilable.
3. That the inconsistency between the provisions of the two Acts is of such a nature as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other.

The guideline afforded by the Supreme Court to consider the question of repugnancy and to resolve the said question is seen above. Unless there is a clear and direct inconsistency between the Acts, the Courts will always lean in favor of a co-existence between the two Acts. The same is the position when an apparent inconsistency is not one which is absolutely irreconcilable and the third

condition laid down is that the inconsistency between the two Acts should be of such a nature that compliance with one would be impossible without disobeying the other.

13. With these guidelines we will consider the provisions of the T.C Act vis-a-vis the Central Act. It cannot be disputed that the T.C. Act and the Central Act cover the same field and are legislations on item 26 of List III of the Seventh Schedule. Section 2(g) of the T.C. Act defines "practitioner" as any person ordinarily engaged in the practice of modern medicine or homeopathic medicine or indigenous medicine, as the case may be; section 2(k) defines "register" as a register of practitioners maintained under the Act, and 2(1) defines "registered practitioner" as a practitioner whose name is for the time being entered in a register. Section 23 of the T.C. Act deals with eligibility for registration; section 24 about registration fee and section 27 about application for registration. Section 78 deals with removal from the registers by Council and section 38 about Annual List of practitioners. Section 38 occurring in Part III bears the caption "Medical Practitioners Generally" and stipulates that no person other than those registered under the Act shall practice. The first proviso to it is important and therefore we read section 38 with the first proviso:

38. No person other than (i) a registered practitioner or (ii) a practitioner whose name is entered in the List of Practitioners published u/s 30 or (iii) a practitioner whose name is entered in the list mentioned in section 25 shall practice or hold himself out, whether directly or by implication, as practicing modern medicine, homeopathic medicine, or ayurvedic medicine, siddha medicine or unani tibbi medicine and no person who is not a registered practitioner of any such medicine shall practice any other medicine unless he is also a registered practitioner of that medicine.

Provided that the Government may, by notification in the Gazette, direct that this section shall not apply to any person or class of persons or to any specified area in the State where none of the three classes of practitioners mentioned above carries out medical practices.

This section thus prevents a homeopathic practitioner to practice allopathic medicine unless he is also a registered practitioner of that medicine. This embargo is whittled down by the first proviso. This proviso gives the Government power by issuance of a Notification in the Gazette, to exempt class or classes of persons from the rigour contained in section 38. The attack against this proviso is that it is arbitrary. We will consider this attack. It is contended that this proviso does not contain any built-in safeguards or guidelines for its exercise. It may appear to be so. But we cannot ignore the fact that the authority who is to exercise power under this proviso is the Government. We will have to assume, as is usually, done in such cases, that this power will be exercised by the Government only with extreme caution and care. The counter-affidavit filed by the Government contains sufficient averments that it was after deep study of the course of study of the Bihar D.M.S. holders and after consultation with the

concerned authorities that the Notification was issued. We do not find in the proviso a conferment of an arbitrary power on the Government. The fact that the power vests in the Government is itself a sufficient safeguard. The attack on the proviso on the ground of arbitrariness and violation of Article 14 cannot be sustained.

14. Now about the scope of the proviso. The Central Act does not lay down any qualification for registration. All that section 15 says is that a person whose name is not seen in the State Register shall not practice medicine. The proviso in question does not in terms say that person whose name is not on the rolls of the State Register in one system can practice another system. The proviso only exempts practitioners who want to practice one system without being in the concerned list from the operation of section 38. Neither the Central Act nor the T.C. Act contains any provision which prohibits a person who satisfies the authorities that he possesses the requisite qualification to practice two systems from getting enrolled on two State rolls. If that is so, a practitioner can be a registered practitioner in two registers. The Central Act does not place an embargo on a State from recognizing qualifications for the purposes of two systems, due regard being given to the course of study and subjects taught, for such qualification. If that is possible, nothing prevents a State Government from permitting a practitioner to be on two Rolls. Such a situation appears to be what S. 47 of the T.C. Act contemplates. It would be useful to read section 47 of the T.C. Act in full:

47. If it shall appear to the Government, on the report of the appropriate Council or otherwise, that the course of study and examinations prescribed by any of the medical schools or colleges or bodies conferring the qualifications described in the schedule are not such as to secure the possession by persons obtaining such qualifications of the requisite knowledge and skill for the efficient practice of their profession, or if it shall appear to the Government, on the report of the appropriate Council or otherwise, that the course of study and examinations prescribed by any medical school or college or body conferring a qualification not entered in the schedule are such as to secure the possession of by persons obtaining such qualification of the I requisite knowledge and skill for the efficient practice of their profession, it shall be lawful for the Government, from time to time, by notification in the Gazette, to direct that the possession of any qualification entered in the schedule shall not entitle any person to registration under this Act, or to direct that the possession of any qualification not entered in the schedule shall, subject to the provisions of this Act, entitle a person to be so registered, as this case may be, and the schedule shall there-upon be deemed for all purposes to be altered accordingly.

This section states, among other things, that if the Government is satisfied that the course of study and examinations prescribed by any medical school or college, though not entered in the schedule are such as to secure the possession by persons obtaining such qualifications of the requisite knowledge and skill for

the efficient practice of their profession, such persons can be permitted to be registered by the issuance of a notification in the Gazette. The effect of the section, as we see it, is the conferment of power on the Government to permit enrolment of persons who satisfy it of having secured qualifications with requisite knowledge and skill for the efficient practice of their profession, to be enrolled not Only in one State Register but in more than one. If respondents 3 to 7 are enrolled both in the homeopathic register and the allopathic register, a challenge against their practicing both the systems will not lie. But they are not enrolled in the State Register for allopathic medicine. What falls for consideration is whether in the absence of their names in the allopathic register the petitioner's claim to quash Ext. P8 notification should be granted or not

15. While we see that there is some repugnancy between the Central Act and the T.C Act, in our view that repugnancy is not one that is absolutely irreconcilable. If respondents 3 to 7 get themselves enrolled in the State register for allopathic medicine, they will satisfy section 15(2) of the Central Act to practice that medicine. In the nature of the contentions raised, we are not therefore inclined to hold either that the first proviso to section 38 is unconstitutional or that the notification Ext. P8 issued thereunder is invalid. The notification is strictly in consonance with the first proviso to section 38 of the T.C. Act. The only safeguard necessary is to observe that respondents 3 to 7 can be permitted to practice allopathic medicine only if and when they get themselves enrolled in the State Register for the said medicine. The first respondent appears to be interested in giving due encouragement both to the Ayurvedic medicine and homeopathic medicine, as is seen in its counter-affidavit. We are sure that when applications are made by respondents 3 to 7 to be enrolled in the allopathic register, they would be considered in the spirit of the averments contained in the counter-affidavit. For the foregoing reasons, we hold that the writ petitioner is not entitled to succeed. O.P. fails and is dismissed. No costs.

Before parting with this case, we wish to express our concern at the undue attraction that the allopathic system invites at the hands of persons practicing homeo and other indigenous systems of medicine and indirectly down-grading their own systems. No system can claim superiority over other systems. Each system has its own peculiarities, efficaciousness and healing powers. Ayurvedic system is ancient. Nature has provided indigenous herbs with power to heal dreadful diseases. It is want of research that has stunted the ayurvedic system. Equally so the Unani and other indigenous systems. Homeopathy also has its own efficacy. Undue attraction for allopathy that the other systems display may in due course destroy the systems which were in vogue for centuries. We hope wish that the Government will give due encouragement to the indigenous systems of medicine and not allow them to die out because of negligence and difference.