Dr. A. K. Sabhapathy

Vs

State of Kerala and others

Civil Appeal No. 3847 of 1983

(Smt. M. S. Fathima Beevi, S. C. Agrawal JJ)

22.04.1992

JUDGEMENT

S.C. AGRAWAL, J.:-

1. This appeal by special leave is directed against the judgment of the High Court of Kerala dated October 14, 1982(reported in AIR 1983 Kerala 24). It raises the question relating to the validity of the first proviso to S. 38 of the TravancoreCochin Medical Practitioners' Act, 1953 (hereinafter referred to as'the State Act) and the order dated September 28, 1978 and notification dated April 13, 1981 issued by the Government of Kerala.

2. Section 38 of the State Act reads as under:.

> "38. Persons not registered under this Act etc. not to practise : - No person other than (i) a registered practitioner or (ii) a practitioner whose name is entered in the list of practitioners published under S. 30 or (iii) a practitioner whose name is entered in the list mentioned in S. 25 shall practise or hold himself out, whether directly or by implication as practising modern medicine, homoeopatnic medicine, or ayurvedic medicine, sidda medicine or such medicine shall practise any other medicine unless he is also a registered practitioner of that medicine.
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> 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 on medical practice:
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> Provided further that this section shall not apply to a practitioner eligible for registration under this Act who, after having filed the application for registration, is awaiting the decision of the appropriate council or of the Government in case of appeal.
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> Provided also that this section shall not apply to a practitioner eligible for registration under this Act until the period prescribed for applications under S. 23 expires".

3. The University of Kerala awards a degree as well as a diploma in Integrated Medicine known as DAM. By notification dated May 4, 1977 issued by the Government of Kerala under the first

proviso to S. 38, it was directed that S. 38 of the Act shall not apply to the degree holders of DAM and diploma holders of DAM in practising modern medicine in the State. The Government of Bihar through the Bihar State Board of Homoeopathic Medicine awards a Diploma in Medicine and Surgery called DMS. By order dated September 28, 1978, the Government of Kerala ordered that the said diploma (DMS) awarded by the Government of Bihar will be held in par with the integrated DAM of Kerala University for purpose of continuing in the profession only.

The holders of DMS approached the Government with a request to issue of notification similar to notification dated May 4,1977 to enable them to practise Modern Medicine. The said request was earlier rejected by the Government but ultimately it was acceded and a notification dated April 13, 1981 was issued by the Government of Kerala in exercise Of the power conferred by the first proviso to S. 38 of the State Act whereby it was directed that S. 38 shall not apply to holders of DMS awarded by the Government of Bihar. The aforesaid notifications dated May 4, 1977 and April 13, 1981 and order dated September 28, 1978 were challenged by the appellant before the High Court of Kerala by filing a Writ Petition under Articles 226 of the Constitution. In the said Writ Petition it was submitted by the appellant that after the enactment of the Indian Medical Council Act, 1956 (hereinafter referred to as 'the Central Act'), by Parliament the first proviso to S. 38 of the State Act, being repugnant and in consistent with the provisions of S. 15 of the Central Act, has been rendered void and ineffective and the impugned notifications having been issued in exercise of the power conferred by the said proviso are also void and ineffective. The validity of the first proviso to S. 38 of the State Act was also challenged by the appellant on the ground that it does not contain any guidelines for exercise of the power conferred on the State Government and since it confers arbitrary power on the State Government it is violative of the provisions of Art. 14 of the Constitution.

4. The said Writ Petition was contested by the State Government. On behalf of the State Government it was submitted that since DAM of Kerala University had been permitted practice of modern medicine, the Government did not see any reason why the holders of DMS of Bihar Government should not practice and that the order dated September 28, 1978 was passed by the Government after consultation with the University of Kerala and the Director of Indigenous Systems of Medicine and that due consideration was given by the Government to the allopathic subjects taught in the Bihar DMS course. As regards the notification dated May 4, 1977 relating to DAM diploma holders and DAM diploma holders of Kerala University, it was submitted that the challenge was highly belated.

5. The High Court did not go into the validity of notification dated May 4, 1977 relating to DAM degree holders and DAM diploma holders for the reason that no one who would be affected by the invalidation of the said notification was before the Court and in absence of any such person being impleaded as a party to the Writ Petition, it was neither permissible nor lawful for the Court to adjudicate upon the said question. While considering the validity of the other two notifications relating to DMS diploma holders of Bihar, the High Court examined the provisions of the first proviso to S. 38 in the light of the provisions contained in S. 15 of the Central Act. The High Court rejected the contention urged on behalf of the State Government that the de inition of medicine contained in S. 2(f) of the Central Act would take in both Homoeopathic and indigenous systems of medicine and held that the Central Act concerns itself only with the allopathic medicine and the modern system that is contemplated by it is the allopathic medicine. After examining the enactments the High Court has observed that the State Act and the Central Act are both covered by Entry 26 in List III of the Schedule VII to the Constitution. The High Court, therefore, considered the question whether the first proviso to S. 38 of the State Act was repugnant to S. 15 of the Central Act in the

light of the provisions contained in Article 254 of the Constitution. The High Court has held that the Central Act does not lay down any qualification for registration and all that S. 15 says is that a person whose name is not seen in the State register shall not practise medicine. The High Court has also pointed out that the proviso to S. 38 does not in terms say that a person whose name is not on the rolls of the State register in one system can practise another system. According to the High Court the proviso only exempts practitioners who want to practice one system without being in the concerned list from the operation of S. 38. The High Court was of the view that neither the Central Act nor the State Act contains any provision which prohibits a person who satisfies the authorities that he possesses the requisite qualification to practise two systems from getting enrolled on two State rolls and a practitioner can be a registered practitioner in two registers and the Central Act does not place an embargo on a State from recognising qualifications for the purpose of two systems, due regard being given to the course of study and subjects taught, for such qualification and if that is possible, nothing prevents a State Government from permitting a practitioner to be on two rolls. Although the High Court found some repugnancy between the Central Act and the State Act, it was of the view that the repugnancy was not one that was absolutely irreconcilable. The High Court negatived the challenge to the validity of the first proviso to S. 38 of the State Act on the ground of violation of Art. 14 on the view that the power conferred by the proviso vests in the State Government which is a sufficient safeguard against arbitrary exercise of power. Since the validity of the first proviso to S. 38 of the State Act was upheld the notification dated April 13, 1981 issued under the said proviso was also upheld as valid by the High Court.

6. The appellant is assailing the validity of the first proviso to S. 38 of the State Act on the ground of repugnancy under Art. 254 (1) of the Constitution which provides as under:

> "254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States. - (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect of one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliamerit, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void".

7. In order that Art. 254(1) may apply, two conditions must be fulfilled:

> "(1) The provisions of the Provincial law and those of the Central legislation must both be in respect of a matter which is enumerated in the Concurrent List, and (2) they must be repugnant to each other. It is only when both these requirements are satisfied that the Provincial law will, to the extent of the repugnancy, become void".
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> [A. S. Krishna v. State of Madras, 1957 SCR 399 : (AIR 1957 SC 297) Hoechst Pharmaceuticals Ltd. v. State of Bihar (1983) SCR 130: (AIR 1983 SC 1019)]

8. In the instant case the Central Act as well as the State Act are both laws made in respect of the medical profession which is a matter relating to Entry 26 of the Concurrent List. The question is : Are the provisions of the first proviso to S. 38 of the State Act repugnant to any provision of the Central Act? This question will have to be answered by applying the tests of repugnancy laid down bv this Court. In Deep Chand v. State of. Pttar Pradesh, 1959 Suppl (2) SCR 8 : (AIR 1959 SC

648), this Court has laid down that repugnancy between two statutes may be ascertained on the basis of the following principles

> "(1) Whether there is direct conflict between the two provisions.,
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> (2) Whether Parliament intended to lay down an exhaustive code in respect of the subject matter replacing the Act of the State Legislature; and ..
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> (3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field". (p. 43) (of SCR): (at p. 665 of AIR).

9. After considering the various decisions construing the provisions of Art. 254 this Court in M. Karunanidhi v. Union of India, (1979) 3 SCR 254 : (AIR 1979 SC 898), the Court laid down followin propositions:

> "1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.
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> 2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.
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> 3. That where the two statutes occupy a particular field, there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.
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> 4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field". (p.278) (of SCR) : (at p. 910 of AIR).

10. Keeping in view these principles, we will examine the revisions of the State Act and the Central Act to ascertain the field of operation of the two enactments.

11. As indicated in the Preamble the State Act is a law relating to medical practitioners generally in the State of Travancore-Cochin (now Kerala) and it has been enacted to regulate the qualifications and to provide for the registration of practitioners of modern medicine, homoeopathic medicine and indigenous medicine with a view to encourage the spread of such medicines. In Clause (f) the expression "modern medicine" is defined to mean the allopathic system of medicine. Clause (g) of S. 2 defines "practitioner" to mean any person ordinarily engaged in the practice of modern medicine or homoeopathic medicine or indigenous medicine as the case may be. The expression "qualified practitioner" has been defined in clause (i) to mean a qualification enumerated in the Schedule. The expression "registered practitioner" has been defined in Clause 0) of S. 2 to mean a practitioner whose name is for the time being entered in a register. Under Clause (k), "register" means the Register of practitioners maintained under this Act. Section 3 makes provisions for establishment, incorporation and constitution of the Council of Modern Medicine, the Council of Homoeopathic Medicine and the Council of Indigenous Medicine. Section 19 provides for appointment of a Registrar for each council and under S. 20(1) it is the duty of the Registrar.to keep the registers. Section 20(2) lays down that there shall be separate registers for modern medicine, homoeopathic medicine, ayurvedic medicine, siddha medicine and unani-tibbi medicine. Section 23 lays down the conditions of eligibility for registration of a practitioner and every holder of a

recognised qualification is eligible. Sections 28 and 29 make provision for removal of the name of a person from the register of practitioners. Section 31 (1) imposes a prohibition that no registered practitioner, other than a qualified registered practitioner who has not undergone a course of practical training in surgery or obstetrics under modern medicine to the satisfaction of that appropriate council, shall practise surgery or obstetrics. Section 47 empowers the State Government to alter the list of recognised qualifications mentioned in the Schedule to the Act on the, basis of the report of the appropriate Council. It would thus be seen that the State Act governs the practitioners in the various systems of medicine prevalent in the State by establishing separate councils for each system to regulate the registration of such practitioners and also by prescribing the qualifications which shall be recognised for such registration.

12. The Central Act has been enacted to provide for the reconstitution of the Medical Council of India and the maintenance of medical register for India and for matters connected therewith. The expression "medicine" is defined in Clause (f) of S. 2 to mean modern scientific medicine in all its branches including surgery and obstetrics but excluding veterinary medicine and surgery. In Clause (h) the expression "recognised medical qualification" has been defined to mean any of the medical qualifications included in the Schedules. "State Medical Council" has been defined in Clause (j) to mean a medical council constituted under any law for the time being in force in any State regulating the registration of practitioners of medicine. Clause (k) defines "State Medical Register" to mean a register maintained under any law for the time being in force in any State regulating registration of practitioners of medicine. Section 3 provides for the constitution of the Medical Council of India. Sections 11 to 14 deal with recognition of medical qualifications granted by universities or medical institutions in India as well as by medical institutions outside India. Section 15 enables a person possessing the medical qualifications included in the Schedule to be enrolled on any State Medical Register and it prohibits a person other than a medical practitioner enrolled on a State Medical Register to practise medicine in any State.

13. Section 16 prescribes that every university or medical institution in India which grants recognised medical qualification shall furnish such information as the Indian Medical Council may from time to time require as to the course of study and examinations to be undergone in order to obtain such qualification, as to the ages at which such course of study and examinations are required to be undergone and such qualification is conferred and generally as to the requisites for obtaining such qualification. Section 17 provides for the appointment of medical inspectors for inspection of any medical institution, college, hospital or other institution where medical education is given. Under Section 18 the Medical Council of India has been empowered to appoint visitors to inspect any medical institution, college, hospital or other institution where medical education is given or attend any examination held by any University or medical institution for the purpose of granting recognised medical qualifications. Section 19 provides for withdrawal of recognition of a medical qualification by the Central Government on the basis of the representation by the Medical Council. Section 19-A empowers the Medical Council of India to prescribe the minimum standards for medical education required for granting' recognised medical qualifications by the universities or medical institutions in India. Section 20-A empowers the Medical Council of India to; prescribe the standards of professional conduct and etiquette and a code of ethics for medical practitioners. Section 21 makes provision for maintaining a register of medical practitioners known as the Indian Medical Register, which shall contain the names of all persons who are for the time being enrolled on any State Medical Register and who possess any of the recognised medical qualifications. Section 24(1) provides for removal of the name of a person from the Indian Medical Register if his name has been removed from the State Medical Register in pursuance of any power conferred by or under any law relating to registration of medical practitioners for the time being in force in any

State. Section 27 provides that every person whose name is for the time being borne on the Indian Medical Register shall be entitled according to his qualifications to practise as a medical practitioner in any part of India.

14. The High Court, in our opinion, has rightly held that the expression 'modern scientific medicine' in S. 2(f) of the Central Act refers to the Allopathic system of medicine and that the provisions of the Central Act have been made in relation to medical practitioners practising the said system. This view finds support from the fact that after the enactment of the Central Act, Parliament has enacted the Indian Medicine Central Council Act, 1970 in relation to the system of Indian medicine commonly known as Ayurveda, Siddha and Unani and the Homoeopathy Central Council Act, 1973 in relation to Homoeopathic system of medicine wherein provisions similar to those contained in the Central Act have been made in relation to the said systems of medicine.

15. From the provisions of the State Act, noticed earlier, it is evident that the field of operation of the State Act covers all the systems of medicine, namely, allopathic, ayurvedic, siddha, unani and homoeopathic systems of medicine. Moreover the State Act deals with recognition of qualifications required for registration of a person as a medical practitioner in these systems, conditions for registration of medical practitioners and maintenance of register of practitioners for each system and the constitution of separate councils for modern medicine, homoeopathic medicine and indigenous medicine. As compared to the State Act, the field of operation of the Central Act is restricted and it is confined in its application to modern scientific medicine, namely, the allopathic system of medicine only, wherein also it deals with recognition of medical qualifications which may entitle a person to be registered as a medical practitioner, constitution of the Medical Council of India to advise the Central Government in the matter of recognition or withdrawal of recognition of medical qualifications, to prescribe the minimum standards of medical education required for granting recognised medical qualifications by universities or medical institutions in India and to appoint inspectors and visitors for inspection of any medical institution, college or hospital. It also provides for maintaining the Indian Medical Register and for enrolment of a person possessing recognised medical qualification in the said register and for removal of a person from the said register. The Central Act does not deal with the registration of medical practitioners in the States and it proceeds on the basis that the said registration and the maintenance of State Medical Register is to be governed by the law made by the State. It cannot, therefore, be said that the Central Act lays down an exhaustive code in respect of the subjectmatter dealt with by the State Act. It can, however, be said that the Central Act and the State Act, to a limited extent occupy the same field, viz. recognition of medical qualifications which are required for a person to be registered as a medical practitioner in the allopathic system of medicine. Both the enactments make provision for recognition of such qualifications granted by the universities or medical institution. The third test of repugnancy laid down in Deep Chand's case (AIR 1959 SC 648) (supra) is, therefore, satisfied. Since the grievance of the appellant is confined to the first proviso to Section 38 of the State Act, we would examine whether the provisions of the First Proviso to Section 38 of the State Act are inconsistent with any of the provisions of the Central Act and whether it is possible to reconcile the provisions of the First Proviso to Section 38 of the State Act with the provisions of the Central Act. The main part of Section 38 prohibits a person other than those mentioned in the three categories specified therein, namely, (i) a registered practitioner or (ii) a practitioner whose name is entered in the list published under Section 30 or (iii) a practitioner whose name is entered in the list published under Section 25 to practise or to hold himself out, whether by directly or by implication, as practising modern medicine, homoeopathic medicine, ayurvedic medicine, siddha medicine or unani-tibb'k medicine and it further lays down that no person who is not a registered practitioner of such medicine shall practice any other medicine unless he is also a registered practitioner in that

medicine. In other words, the main part of Section 38 insists upon compliance with the requirements of the provisions of the State Act prescribing the conditions for registration as a medical practitioner which includes holding a recognised qualification, i.e., a qualification enumerated in the schedule to the State Act, in respect of a particular system of medicine in which he wishes to practise. The first proviso to Section 38 enables the State Government to dispense with the requirements of the main part of Section 38 in relation to any person or class of persons or in relation to any specified area in the State where none of the three classes of practitioners mentioned above carries on medical practice. As a result a person can be permitted to practise as a medical practitioner even though he does not possess the recognised qualifications which are,necessary for a person to be registered as a medical practitioner in a particular system of medicine. This provision in so far as it relates to the allopathic system of medicine, runs contrary to the provisions of the Central Act. Under S. 11(1) of the Central Act medical qualifications granted by any university or of India to keep an eye on the imparting of medical institution in India which are included in the First Schedule of the said Act alone are the recognised medical qualificalions and under Section 11(2) a medical qualification granted by any university or medical institution in India which is not included in the First Schedule can be included in the said Schedule by the Central Government by a notification in the Official Gazette after consulting the Medical Council of India. Similar provisions are contained in Section 12 in relation to medical qualifications granted by medical institutions outside India in connection with which there is a scheme of reciprocity which qualifications are included in the Second Schedule and Section 13 relating to medical qualifications granted by medical institutions in India or outside India which are included in Parts I and II of the Third Schedule. Section 14 contains a special provision empowerin the Central Government after consultation with the Medical Council of India to give recognition to medical qualifications granted by medical institutions in any country outside India in respect of which a scheme of reciprocity for the recognition of such medical qualification is not in force. Section 15(1) entitles a erson having recognised medical qualification under the Act to be enrolled in any State medical register. Under sub-section (2) of Section 15 no person other than a medical practitioner enrolled on a State medical register shall practise medicine in any State. The object underlying these provisions in the Central Act is that a person possessing a recognised medical qualification alone is entitled to be registered as a medical practitioner and it is the Central Government alone which can declare a particular medical qualification as a recognised medical qualification in accordance with the provisions contained in Sections 11 to 14 of the Act. Moreover the Central Act, in Section 19-A, empowers the Medical Council of India to prescribe the minimum standards of medical educati__on required for granting recognised medical qualifications by universities or medical institutions in India. Sections 16, 17 and 18 confer powers on the Medical Council medical education by the universities and medical institutions in India and to appoint inspectors and visitors for that purpose. Section 19 enables the Central Government to withdraw the recognition to a medical qualification on the basis of the representation by the Medical Council of India. These provisions indicate that in enacting the Central Act the intention of Parliament was to ensure that only persons having adequate knowledge of the allopathic system of medicine are able to practise medical profession.

16. We are, therefore, unable to agree with the view of the High Court that the Central Act does not lay down the qualifications for registration of a medical practitioner. We may in this contest refer to subsection (1) of Section 15 which postulates the holding of a recognised medical qualificion by a person for being registered in the State Medical Register so as to entitle to practise modern scientific medicine in the State and sub-section (1) of Section 21 which provides that. the Indian Medical Register that is required to be maintained by the Medical Council of India shall contain the name of persons who are for the time being enrolled in the State Medical Register and who possess any of

the recognised medical qualifications.These provisions contemplate that a person an practise in allopathic system of medicine in a State or in the country only if he possesses recognised medical qualification. Permitling a person who does not possess the recognised medical qualification in the allopathic system of medicine would be in direct conflict with the provisions of the Central Act. We are, therefore, of the view that the first proviso to Section 38 of the State Act in so far as it empowers the State Government to permit a person to practise allopathic system of medicine even though he does not possess the recognised medical qualifications for that system of medicine is inconsistent with the provisions of Sections 15 and 21 read with Sections 11, 14 of the Central Act. The said proviso suffers from the vice of repugnancy in so far as it covers persons who want to practice the Allopathic system of medicine and is void to the extent of such repugnancy. Practitioners in allopathic system of medicine must, therefore, be excluded from the scope of the first proviso and it must be confined in its application to systems of medicines other than the Allopathic system of medicine. We, however, wish to make it clear that we have not considered the impact of the provisions contained in the Indian Medicine Central Council Act, 1970 and the Homoeopathy Central Council Act, 1973 on the provisions of the said proviso to Section 38 of the State Act.

17. The notification dated April 13, 1981 has been issued under the first proviso to Section 38 and in express terms it enables holders of DMS diploma of Government of Bihar to practise modern medicine in the State of Kerala and makes them eligible for registration as practitioners in modern medicine. Since the scope of the first proviso has been restricted to exclude the system of modern medicine, the said notification cannot be upheld and must be set aside. The same, however, cannot be said with regard to Order dated September 20, 1978 whereby the DMS diploma awarded by Government of Bihar is to be treated at par with Integrated DAM of the University of Kerala for the purpose of continuing in profession only. The said order has not been issued under the first proviso to Section 38 of the State Act and it cannot be said that it entitles the holder of DMS diploma to get themselves registered as medical practitioner in modern medicine and practise modern medicine. The said order dated September 20, 1978, does not suffer from the same infirmity as the notification dated April 13, 1981.

18. In the result, the appeal is partly allowed. The judgment and order of the High Court of Kerala dated October 14, 1982 is set aside and the Writ Petition filed by the appellant is allowed to the extent that the notification (Ext.P8) dated April 13, 1981 is quashed. No order as to costs.

Appeal partly allowed.

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