

W.A. No. 495/2021 &
W.P.(C) No. 6674/2021 : 1 :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE THE CHIEF JUSTICE MR.S.MANIKUMAR

&

THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

THURSDAY, THE 13TH DAY OF JANUARY 2022 / 23RD Pousha, 1943

WA NO. 495 OF 2021

AGAINST THE JUDGMENT IN WP(C) 33715/2019 OF HIGH COURT OF KERALA

APPELLANTS/PETITIONERS:

- 1 ALL KERALA PHARMACISTS UNION (AKPU)
REGISTRATION NO.TU19354/2019, REPRESENTED BY ITS GENERAL
SECRETARY, K.P.6/2A, MALIKAPEEDIKAYIL, MAKKAD POST, KAKKODI,
KOZHIKODE DISTRICT, PIN-673 611.
- 2 NOBY C.P.,
AGED 30 YEARS
S/O. GOVINDANKUTTY, POONTHOTTATHIL HOUSE, KODATHUMPOYIL,
KAKKODI POST, KOZHIKODE DISTRICT, PIN-673 611.

BY ADV P.K.RAVI SANKAR

RESPONDENT/S:

- 1 STATE OF KERALA
REPRESENTED BY ITS ADDITIONAL CHIEF SECRETARY, HEALTH AND
FAMILY WELFARE DEPARTMENT, SECRETARIAT,
THIRUVANANTHAPURAM, PIN-695 001.
- 2 DIRECTOR OF HEALTH SERVICES
GENERAL HOSPITAL JUNCTION,
THIRUVANANTHAPURAM, PIN-695 035.
- 3 PHARMACY COUNCIL OF INDIA

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COMBINED COUNCIL'S BUILDING, KOTLA ROAD, AIWAN-E-GHALIB
MARG, NEW DELHI-110 002.

- 4 KERALA STATE PHARMACY COUNCIL
PHARMACY BHAVAN, PUBLIC HEALTH LABORATORY CAMPUS,
THIRUVANANTHAPURAM-695 037.
- 5 ASSOCIATION OF SMALL HOSPITALS AND CLINICS-KERALA
NANMA, TC.14/573(1) PJRRA-53A, MEDICAL COLLEGE,
THIRUVANANTHAUPRAM, KERALA 695 011, REPRESENTED BY ITS
SECRETARY, DR. SUSHAMA ANIL, D/O. LATE V.KRISHNAN NAIR, AGED
56 YEARS, KRISHNA HOUSE, CHELANNUR-8/2, PUNNAD P.O.,
KANNAKARA, KOZHIKODE DISTRICT, PIN-673 616.
- 6 ADDL. INDIAN MEDICAL ASSOCIATION
(SOUGHT TO BE IMPEADED)

BY ADVS.
R1 & R2 BY SRI. TEK CHAND, SR. GOVERNMENT PLEADER
R4 BY SRI.SOORAJ ELANJICKAL
R3 BY S.MANU, ASG
K.I.MAYANKUTTY MATHER
SRI.K.ARJUN VENUGOPAL
SHRI.ASWIN KUMAR M J
UTHARA ASOKAN

R5 BY SRI. JACOB SEBASTIAN

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 13.01.2022,
ALONG WITH WP(C).6674/2021, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:

W.A. No. 495/2021 &
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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE THE CHIEF JUSTICE MR.S.MANIKUMAR

&

THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

THURSDAY, THE 13TH DAY OF JANUARY 2022 / 23RD POU SHA, 1943

WP(C) NO. 6674 OF 2021

PETITIONER/S:

V.K.SAGUNA
AGED 54 YEARS
WIFE OF RAMESHAN, ALAKANANDA HOUSE, MAVILAYI P.O,
KANNUR 670 622.

BY ADVS.
P.B.SAHASRANAMAN
SRI.T.S.HARIKUMAR

RESPONDENT/S:

- 1 STATE OF KERALA
REPRESENTED BY ITS ADDITIONAL CHIEF SECRETARY, HEALTH AND
FAMILY WELFARE DEPARTMENT, SECRETARIAT,
THIRUVANANTHAPURAM 695 001.
- 2 DIRECTOR OF HEALTH SERVICES,
GENERAL HOSPITAL JUNCTION, THIRUVANANTHAPURAM 695 035.
- 3 KERALA STATE PHARMACY COUNCIL
PHARMACY BHAVAN, PUBLIC HEALTH LABORATORY CAMPUS,
THIRUVANANTHAPURAM 695 037.
- 4 UNION OF INDIA,
REPRESENTED BY ITS PRINCIPAL SECRETARY, MINISTRY OF HEALTH
AND FAMILY WELFARE, NIRMAN BHAVAN, NEW DELHI 110 011.
- 5 AKG SMARAKA CO-OPERATIVE HOSPITAL SOCIETY LTD NO. C.401
PERALASSERY P.O, MUNDALLUR, KANNUR 670 002 REPRESENTED BY
ITS SECRETARY.

W.A. No. 495/2021 &
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BY ADVS.
GOVERNMENT PLEADER
DR.S.GOPAKUMARAN NAIR (SR.)
SHRI.P.VIJAYAKUMAR, ASG OF INDIA
SRI.M.SASINDRAN
K.JAGADEESH
G.N.DEEPA
SRI.SOORAJ T.ELENJICKAL
SRI.K.ARJUN VENUGOPAL
SHRI.ASWIN KUMAR M J
SHRI.ARUN ROY
SMT.HELEN P.A.

OTHER PRESENT:

R1 & R2 BY SRI. TEK CHAND SR GP ,
R4 BY SRI.S.MANU, ASG
R1& R2 BY SRI. TEK CHAND, SR. GOVERNMENT PLEADER
R3 BY SRI. SOORAJ T. ELENJICKAL
R5 BY SRI. M. SASINDRAN

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 13.01.2022,
ALONG WITH WA.495/2021, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

W.A. No. 495/2021 &
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Dated this the 13th day of January, 2022.

JUDGMENT

[W.A. No. 495/2021 & W. P. © No. 674 of 2021]

SHAJI P. CHALY.

The captioned appeal and the writ petition are materially connected in respect of two orders passed by the Director of Health Services, Thiruvananthapuram dated 11.01.2018 and 12.01.2018, whereby it is directed that in a hospital pharmacy, in the absence of a Pharmacist or when the Pharmacist leaves the pharmacy, the Medical Officer may arrange dispensing of drugs under his/her direct supervision. Apparently, the said direction is issued taking into consideration Section 42 of the Pharmacy Act, 1948 ('Act, 1948' for brevity).

2. The basic contention advanced by the writ petitioners is that in the aforesaid Government Orders, there is no empowerment under Section 42 of the Act, 1948 to arrange dispensing of medicine by the doctors, and therefore, the said orders are bad being arbitrary and illegal.

3. The learned single Judge, after taking into consideration the facts and figures, held that authorising dispensation of medicines

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under the direct and personal supervision of registered pharmacists has been removed by way of amendment to the Act, 1948, but that does not mean that the word 'dispense' contained in Section 42 of the Act, 1948 is to be construed so narrowly to mean that either the Pharmacist or the Medical Practitioner should deliver the drugs/medicines personally to the patients or to the agents of the patients. It was also held that Section 42 of Act, 1948 being only an ongoing provision intended for the safety of patients, having regard to the various developments took place in the field of medicines during the last several decades, it cannot be said that dispensing of medicines which now come in blister packs under the direct supervision of the Medical Officer would contravene Section 42 of the Act, 1948 in any manner.

4. The paramount contention advanced in the appeal and the writ petition are basically and substantially one and the same that the Government Orders specified above are in violation of Section 42 of the Act, 1948. It is also contended that effectively the direction permits the Medical Officer to delegate the authority given to him/her to dispense medicine in terms of the proviso to Section 42 of the Act, 1948 to any person, whether qualified or not; that the direction is in straight conflict with the provisions contained under Section 42 of the

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Act, 1948; that Section 42 carves out an exception in favour of the Medical Practitioner in the matter of dispensing medicines, considering the qualification of the Medical Practitioner; and that the doctrine of updating construction is to be applied while interpreting its provisions, omitted to take into consideration. It is further contended that the word 'dispense' was defined as per the Pharmacy Practice Regulations, 2015 ('Regulations, 2015' for brevity) and applying the said definition, it can be seen that the Government Orders in question, insofar as they permit Medical Practitioners to arrange dispensing of drugs under his/her supervision, are illegal.

5. It is also contended that the Act, 1948 was brought into force on and with effect from 01.09.1976 and it has undergone amendment even up to the year 2015 and therefore, the principles of updating construction would not apply in the instant case; that the action of the Director of Health Services is nothing but an absolute violation of Section 42 of Act, 1948; that the Regulations, 2015 contained various provisions which would indicate various duties and functions to be performed by the registered pharmacist while dispensing medicines and therefore, delegating the authority given to the Medical Practitioners as per the proviso to Section 42 of Act, 1948 would not empower the Medical Practitioner to arrange dispensing of medicines

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through other persons. Therefore, the sum and substance of the contention advanced by the writ petitioners is that the impugned Government Orders cannot be sustained under law and facts.

6. In the Public Interest Litigation captioned above, it is contended that when the Act, 1948 does not empower the State Government to delegate the duties of pharmacists to other persons, there is no justification for the issuance of the orders; that the right to health is part of the right to life enshrined under Article 21 of the Constitution of India and the said right protected by the Act, 1948 cannot be taken away by the impugned Government Orders. Other contentions are also raised to canvas the proposition that the State Government is not vested with powers to dilute the imperative conditions contained under Section 42 of the Act, 1948.

7. In fact, the learned single Judge has considered the question raised by the appellant with specific reference to the provisions of the Act, 1948 in order to arrive at the conclusions. However, it is contended by the appellant and the writ petitioners that the intention behind the conditions prescribed under the Act, 1948 and the Regulations, 2015 was not seriously adjudicated by the learned single Judge and therefore, there is error of jurisdiction in discharging the discretionary power conferred under Article 226 of the Constitution of

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India and accordingly, the judgment of the learned single Judge requires interference and the directions as are sought for by the petitioners are to be issued.

8. We have heard, Sri. P.K. Ravi Sankar for the appellants, Sri. P. B. Sahasranaman for the writ petitioners, Sri. Tek Chand, learned Senior Government Pleader, Sri. S. Manu, learned Assistant Solicitor General, Sri.M. Saseendran for the 5th respondent in the writ petition, i.e., AKG Smaraka Co-operative Hospital Society Ltd., Mundallur, Kannur, Sri. Jacob Sebastian for the Association of Small Hospitals and Clinics-Kerala having its office at Medical College P.O., Thiruvananthapuram, the 5th respondent in the appeal and Sri. Sooraj T. Elenjickal, learned Standing Counsel for the Kerala State Pharmacy Council, and perused the pleadings and materials on record.

9. The question to be decided in this case is largely dependent upon Section 42 of the Act, 1948, which reads thus:

42. Dispensing by unregistered persons.—(1) On or after such date as the State Government may by notification in the Official Gazette appoint in this behalf, no person other than a registered pharmacist shall compound, prepare, mix, or dispense any medicine on the prescription of a medical practitioner.

Provided that this sub-section shall not apply to the dispensing by a medical practitioner of medicine for his own patients, or with the

general or special sanction of the State Government, for the patients of

another medical practitioner:

[Provided further that where no such date is appointed by the Government of a State, this sub-section shall take effect in that State on the expiry of a period of [eight years] from the commencement of the Pharmacy (Amendment) Act, 1976.

(2) Whoever contravenes the provisions of sub-section (1) shall be punishable with imprisonment for a term which may extend to six months, or with fine not exceeding one thousand rupees or with both.

(3) Cognizance of an offence punishable under this section shall not be taken except upon complaint made by [order of the State Government or any officer authorised in this behalf by the State Government,

or by order of the Executive Committee of the State Council.]”

10. On an analysis of the said provision, it is clear that quite distinct from the pharmacist dealt with under sub-Section (1) of Section 42 of Act, 1942, proviso thereto makes it specific that sub-Section (1) shall not apply to the dispensing of medicine by a Medical Practitioner for his own patients, or with the general or special sanction of the State Government, for the patients of another Medical Practitioner. The Act, 1948 was brought into force in order to ensure that only persons who have attained a minimum standard of

professional education should be permitted to practise the profession of Pharmacy and it was accordingly proposed to establish a Central Council of Pharmacy, which will prescribe the minimum standards of education and approve courses of study and examinations for Pharmacists, and Provincial Pharmacy Councils, which will be responsible for the maintenance of provincial registers of qualified pharmacists. It was also the intention of the Central Government to empower the Provincial Governments to prohibit the dispensing of medicine on the prescription of a Medical Practitioner otherwise than by, or under the direct and personal supervision of a registered pharmacist.

11. In fact, sub-Section (1) of Section 42 of Act, 1948, as it originally stood, contained the following words along with the provision extracted above which was deleted as per Section 16 of Act 24 of 1959:

“except under the direct and personal supervision of a registered pharmacist”

Therefore, it can be seen that what is taken away is the empowerment of the pharmacist to dispense medicines and do the activities prescribed under sub-Section (1) of Section 42 of Act, 1948 through any person, rather than discharging the duties under the direct and

personal supervision of a registered pharmacist. It is also true that Regulation 9 of the Regulations, 2015 stipulates that a registered pharmacist has to discharge the duties by undertaking a pharmaceutical assessment of every prescription presented for dispensing and for the purpose of the Act. Pharmaceutical assessment is defined as the point at which a registered pharmacist applies his knowledge to establish the safety, quality, efficacy and rational use of drug treatments specified by a prescriber. Other duties are also empowered by a pharmacist. According to us, those are all undisputed aspects.

12. But, here, the question arises for consideration is, whether there is any arbitrariness or illegality in the impugned Government Orders. As we have pointed out above, the direction issued by the Director of Health Services to all the District Medical Officers is that the Medical Officers is already empowered under Section 42(1) of Act, 1948 to arrange dispensing of drugs under his/her supervision, in the absence of a pharmacist or when the pharmacist leaves the pharmacy. In our view, the said direction was issued by the State Government apparently under the proviso to Section 42(1) itself in order to ensure that a patient approaching a Government Hospital/pharmacy is not unattended for want of a pharmacist. It is clear from the Government

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Orders that the Medical Officer cannot authorise any person to dispense drugs; but, it is explicit and clear that the Medical Officer is conferred with a power to arrange dispensing of drugs under his/her direct/personal supervision. Which thus means, the power is conferred on the Medical Officer to attend to a prescription issued by a different doctor other than a doctor discharging the duties on a particular point of time. The term 'arrange' can never be read and interpreted "as authorising" and also detached from the word direct supervision of the Medical Officer, in the matter of dispensing drugs without interpreting and evaluating the prescription.

13. Moreover, in a hospital, there would be various qualified persons like junior doctors or other qualified doctors enabling the Medical Officer to seek assistance for the arrangement of dispensing drugs and the power so conferred cannot be termed as a power conferred on a Medical Officer to discharge the functions as per the Government Order through any unqualified or totally strange persons. The intention of the Government Orders is clearly gatherable from the recitals contained under the orders and the said orders would have to be provided with a purposive interpretation, rather than making a pedantic and narrow approach presuming and visualising a situation where the doctor is entrusted for the arrangement of dispensing drugs

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through any person of his choice, irrespective of the requirements of law. As held by the learned single Judge, medicines are now dispensed in consultation with the doctors and the doctors would always be at liberty to arrange to take the medicines from the pharmacy and the dispensation of the same should be under his/her direct/personal supervision.

14. Taking into account the pros and cons and the legal and factual circumstances deliberated above, we are of the clear and considered opinion that the learned single Judge was right in dismissing the writ petitions. Since we have taken a decision accordingly, the Public Interest writ petition captioned above, which is directly and substantially connected with the appeal, has also no legal or factual foundation so as to grant the relief of quashing the Government Orders and issuing the consequential directions interfering with the impugned Government Orders.

15. We also have no reason to think that the Medical Practitioner/Medical Officer would be discharging the duties and responsibilities without adhering to the prescriptions and stipulations contained under the Act, 1948.

16. Upshot of the above discussion is that there is no merit in the appeal and the writ petition, justifying our interference exercising

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the power under Section 5 of the Kerala High Court Act, 1958, and the discretionary power conferred under Article 226 of the Constitution of India.

Needless to say, the writ appeal and the writ petition fail and accordingly, they are dismissed.

sd/-
S. MANIKUMAR,
CHIEF JUSTICE.

sd/-
SHAJI P. CHALY,
JUDGE.

Rv

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APPENDIX OF WP(C) 6674/2021

PETITIONER'S EXHIBITS:

- EXHIBIT P1 TRUE PHOTOSTAT COPY OF THE OUT PATIENT CASE PAPER WHEREIN THE DETAILS OF TREATMENT GIVEN BY THE 5TH RESPONDENT, DATED 04-08-2020
- EXHIBIT P2 TRUE PHOTOSTAT COPY OF THE BILL NO. 197 ISSUED BY THE 5TH RESPONDENT, DATED 28-11-2020
- EXHIBIT P3 TRUE PHOTOSTAT COPY OF THE DISCHARGE SUMMARY ISSUED BY THE BABY MEMORIAL HOSPITAL LTD, KOZHIKODE, DATED 17-12-2020
- EXHIBIT P4 TRUE PHOTOSTAT COPY OF THE COMMUNICATION SENT BY THE 2ND RESPONDENT TO ALL DISTRICT MEDICAL OFFICERS, DATED 24-06-2016
- EXHIBIT P5 TRUE ENGLISH TRANSLATION.
- EXHIBIT P6 TRUE PHOTOCOPY OF THE JUDGMENT REPORTED AS SABIRA VS STATE OF KERALA, 2017(5) KHC 147
- EXHIBIT P7 TRUE PHOTOSTAT COPY OF THE ORDER NO. PH2/96525/17/DHS ISSUED BY THE 2ND RESPONDENT, DATED 11-01-2018.
- EXHIBIT P8 TRUE PHOTOSTAT COPY OF THE ORDER ISSUED BY THE 2ND RESPONDENT NO. PH2/96525/17/DHS, DATED 12-01-2018.
- EXHIBIT P9 TRUE PHOTOSTAT COPY OF THE GOVERNMENT ORDER, G.O(RT) NO. 631/2020/H AND FWD DATED 20-03-2020
- EXHIBIT P10 TRUE PHOTOSTAT COPY OF THE ORDER ISSUED BY THE 4TH RESPONDENT TO ALL STATE, DATED 09.03.2020.

/True Copy/

P.S to Judge.