CASE NO.:
Appeal (civil) 152 of 1994

PETITIONER:
Subhasis Bakshi & Ors.

RESPONDENT:
West Bengal Medical Council & Ors.

DATE OF JUDGMENT: 14/02/2003

BENCH:
S. RAJENDRA BABU & SHIVARAJ V. PATIL

JUDGMENT:

J U D G M E N T

RAJENDRA BABU, J. :

"Thou shall not prescribe, but treat". Does this commandment stand the test of legal scrutiny? This is the stark and simple question to be decided in this case.

The long-winded facts of this case read as follows:

That about 337 persons, including the appellants had completed the diploma course of Community Medical Service in duly recognized institutions in the State of West Bengal and were posted in different parts of the State by the Government of West Bengal. On October 15, 1980 vide Notification No. Health/MA/7076/5M-5/80 the Government of West Bengal made an amendment in the Statute of the State Medical Faculty by introducing Article 6F under Part B, which reads verbatim as under:

"6F: Students who will undergo and complete the requisite course of studies in Medicine/Medical Science (as defined and detailed in the Schedule to this article and hereinafter called as the said Regulations for the Diploma course in Community Medical Services) in Medical Institutions, duly recognized by the State Medical Faculty of West Bengal, shall be admitted into examinations in the subjects laid down in the said regulations and the students passing the examinations shall be granted Diploma with the abbreviation "Dip. C.M.S", by the Governing body of the aforesaid Faculty.

The Governing Body of the aforesaid Faculty shall also maintain a Register of such Diploma holders with a view to regulating, supervising and restricting their practice for the present."

The objective of the said Notification, as detailed therein, is as follows:

" I. Objectives:

i). To provide medical training to a group of personnel to man the Health Centers and Subsidiary Health Centers.
ii). Emphasis is to be given on comprehensive Health Care of the Community including promotive, preventive and curative aspects.
iii). A candidate after successfully completing the course of studies will act as a Team Leader of various categories of Field Workers.
iv). Training in curative medicines is to be imparted in such a way that after completion of training the trainees can treat common diseases among rural population including communicable diseases, malnutritional states, snake bite, insecticidal poisoning etc. Instructions on diseases requiring sophisticated treatment not practicable in Health Centers will be

restricted to the barest minimum. However, such candidates should learn to recognize sign and symptoms of more serious diseases requiring special treatment at referral hospitals (e.g., Sub-divisional or District Hospital) so that such patients may be sent early to these institutions.
v). The training in promotive and preventive aspect of Health Care including Family Planning and Child Care should be undertaken by actual participation in the field work under the supervision of their teachers along with the field workers.
vi). A substantial part of the training will be conducted in Health Centers where they will reside along with their teacher in each term of their course so that they are exposed to the field condition from the beginning of their course."

On 23/6/1987, the Government of West Bengal issued a Corrigendum and the Diploma that was earlier known as 'Diploma in Medicine for Community Physicians' was rechristened as 'Diploma in Community Medical Service.' Apprehending that the re-naming would have a detrimental effect on their rights, the appellants filed W.P. No.7052/89 in the Calcutta High Court. The said Writ Petition was disposed of by the learned Single Judge on the assurance given by the Government Pleader that the State was willing to award the 'Diploma in Community Medical Service' to the successful candidates. It was also assured by the State, in the said petition that it would provide jobs to such candidates in accordance with the stated policy of the Government. The learned Single Judge of the High Court made it clear that the Diploma Holders will not have the right to private practice and that part of the order was not challenged by the appellants at all and entry in the register is only for the right to prescribe medicines and issue certificates.

Aggrieved by the order of the learned Single Judge, the appellants preferred an appeal before the Division Bench of Calcutta High Court. The Division Bench assured that the change in the nomenclature would not affect the Appellants right. The Division Bench reiterated that "the persons holding the Diploma and employed to man the Health Centers and Subsidiary Health Centers would be competent to treat common diseases among rural population including communicable disease, malnutritional states, snake bite, insecticidal poisoning etc". The Division Bench also mentioned the stated Government policy on providing jobs to such Diploma holders. Upon this the High Court opined that in the light of the clarifications made by and on behalf of the State Medical Faculty and the State, there should be no reason for the appellants to entertain any kind of apprehension with regard to their being able to perform functions and duties which they as are entitled to do under the Regulations as amended vide notification dated October 10, 1980. Pertaining to the registration of names in the Register of Diploma holders, the High Court stated that the Register shall be prepared and will be maintained in accordance with and in terms of the Statute 6F and that necessary formalities in that regard will be completed on or before March 31, 1990.

This judgment of the High Court was not complied with by the State. Contempt Application was filed on September 7, 1990 in the High Court. By the time, on November 21, 1990 Director of Health Services, West Bengal vide Order No. HPH/10 'S-3-90/1512 issued Job Description of Community Health Service Officers. While hearing the Contempt Application on November 23, 1990 the High Court accepted the assurance given by the Secretary to the Government in Department of Family Welfare in the presence of Secretary of the Medical Faculty and the State Medical Council that the Government would issue fresh instructions to the Job Description of Community Health Officers. These fresh instructions, were assured, would be issued in accordance with the earlier judgment of the Bench. On December 10, 1990 the aforementioned description was partially modified vide Order No. HPH/10-'S-3-90/1629. By virtue of this Order, the Diploma Holders were allowed to treat common diseases among rural population as provided in the sub-clause (iv) of the objectives to the Notification dated October 15, 1980 and it was also mentioned that item No 17 in the Notice issued under No 1512 dated November 21, 1990 was treated as omitted. Another Order No HPH/10-'S-3-90/1630 was issued on the same day which says that the Diploma Holders were "not permitted to issue Death Certificate, Sickness

Certificate or Medical Fitness Certificates required for Court cases" and also directed that the treatment advice and prescription made by them were to be counter signed by the BMO or the MO-in-charge. While on March 6, 1991 vide Memo No. HPH/10-'S-3/90/222 the Order No HPH/10-'S-3-90/1630 dated December 10, 1990 was cancelled. By Order dated May 7, 1991 the High Court disposed of the contempt proceeding by making the direction to the Government that they would maintain a register of the Diploma Holders in terms of the Article 6F of the original Notification. It is also clarified by the High Court in the Order that the "Registration by the State Medical Faculty will authorize the Community Health Service Officers to continue to discharge their duties as specified in the duty chart in the Health Centers/Subsidiary Health Centers as long as they are in service." Upon this high note, the first round of litigation before the Calcutta High Court was concluded.

At this juncture, by virtue of the order of the High Court, the appellants had obtained the right to treat common diseases among rural population including communicable diseases, malnutritional states, snake bites, insecticidal poisoning etc. But their grievance is that the consequential right of issuing certificates of sickness or death, prescriptions etc. was taken away by Notification No. HPH/10-'S-3-90/1630 dated November 21, 1990. It is also the case of the appellants that item no 17 of the said notification was cancelled. Challenging the denial of 'consequential rights to treat' such as right to issue prescription or certificates of sickness or death, the second round litigation was initiated.

The appellants anchored their case on a Notification No. 1076-Medical dated May 17, 1915 issued by the then Financial Department, Government of Bengal. The relevant portion of the said Notification is extracted hereunder:

"In exercise of the power conferred by clause (1) of Section 18 of the Bengal Medical Act, 1914 (Bengal Act, VI of 1914) and on the recommendation of the Bengal council of Medical Registration, the Governor in Council is pleased to direct that a title, certificate of qualification, Diploma or license granted by the Governing Body of the State Medical Faculty, to any person shall subject to the provisions referred to in the said Clause entitled the holder of such title, certificate of qualifications, Diploma or License to have his name entered in the Register of Registered practitioners maintained under Section 15 of the said Act."

By virtue of this Notification read with Sections 15 and 18 of the Bengal Medical Act, 1914, the appellants argues that they are entitled to enter their names in the Register of Registered Practitioners maintained by the Bengal Council of Medical Practitioners. Urging this a Writ Petition was filed before the learned Single Judge of Calcutta High Court. The Petition was allowed in favour of these appellants, subject to the condition that they are not allowed to pursue Private Practice and making it clear that their only right is to prescribe medicines and issue certificates and this part of the order became final.

Aggrieved by this order of the learned Single Judge of the High Court, the Bengal Medical Council preferred an appeal before the Division Bench of Calcutta High Court. The Division Bench allowed the appeal and set-aside the decision of the learned Single Judge. There are two main reasons given by the Division Bench to vacate the Writ. They are - (1). "The sine qua non for the application and operation of Section 18 are- (a) satisfaction of the Council that any particular qualification is sufficient guarantee for the requisite knowledge or skill for efficient medical practice, (b) report to that effect by the Council to the Government, and (c) direction by the Government, on acceptance of such report, by notification in the Official Gazette. We do not think that in 1915, the Council could in any way be satisfied as to the quality or merit of a course or qualification introduced in 1980 and could report its satisfaction by some sort of divine prescience or foresight. Not do we think that the Government could by a Notification recognize or approve a course or certificate or qualification in futuro or in vacuo, in respect of a course or certificate which was not in existence at the date of Notification." (2). Relying on A.K Sabhapathy v. State of Kerala, AIR

1992 SC 1310 it was found that 'a person can practice in allopathic system of medicine in a state or in the country only if he possesses a recognized medical qualification' and since the appellants doesn't possesses the required qualification, it was held that their names could not be included in the Medical Register. Thus this appeal by special leave.

The only relief, which these appellants are seeking, is the protection of their 'consequential rights to treat' such as issuing prescriptions or sickness or death certificates. As a matter of fact the respondents do not dispute the validity of Notification No. Health/MA/7076/5M-5/80 dated October 15, 1980. It is by virtue of this Notification that the appellants were having the right to treat. Now the only question for consideration is whether the Appellants, who are having the right to treat could issue prescription or sickness or death certificates?

In this context it is worthwhile to discuss Dr. Mukhtiar Chand v. State of Punjab, (1998) 7 SCC 579. In this case the validity of Notifications issued by State Governments of Punjab and Rajasthan, under Rule 2(ee)(iii) of the Drugs and Cosmetics Rules, 1945 whereby the Governments declaring some vaids/ hakims as persons practicing modern medicines were challenged. Upholding the validity of the Notifications and the said Rule, this Court held that, for the purpose of Drugs Act "what is required is not the qualification in modern scientific system of medicine but a declaration by a State Government that a person is practicing modern scientific system and that he is registered in a Medical Register of the State". In Dr. Mukhtiar Chand, this Court also clarifies that there could be two registers for medical practitioners i.e, Indian Medical Register and State Medical Register. As far as the State Medical Registers are concerned the concerned State Government according to the rules will determine the required qualification. While recognizing the rights of vaids or hakims to prescribe allopathic medicines, this Court also took into account of the fact that qualified allopathic doctors were not available in rural areas and the persons like vaids / hakims are catering to the medical needs of residents in such areas. Hence the provision which allows them to practice modern medicine was found in the public interest. In this context Dr. Mukhtiar Chand holds that "It is thus possible that in any State, the law relating to registration of practitioners of modern scientific medicine may enable a person to be enrolled on the basis of the qualifications other than the 'recognized medical qualification' which is a prerequisite only for being enrolled on the Indian Medical Register but not for registration in a State Medical Register. Even under the 1956 Act, 'recognized medical qualification' is sufficient for that purpose. That does not mean that it is indispensably essential. Persons holding 'recognized medical qualification' cannot be denied registration in any State Medical Register. But the same cannot be insisted for registration in a State Medical Register. However, a person registered in a State Medical Register cannot be enrolled on the Indian Medical Register unless he possesses 'recognized medical qualification'. This follows from a combined reading of Sections 15(1), 21(1) and 23. So by virtue of such qualifications as prescribed in a State Act and on being registered in a State Medical Register, a person will be entitled to practice allopathic medicine under Section 15(2)(b) of the 1956 Act." Based on this reasoning this Court partially overruled A.K Sabhapathy, which earlier ruled that a person could practice allopathic medicine only if he possess a recognized medical qualification. In Medical Council of India & Another v. State of Rajasthan and Anr, (1996) 7 SCC 731 (2 judges), it was observed that "It would thus be clear that the basic qualification of MBBS as a primary qualification is a precondition for a candidate for being registered in the State Medical Register maintained by the State Board". Identical view expressed in the decision in A.K Sabhapathy on the same point having been overruled, this view in Medical Council of India vs. State of Rajasthan [supra] also stands impliedly overruled.

Coming back to the case in hand, the Division Bench in the impugned judgment relied upon A.K Sabhapathy to deny the appellants' right to prescribe medicines or to issue sickness or death certificates and held that the appellants do not possess the 'recognized medical qualification'. In the light of the ruling in Dr. Mukhtiar Chand this view of the Division Bench cannot be sustained. Therefore there is no bar to register the name of the appellants in the State Medical Register.

Now the only issue for consideration is whether the right to issue prescription or certificates could be treated as a part of right to treat. In Dr. Mukhtiar Chand it was pointed out that "because prescribing a drug is a concomitant right to practice a system of medicine. Therefore, in a broad sense, the right to prescribe drug of a system of medicine would be synonymous with the right to practice that system of medicine. In that sense, the right to prescribe an allopathic drug cannot be wholly divorced from the claim to practice allopathic medicine." The appellants are validly holding the right to treat certain diseases. So their right to issue prescriptions or certificates cannot be detached from their right to treat. Such right to issue certificates or prescriptions is imbibed in the right to treat. One cannot and shall not be separated from the other. Once the right to treat is recognized, then the right to prescribe medicine or issue necessary certificate flows from it. Or else the right to treat cannot be completely protected. Hence, even assuming for a moment that the 1915 Notification is not there, still the appellants' right to prescribe medicine cannot be denied. In that view of the matter, the order of the Division Bench is set aside and that of the learned Single Judge is restored.

Therefore, the respondents shall make necessary arrangements to include the names of all the concerned Diploma holders in the State Medical Register for the limited purpose indicated therein within a period of six months from today. The appeal is allowed accordingly.