

IN THE HIGH COURT OF KERALA AT ERNAKULAM  
Present :

THE HON'BLE MR. JUSTICE ANTONY DOMINIC

Tuesday the 15th day of March 2011/24TH PHALGUNA 1932

WP(C) No. 6579/2011 (V)

PETITIONER:

THE INSTITUTION OF HOMOEOPATHS KERALA,  
HAHNEMANNS CLINIC, TRIVANDRUM-23, REPRESENTED  
BY ITS GENERAL SECRETARY, (DR.B.SURESH,  
DEVI NURSING HOME, VALAYANCHI TRANGARA P.O.,  
PERUMBAVOOR-683 556).

RESPONDENTS:

1. THE UNION OF INDIA, REPRESENTED BY  
THE SECRETARY, MINISTRY OF HEALTH AND  
FAMILY WELFARE, NIRMAN BHAVAN,  
NEW DELHI-110 011.
2. THE STATE OF KERALA, REPRESENTED BY  
ITS SECRETARY, HEALTH AND FAMILY DEPARTMENT  
SECRETARIAT, TRIVANDRUM-695 001.
3. THE CENTRAL COUNCIL OF HOMOEOPATHY,  
61-65, INSTITUTIONAL AREA, OPP. 'D' BLOCK,  
JANAK PURI, NEW DELHI, PIN-110 058,  
REPRESENTED BY ITS CHAIRMAN.
4. THE TRAVANCORE COCHIN MEDICAL COUNCILS,  
COMBINED COUNCIL BUILDING, RED CROSS ROAD,  
THIRUVANANTHAPURAM-695 035, REPRESENTED BY ITS  
REGISTRAR.

\*ADDL.R5 IMPEADED:

ADDL.R5 : THE MALABAR HOMEOPATHY FEDERATION  
REPRESENTED BY ITS PRESIDENT, K.K.PADMANABHAN  
KENT HOMEO CLINIC, CHAMPAD P.O., KANNUR.

*Addl.R5* IS IMPEADED AS PER ORDER DATED 15.3.2011 IN IA.NO.4475/11.

Writ Petition praying inter alia that in the circumstances stated  
in the affidavit filed along with the WP(C) the High Court be pleased  
to stay Ext.P7, pending the above writ petition.

This petition coming on for admission upon perusing the  
petition and the affidavit filed in support of the WP(C) and upon  
hearing the arguments of SRI.A.JAYASANKAR, <sup>MR. HANU GOVIND</sup> Advocate for the Petitioner,  
and of Sri.P.Parameswaran Nair, Assistant Solicitor General of India  
for R1 & R3 and of Advocate Sri.N.Raghuraj for R4, the court passed  
the following

p.t.o

**ANTONY DOMINIC, J.**

**=====**  
**W.P.(C) NO. 6579 OF 2011**

**Dated this the 15<sup>th</sup> day of March, 2011**

**O R D E R**

IA No.4475/11

Having regard to the peculiar facts of this case, the additional 5<sup>th</sup> respondent is impleaded in a representative capacity and the petitioner will take out notice of this writ petition by speed post as also by publication in Mathrubhumi Daily – Calicut, Palakkad and Kannur editions.

WP(C) No.6579/11

Admit. Notice to respondents 1 to 4 by speed post.

2. The interim prayer sought is to stay Ext.P7, GO(MS) No.114/11/H&FWD dated 21/2/2011 by which, Government have exempted unqualified Homeopathic practitioners from the Districts mentioned therein, who have been practicing for 20 years or more as on 1/1/2011 from the requirements of Section 38 of the Travancore Cochin Medical Practitioners Act, 1953 (hereinafter referred to as 'Act'). Petitioner, an association of qualified professional Homeopathic Practitioners in the State of Kerala have filed this writ petition challenging Ext.P7 to the extent

it exempts unqualified Homeopathic Medical Practitioners of the aforesaid category. The main grounds urged by the learned counsel for the petitioner are:-

(1)that the Proviso to Section 38 of the Act does not empower the 2<sup>nd</sup> respondent to issue an order in the nature of Ext.P7.

(2)that the proviso to Section 38 of the Act runs counter to the provisions contained in Section 15 of the Homeopathic Central Council Act, 1973 and for that reason also Ext.P7 is illegal.

3. Section 38 of the Travancore Cochin Medical Practitioners Act, to the extent it is relevant, reads as under:-

*38. Persons not registered under this Act, etc. not to practice. No person other than (i) a registered practitioner or (ii) a practitioner whose name is entered in the list or practitioners published under Section 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 and no persons 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 or persons or to any' specified area in the State where none of the three classes of practitioner mentioned above carries on medical practice.*

4. A reading of Section 38 shows that only those homoeo medical practitioners who satisfy any of the three conditions mentioned in the first part of Section 38 are entitled to practice Homoeopathy in the State of Kerala. By virtue of the proviso to the said section, the Government have reserved to itself the power to direct that the provisions of Section 38 shall not apply to any person, any class of persons or to any specified area in the State where none of the three classes of practitioners mentioned in Section 38 carry on medical practice. Ext.P7 shows that, by this order, the Government have exempted the unqualified Homoeopathic Practitioners practicing in the districts of Palakkad, Malappuram, Kozhikode, Wynad, Kannur and Kasargode, who have been practicing for 20 years as on 1/1/2011 from the requirements of Section 38. This Government Order therefore exempts a class of unqualified Homoeo Practitioners. Such classification has been made adopting duration of their practice

and the area where they practice homoeopathy, as the basis.

5. Power to exempt medical practitioners from a specified area can be invoked by the Government only if the conditions specified in the proviso are satisfied viz., that in the area concerned, none of the three classes of practitioners mentioned in the first part of Section 38 should be carrying on medical practice.

6. In para 12 of the writ petition, petitioner has specifically averred thus:-

<i>Sl No.</i>	<i>District</i>	<i>Government Dispensaries</i>	<i>Taluk Hospitals</i>	<i>Districts Hospitals</i>	<i>Medical Colleges</i>	<i>NHRM</i>
1	Malappuram	48	1	1		31
2	Kozhikode	52	1	1	1	14
3	Palakkad	40	1	1		26
4	Kasargode	28	1			12
5	Wayanad	32	1	1		8
6	Kannur	40	1	1		48
	Total	240	6	5	1	139

*Thus there are 391 Government institutions functioning in the erstwhile Malabar area under the 2<sup>nd</sup> respondent itself, all functioning with qualified registered medical practitioners. In addition to those in the Government sector, there are more than five thousand registered medical practitioners in the Malabar area, with registration granted by the 4<sup>th</sup> respondent for practicing Homoeopathy.*

7. Therefore, the materials produced by the petitioner prima facie show that, in the area in relation to which Ext.P7 has been issued, there are Government Dispensaries, Taluk Hospitals, District Hospitals and Medical Colleges run by the 2<sup>nd</sup> respondent itself where Homoeo treatment is imparted by qualified medical practitioners. Further, according to the petitioner, more than 5000 persons having registration are also practicing in this area. If that be so, the power under proviso to Section 38 of the Act could not have been exercised in the facts of this case.

8. In so far as the contention of the petitioner that the proviso to Section 38 runs counter to the provisions contained in the Homeopathy Central Council Act, 1973 is concerned, it is to be noticed that Section 15 of the Homeopathy Central Council Act deals with the rights of persons possessing qualifications included in Second or the Third Schedule to be enrolled. Section 15(2) reads as under:-

*15.2) No person, other than a practitioner of Homoeopathy who possess a recognized medical qualification and is enrolled on a State Register or the Central Register of Homoeopathy.*  
*(a) shall hold office as Homoeopathic physician or any other office (by whatever designation called) in Government or in any institution maintained by a*

*local or other authority;*  
*(b) shall practice Homoeopathy in any State.*

9. Therefore, it is clear that this Section mandates that only those persons who possess the recognised medical qualification and enrolled in the State Register or Central Register of Homoeopathy can be Homeopathic Practitioners. While the Central Legislation provides as above, proviso to Section 38 enables the State Government to permit unqualified persons to practice Homoeopathy even though they do not possess the recognised qualifications, which are necessary for registration either in the State Register or in the Central Register. Proviso to Section 38, therefore prima facie appear to be in conflict with Section 15 of the Central Act.

10. Learned counsel also pointed out that Section 38 of the Travancore Act referred to above was considered by the Apex Court in **A.K.Sabhpathy v. State of Kerala** (AIR 1992 SC 1310) in the context of the corresponding provisions contained under the Medical Council Act, 1956, where it was held as follows:-

*It cannot, therefore, be said that the Central Act lays down an exhaustive code in respect of the subject matter 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 practicing modern medicine, homoeopathic medicine, ayurvedic medicine, siddha medicine or unani-tibbi 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 practice 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."*

11. The principles laid down by the Apex Court also, prima facie shows that the contention of petitioner deserves acceptance.

12. In view of the above, I am satisfied that the petitioner has made out a prima facie case for an interim order. Therefore, it is ordered that Ext.P7 GO(MS) No.114/11/H&FWD dated 21/2/2011 to the extent it exempts unqualified Homoeo practitioners from the requirements of Section 38 of the Act will stand stayed until further orders.

Hand over the order.

Rp

- Sd -  
ANTHONY DOMINIC, JUDGE

(True Copy)

  
Assistant REGISTRAR