

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

FRIDAY, THE 18TH DAY OF DECEMBER 2015/27TH AGRAHAYANA, 1937

WP(C).NO. 24254 OF 2015 (S)

PETITIONER(S):

DR.SYAMAKRISHNA K. AGED 32 YEARS
CHAITHANYA, KALAYAPURAM P.O., KOTTARAKKARA.

BY ADVS.SRI.KURIAN GEORGE KANNANTHANAM (SR.)
SRI.TONY GEORGE KANNANTHANAM
SRI.THOMAS GEORGE

RESPONDENT(S):

1. STATE OF KERALA
REPRESENTED BY PRINCIPAL SECRETARY
HEALTH & FAMILY WELFARE DEPARTMENT, SECRETARIAT
THIRUVANANTHAPURAM-695 001.

2. THE PRINCIPAL & CONTROLLING OFFICER
GOVERNMENT HOMEOPATHIC MEDICAL COLLEGE, IRANIMUTTOM
THIRUVANANTHAPURAM-695 009.

3. LBS CENTRE FOR SCIENCE & TECHNOLOGY
REPRESENTED BY ITS DIRECTOR, EXTRA POLICE ROAD
NANDAVANAM, THIRUVANANTHAPURAM-695 033.

4. THE CENTRAL COUNCIL OF HOMEOPATHY
REPRESENTED BY THE SECRETARY
JAWAHARLAL NEHRU BHJARTIYA CHIKITSA AVUM
HOMEOPATHY ANUSANDHAN BHAVAN, NO.61-65
INSTITUTIONAL AREA, OPP. "D" BLOCK, JANAKPURI
NEW DELHI-110 058.

5. KERALA UNIVERSITY OF HEALTH SCIENCES
REPRESENTED BY ITS REGISTRAR, MEDICAL COLLEGE P.O.
THRISSUR-630 596.

ADDITIONAL RESPONDENTS IMPEADED:

6. KERALA GOVERNMENT HOMEIO MEDICAL OFFICERS' ASSOCIATION
REG.NO.62/1966, SECRETARIAT, A-74
SANTHI MANDIRAM, SREERANGAM LANE SASTHAMANGALAM PO.
THIRUVANANTHAPURAM, PIN - 695 010
ADDITIONAL 6TH RESPONDENT IS IMPEADED AS PER VIDE
ORDER DATED 28.09.2015 IN I.A. NO.13880 OF 2015

7. TITTY EBENEZER
OFFICE ATTENDANT
GOVERNMENT HOMOEOPATHIC MEDICAL COLLEGE, NEMOM
THIRUVANANTHAPURAM - 695 020.

8. SANIL KUMAR T
ATTENDAR, GOVERNMENT HOMOEIO DISPENSARY, CHENKAL
THIRUVANANTHAPURAM - 695 132.

9. HASSANUDEEN RAEES I
S/O.ISMAIL KUNJU, ILAYILATH KUNJU, PANOOR
PALLANA PO., THIRUVANANTHAPURAM - 695 015.

10. MEHABOOB M
S/O.MASHHOOR KOYA THANGAL
RESIDING AT QUARTERS 31/340, RAJEEV NAGAR, MELARANNOOR
KARAMANA PO., THIRUVANANTHAPURAM - 695 002.

ADDITIONAL RESPONDENTS 7 TO 10 ARE IMPEADED
VIDE ORDER DATED 28.9.2015 IN I.A. NO.13887 OF 2015

R5 BY ADV. SRI.P.SREEKUMAR,SC, KERALA UTY.HEALTH &
R1, R2, BY SPECIAL GOVERNMENT PLEADER SMT. GIRIJA GOPAL
RADDL BY ADV. SRI.ELVIN PETER P.J.
RADDL BY ADV. SRI.K.R.GANESH
RADDL. BY ADV. SRI.R.S.KALKURA
RADDL. BY ADV. SRI.M.S.KALESH
RADDL. BY ADV. SRI.HARISH GOPINATH
RADDL. BY ADV. SMT.R.BINDU
RADDL. BY ADV. SMT.P.ANJANA
RADDL. BY ADV. SRI.P.M.UNNI NAMBOODIRI
R BY SMT.K.K.RAZIYA, SC, LBS CENTRE

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
09.12.2015, THE COURT ON 18-12-2015 DELIVERED THE FOLLOWING:

WP(C).NO. 24254 OF 2015 (S)

APPENDIX

PETITIONER(S)' EXHIBITS:

P1 COPY OF THE PROSPECTUS FOR ADMISSION TO CERTIFICATE COURSE
IN PHARMACY (HOMOEOPATHY) 2015-16.

P2 COPY OF THE ORDER DTD.22.4.2008 OF THE HEALTH & FAMILY
WELFARE (J) DEPARTMENT.

P3 COPY OF THE ORDER DTD.30.10.2010 OF THE HEALTH & FAMILY
WELFARE(J)DEPARTMENT.

P4 COPY OF THE LETTER DTD.11.11.2013 ISSUED FROM THE 2ND
RESPONDENT.

P5 COPY OF THE ORDER DTD.15.5.2014 OF THE 1ST RESPONDENT.

P5(A) COPY OF THE ENGLISH TRANSLATION OF EXT.P5.

P6 COPY OF THE ORDER DTD.22.6.2015 OF THE HEALTH AND FAMILY
WELFARE(J)DEPARTMENT.

P7 COPY OF THE LETTER DTD.9.1.2006 ISSUED FROM THE 4TH
RESPONDENT.

RESPONDENT(S)' EXHIBITS:

ANNEXURE R1(A) A TRUE COPY OF JUDGMENT DATED 26.09.2014 IN W.P(C)
NO.14112 OF 2014.

ANNEXURE R1(B) A TRUE COPY OF REPLY DATED 20.01.2011 F. NO.14-
6/2010-CCH/30348

ANNEXURE R1(C) A TRUE COPY OF NOTIFICATION DATED 08.03.2013 ISSUED
BY THE CENTRAL COUNCIL OF HOMOEOPATHY IN EXERCISE OF THE POWERS
CONFERRED UNDER THE HOMOEOPATHIC CENTRAL COUNCIL ACT AND IN
SUPERSESION OF HOMOEOPATHY (MINIMUM STANDARDS OF EDUCATION)
REGULATIONS, 1983.

WP(C).NO. 24254 OF 2015 (S)

ANNEXURE R1(D) A TRUE COPY OF RELEVANT CHAPTER OF THE FIRST
STATUTES OF KERALA UNIVERSITY OF HEALTH SCIENCES ACT (G.O.(P)
NO.125/2013/H&FWD DATED 04.04.2013)

ANNEXURE R1(E) A TRUE COPY OF COMMUNICATION DATED 18.08.2015
NO.6604/AC.B/KUHS/2013.

R6(A) TRUE COPY OF G.O(P) NO.441/2011/H&FWD DATED 29.07.2011.

R6(B) TRUE COPY OF G.O.(RT.) NO.2929/2014 H&FWD DATED
26.08.2014, ISSUED BY THE DEPARTMENT OF HEALTH AND FAMILY WELFARE.

R6(BA) TRUE ENGLISH TRANSLATION OF EXT.R6(B).

R6(C) TRUE COPY OF G.O.(RT.) NO.2025/2015 H&FWD, DATED
30.06.2015.

R6(CA) TRUE ENGLISH TRANSLATION OF EXT.R6(C).

R6(D) TRUE COPY OF NOTIFICATION NO.3618/C3/2013/GHMCT, DATED
04.07.2015, ISSUED BY THE 2ND RESPONDENT.

R6(DA) TRUE ENGLISH TRANSLATION OF EXT.R6(D).

R6(E) TRUE COPY OF THE JUDGMENT OF THIS HONOURABLE COURT IN W.P
(C) NO.14112 OF 2014.

R6(F) TRUE COPY OF THE LETTER DATED 20.01.2011 ISSUED BY THE 4TH
RESPONDENT.

R6(G) TRUE COPY OF THE LETTER DATED 18.08.2015 ISSUED BY THE 5TH
RESPONDENT.

R7(A) TRUE COPY OF COMMUNICATION DATED 18.08.2015 ISSUED BY
KERALA UNIVERSITY FOR HEALTH SCIENCES.

R7(B) TRUE COPY OF COMMUNICATION ISSUED BY CENTRAL COUNCIL OF
HOMOEOPATHY.

“C.R.”

ASHOK BHUSHAN, C.J.

and

A.M. SHAFFIQUE, J.

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W.P(C) No.24254 of 2015

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Dated this the 18th day of December, 2015

J U D G M E N T

Ashok Bhushan, C.J.

This Writ Petition filed as a public interest litigation seeks a direction to quash the steps taken by the State Government to start Certificate Course in Pharmacy (Homoeo) for the year 2015-2016.

2. Brief facts of the case as emerged from the pleadings of the parties are: The State of Kerala has been running NCP (Nurse-cum-Pharmacist) Course from 1995 to 2009 in two Government Homoeopathic Colleges. On representations from various Organizations, an Expert Committee was constituted by the State Government as per Government Order dated 22.04.2008 to suggest improvement in the NCP Course. It was felt that NCP Course was neither fulfilling the objective of Nursing or Pharmacy.

The Expert Committee submitted a report in 2009 on the basis of which the Government decided to discontinue the NCP Course and a decision was taken to start Certificate Course in Pharmacy (Homoeo) for getting qualified hands for being appointed as Pharmacist since large number of posts of Pharmacist are lying vacant in Government Dispensaries. The NCP Course which is still being run in an Institution under Private Management, Dr.A.K.B.Sathbavana Mission, Quilandy was also to come to an end after the Government introduced the new Course. The State Government issued Government Order dated 30.10.2010 to discontinue the NCP Course and to start new Courses in D.Pharma (Homoeo) and Nursing (Homoeo). Principal and Controlling Officer wrote to the Government to permit to start Pharmacy Course in the Government Homoeopathic Medical Colleges. Government Order was issued on 15.05.2014 (Ext.P5) where sanction was accorded by the Government to commence the Course in Certificate of Pharmacy (Homoeo) in Government Homoeopathic Medical Colleges at

Thiruvananthapuram and Kozhikode from 2014-15 with an annual intake of 50 students. Government approved the Prospectus and Syllabus as per Government Order dated 22.06.2015. Prospectus for admission to Certificate Course in Pharmacy (Homoeo) 2015-16 was issued by the Principal & Controlling Officer, Government Homoeopathic Medical College, Thiruvananthapuram (Ext.P1).

3. Petitioner, who is a Medical Practitioner in Homoeopathy, has filed this public interest litigation, challenging the action of the Government in initiating the Certificate Course in Pharmacy (Homoeo). Petitioner questions the power of the Government to start new Course in the field of Homoeo medical science without reference to the Central Council of Homoeopathy/Central Government/the Kerala University of Health Sciences. Petitioner's case in the Writ Petition is that the State Government cannot exercise its executive power under Article 162 of the Constitution of India to decide upon the new Course, its Syllabus and duration without concurrence or approval/affiliation

of the Kerala University of Health Sciences (for short, “the University”). Petitioner in the Writ Petition prays for the following reliefs:

“(i) To issue a writ of certiorari or other appropriate order or direction to quash Ext.P1, P5 and P6.

(ii) issue a writ of mandamus or order or direction to direct respondents 1 to 3 not to proceed with or make any admissions to the Certificate Course in Pharmacy (Homoeo) based on and pursuant to Ext.P1.

(iii) grant such other reliefs as are just and proper in the nature of this case.”

4. A Statement has been filed on behalf of State of Kerala pleading that the State Government was running the NCP Course from 1995 to 2009 which on the recommendation of the Expert Committee was decided to be bifurcated and new Certificate Course in Pharmacy (Homoeo) has been decided to be started by the State Government with regard to which Prospectus was issued. It was stated that no permission was required from the University for starting the new Certificate Course. Reference to a letter dated 18.08.2015 of the University has also been made by which the University informed that

it is not conducting any Course below undergraduate level and there is no requirement of obtaining any approval of the University for starting Certificate Courses below graduate level. It has been further stated that as per the Special Rules, namely, Kerala Homoeopathic Subordinate Service Rules, 2011 a pass/certificate obtained on successful completion of nursing-cum-pharmacy course conducted by the Government of Kerala or its equivalent qualification recognized by the Government was essential qualification. It has been further pleaded that Certificate Course in Pharmacy (Homoeo) is not a course forming part of any degree or diploma offered by the University.

5. A counter affidavit has also been filed by the State stating that the University is affiliated to the University Grants Commission (for short, "the UGC") which stipulates that University shall confer only such of those degrees as are specifically approved by the UGC and only those courses which comprises a programme of study beyond the level of 10+2. The

Certificate Course offered by the State is for the students who have not completed +2 but have only completed 10th standard. The University cannot offer any Certificate Course, the basic qualification of which is 10th Standard only. Provisions of the University Grants Commission (Affiliation of Colleges by Universities) Regulations, 2009 as well as other relevant facts have been pleaded in the counter affidavit. It has been pleaded that in the absence of any Legislation covering the filed in question, there is no embargo in the State Government starting such a course in exercise of the power conferred on it under Article 162 of the Constitution of India.

6. Kerala Government Homoeo Medical Officers' Association has sought impleadment in the Writ Petition which has been allowed impleading it as additional 6th respondent. Counter affidavit has also been filed by the additional 6th respondent where it is pleaded that it was on the representation of the additional 6th respondent that the Government appointed an Expert

Committee to bifurcate the course. Due to non-availability of trained Pharmacists it was decided to introduce Certificate Course in Pharmacy. It has been pleaded that Writ Petition is not a public interest litigation and has been filed to espouse the cause of the private respondents who does not want Certificate Course in pharmacy to be run by the Government so that it may run the NCP Course. It has been pleaded that no approval is required from the University or Central Homoeopathic Council. In the Statutes framed by the University in Chapter XVII (Faculty of Homoeopathy) no such degree or course is stipulated where qualification is only pass in Class X. Another impleading petition was filed by 4 students who claimed to have secured admission on the basis of Ext.P1 Prospectus which petition has been allowed. A counter affidavit has also been filed on behalf of the students supporting the action of the State.

7. We have heard Shri Kurian George Kannanthanam, learned senior counsel for the petitioner, Smt. Girija

Gopal learned Special Government Pleader on behalf of the State. Shri R.S.Kalkura has appeared for the additional 6th respondent and Shri Elvin Peter has appeared for additional respondents 7 to 10. We have heard Shri P.Sreekumar, learned counsel appearing for the University.

8. Learned counsel for the petitioner challenging the action of the State Government in starting the Certificate Course has confined his submission only to one ground, i.e., the State cannot exercise its Executive Powers under Article 162 of the Constitution to start the Course in Certificate of Pharmacy in view of the enactment of University of Health and Science Act, 2010 which covers the field. It is contended that under the the Kerala University Health Science Act, 2010 (for short, "the 2010 Act") now it is the power and function of the University to award degrees, diplomas and certificates and First Statutes have been framed under Section 41 of the 2010 Act namely, Kerala University of Health Sciences First Statute,

2013 (for short, “the 2013 Statutes”) wherein it is provided that no candidate shall be eligible for Degree Certificate unless he has undergone the prescribed course of study as an enrolled student of College or other University. It is submitted that the provisions of the 2010 Act and the 2013 Statutes eclipse the power of the State Government to run any Certificate Course in Pharmacy which field is covered by the Legislation. It is submitted that executive power under Article 162 of the Constitution cannot be exercised by the Government when the field is covered by Legislation. Learned counsel for the petitioner has placed reliance on the judgment of the Apex Court in **Paul Manoj Pandian v. P.Veldurai** ([2011] 5 SCC 214). It is contended that Ext.P1 read with Ext.P6 is an exercise of executive power of the State and without approval from the University under the 2010 Act no Course could have been started by the State Government.

9. Learned Special Government Pleader appearing for

the State contended that the State has rightly exercised its power under Article 162 of the Constitution and in exercise of the power it does not contravene any of the Legislation. It is submitted that the 2010 Act does not cover the field of Certificate Course in Pharmacy (Homoeo). It is submitted that the minimum qualification for Course Certificate in Pharmacy (Homoeo) is only Class X, whereas minimum qualification of all courses which are being run by the University under the 2010 Act is 10+2. It is submitted that the University is entitled to award Degrees as contemplated by Section 22 of the University Grants Commission Act, 1956 (for short, "the UGC Act"). It is submitted that the UGC has issued Notification under Section 22(3) of the UGC Act. Last of such Notification being Notification published in the Gazette of India dated 05.07.2014 wherein nomenclature of the Degrees, minimum entry level qualifications and duration of the programme have also been indicated. All Degrees which are contemplated under

Section 22(3) are Degrees for which minimum entry level is 10+2. The UGC does not contemplate any Diploma or Certificate which is to be granted on the basis of entry level, i.e., Class X. In the 2013 Statutes details of Degrees and Diplomas which are awarded by the University have been mentioned which does not include any Certificate Course in Pharmacy (Homoeo) or Degree course which has minimum qualification of Class X. The University cannot offer a course, entry level of which is only Class X. The 2010 Act in no manner affect exercise of executive power under Article 162 of the Constitution.

10. Shri R.S. Kalkuara and Shri Elvin Peter, learned counsel appearing for the additional respondents have also adopted the submissions raised by the learned Special Government Pleader.

11. A statement has been filed on behalf of the University. Referring to the statement, learned counsel for the University submitted that Certificate Courses, basic qualification of which is only Class X, are not

affiliated to the University. Referring to Chapters XVIII and XXV of the 2013 Statutes, it is contended that no Certificate Course is included in the same.

12. We have considered the submissions of the learned counsel for the parties and perused the records.

13. The only issue which is to be answered in this Writ Petition is as to whether the Government Orders issued on 15.05.2014 and 26.06.2015 sanctioning the start of Certificate Course in Pharmacy (Homoeo) for the year 2015-16 and Ext.P1 Prospectus can be said to have been issued in valid exercise of the power under Article 162 of the Constitution of India or the State could not have exercised any executive power under Article 162 for initiating a Certificate Course in Pharmacy (Homoeo) after the enactment of the 2010 Act and the field is covered by the 2010 Act.

14. From the facts on record, it is clear that the State has been running NCP Course, i.e., Nurse-cum-Pharmacist from 1995 to 2009. On the recommendation of the Expert Committee constituted by the State Government

by Government Order dated 22.04.2008, a decision was taken to bifurcate the NCP Course to two Courses, i.e, D.Pharm (Homoeo) and Nursing (Homoeo). The Government by Government Order dated 15.05.2014 decided to start Certificate Course in Pharmacy (Homoeo) minimum qualification of which is only a pass in Class X. Learned counsel for the petitioner submitted that eclipse of the executive power of the State under Article 162 of the Constitution came into operation only after the enactment of the 2010 Act. He submitted that after the 2010 Act the State cannot exercise the executive power under Article 162 regarding running of any course in any of the medical sciences including Homoeo. Provisions of the 2010 Act and the 2013 Statutes have to be looked into for appreciating the submissions made by the learned counsel for the petitioner.

15. The 2010 Act has been enacted to establish and incorporate a University of Science in the State of Kerala and provide matters connected therewith or

incidental thereto. Section 3 establishes a University by name the Kerala University of Health Sciences. Section 5 contains the objects of the University. Section 5(ii) which is relevant is as follows:

“5. The objects of the University.- The objects of the University shall be the following, namely:-

.....

5(ii) to design new courses and curricula based on the advances in the field of health science.”

Section 6 of the 2010 Act enumerates the powers and functions of the University. Section 6(iii) and (xviii) which are relevant are as follows:

“6. Powers and functions of the University.- The powers and functions of the University shall be the following, namely:-

.....

6(iii) to institute and award degrees, diplomas, certificates and other academic distinctions.

6(xviii) to control and regulate admission of students for various courses of study in University departments, affiliated colleges, institutions, schools, centres and recognised institutions”.

Section 23 confers powers on the Governing Council. Section 23(xxvii) reads as follows:

“23. Powers of the Governing Council.- The Governing Council

shall exercise the following powers subject to the provisions of this Act:

.....

23(xxvii) to institute and confer such degrees, diplomas, certificates and other academic distinctions recommended by the Academic Council and arrange for convocation for enforcement of the same, as provided by Statutes or Ordinances”.

Section 40 provides for the Statutes. Section 40(2) (xviii) which is relevant is as follows:

“40(2)(xviii) award of degrees diplomas, titles, certificates, and other academic distinctions by the University”.

Section 42 provides for framing of Ordinance and Section 44 provides for framing of Regulations by Academic Council with the approval of the Governing Council. Chapter XVII of the 2013 Statutes provides for the Faculty of Homoeopathy and Degrees in the Faculty of Homoeopathy. Chapter XVIII provides for Faculty of Pharmaceutical Sciences and Degrees in the Faculty, Chapter XIX provides for Faculty of Nursing and Chapter XXV provides for “Degrees, Diplomas and Titles” which can be conferred by the University.

16. Article 162 of the Constitution of India which

provides for extent of the executive power of the State is as follows:

“162. Extent of executive power of the State.- Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof”.

17. The subject, Education is covered by Entry 25 of List III which is as follows:

“25. Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour”.

State has thus full executive power with regard to the subject of education subject to the provisions in Entry Nos.63, 64, 65 and 66.

18. Present is not a case where Legislation under Entry Nos.63, 64, 65 and 66 have been referred to or relied except the provisions of the UGC Act which shall be referred to hereinafter.

19. What is the consequence and effect of the 2010 Act on the power of the State to issue an executive order under Article 162 of the Constitution is the moot question to be answered.

20. A perusal of the provisions of the 2010 Act indicate that the Act empowers the University to institute, award Degrees, Diplomas, Certificates and other academic distinctions. The Governing Council is empowered to institute and confer such Degrees, Diplomas, Certificates and other academic distinctions as recommended by the academic counsel and arranged for convocation and conferment of the same as provided by the Statutes and Ordinances. Power to award degrees and diplomas in Certificate is thus conferred to the University. As noted above, in Chapter XVII, Faculty of Homoeopathy the Degrees which have been contemplated are Degrees of BHMS, MD, Homoeopathy and Ph.D. and in Chapter XVIII, 'Faculty of Pharmaceutical Sciences', the Degrees contemplated are the following in paragraph:

- “(i) Bachelor of Pharmacy (B.Pharm)
- (ii) Master of Pharmacy
- (iii) Pharm D
- (iv) Pharm D (Post Baccalaurate)
- (v) Doctor of Philosophy - Ph.D.”

The most important Chapter of the 2013 Statutes relied on by the learned counsel for the petitioner is Chapter XXV which contains the title “Degrees and diplomas and Titles”. Paragraph 1 of the said Chapter provide for Degree of University a perusal of which indicate that they are all Bachelor's degree, Master's Degree and Higher degrees. Paragraph 2 provides for Diplomas and Certificates. Paragraphs 2 and 3 which are relevant for the relevant case are quoted below:

“2. Diplomas and Certificates.- The University may grant the following diplomas and certificates,-

- | | | |
|-------|---|----------|
| (i) | Diploma in Obstetrics and Gynecology | D.G.O. |
| (ii) | Diploma in Clinical Pathology | D.C.P. |
| (iii) | Diploma in Public Health | D.P.H. |
| (iv) | Diploma in Child Health | D.C.H. |
| (v) | Diploma in Radiology | D.M.R. |
| (vi) | Diploma in Medical
Radiology (Diagnosis) | D.M.R.D. |
| (vii) | Diploma in Medical | |

	Radiology (Therapy)	D.M.R.T.
(viii)	Diploma in Ophthalmology	D.O.
(ix)	Diploma in Orthopedics	D.Ortho.
(x)	Diploma in Oto-Rhino Laryngology	D.L.O.
(xi)	Diploma in Anaesthesia	D.A.
(xii)	Diploma in Psychiatric Medicine	D.P.M.
(xiii)	Diploma in Physical Medicine and Rehabilitation	
		D.P.M.R.
(xiv)	Diploma in Tuberculosis and Chest Disease	D.T.C.D.
(xv)	Diploma in Agatatantra, and	
(xvi)	Diplomas and certificates in such other subjects of study as the Governing Council may decide, from time to time".	

3. Eligibility.- No candidate shall eligible to qualify for a degree, diploma, certificate or title in the University unless he has undergone the prescribed course of study or research as an enrolled student of a college or other institution of this university or is eligible to appear for the examination as laid down in the regulations".

Paragraph 2 of Chapter XVI provides for Diploma and Certificate as the Governing Council may decide from time to time. Nothing has been brought on record to indicate that the Governing Council has decided at any time regarding instituting a Certificate Course in Pharmacy (Homoeo). Another important paragraph of Chapter XXV is paragraph 3 which provides that no

candidate shall eligible to qualify for a degree, diploma, certificate or title in the University unless he has undergone the prescribed course of study or research as an enrolled student of a college or other institution of the University or is eligible to appear for the examination as laid down in the Regulations. No regulation has also been brought on record to indicate that any prescribed course of study pertaining to Certificate of Pharmacy (Homoeo) has been framed. It is true that the 2010 Act empowers the University to institute any degree diploma or certificate in different disciplines which are covered by the enactment. Whatever degrees and diplomas are specifically covered by the Act, Statute, Ordinances, regulations have to be treated as fully covered by legislation and no executive power can be exercised by the State contrary to the description. In the present case the question to be answered is as to whether the executive power exercised by the State by Exts.P5 and P6 and Ext.P1 Prospectus contravenes any executive power

under the 2010 Act, Statutes and Regulations.

21. Learned Government Pleader has also referred to the provisions of the UGC Act. Section 22 of the UGC Act is as follows:

“22. Right to confer degrees.- (1) The right of conferring or granting degree shall be exercised only by a University established or incorporated by or under a Central Act, a Provincial Act or a State Act or an institution deemed to be a University under section 3 or an institution specially empowered by an Act of Parliament to confer or grant degrees.

(2) Save as provided in sub-section (1), no person or authority shall confer, or grant, or hold himself or itself out as entitled to confer or grant, any degree.

(3) For the purposes of this section, “degree” means any such degree as may, with the previous approval of the Central Government, be specified in this behalf by the Commission by notification in the Official Gazette.”

Notification issued under Section 22(3) of the UGC Act which is published in the Gazette of India dated 05.07.2014 has also been placed before us. The Notification states as follows:

“UNIVERSITY GRANTS COMMISSION
SPECIFICATION OF DEGREES
NEW DELHI, March, 2014

No.F.5-1/2013 (CPP-II)- In exercise of the powers conferred by sub-section (3) of Section 22 of the University Grants Commission Act, 1956)3 pf 1056) and in supersession of all earlier Gazette Notifications pertaining to specification of degrees, the University Grants Commission (UGC) with the approval of the Central Government hereby specifies the nomenclature of degree for the purposes of the said section.

SPECIFIED DEGREES

Broad discipline-wise nomenclatures of degrees at all levels of higher education should be taken as the specified degree, which the universities/institutions must adhere to, are given below. Alongside the nomenclature of the degrees, minimum entry-level qualifications and duration of the programmes have also been indicated. The information is presented in a tabular form for clarity. In the bottom-most row of each table, nomenclatures of degrees that are presently in vogue in some institutions were found to be neither conventional, nor reflective of a real innovation in knowledge and are de-specified with the suggestion that the same may be restructured/changed as suggested therein.

.....

	Medicine & Surgery/Ayurveda/Unani/Homoeopathy/Health & Allied Sciences/Paramedical/Nursing				
	Specified Degrees		Level	Minimum Duration (years)	Entry Qualification
	Abbreviated	Expanded			
73	MBBS	Bachelor of Medicine and Bachelor of Surgery	BACHELOR'S	5-½	10 + 2
74	MD	Doctor of Medicine	MASTER'S	3	BACHERLOR'S
75	MS	Master of Surgery	MASTER'S	3	BACHERLOR'S
76	DM	Doctor of Medicine	Post MASTER'S	3	MASTER'S

77	M.Ch.	Master of Chiruglae	Post MASTER'S	3	MASTER'S
78	M.Sc. (Medical Anatomy)	Master of Science (Medical Anatomy)	MASTER'S	2	BACHELOR'S
79	M.Sc. (Medical Biochemistry)	Master of Science (Medical Biochemistry)	MASTER'S	2	BACHELOR'S
80	M.Sc. (Medical Microbiology)	Master of Science in Medical Microbiology	MASTER'S	2	BACHELOR'S
81	M.Sc. (Medical Pharmacology)	Master of Science in Medical Pharmacology	MASTER'S	2	BACHELOR'S
82	M.Sc. (Medical Physiology)	Master of Science in Medical Physiology	MASTER'S	2	BACHELOR'S
83	MHA	Master of Hospital Administration	MASTER'S	2	BACHELOR'S
84	MPH	Master of Public Health	MASTER'S	2	BACHELOR'S
85	BDS	Bachelor of Dental Surgery	BACHELOR'S	5	10 + 2
86	MDS	Master of Dental Surgery	MASTER'S	3	BACHERLOR'S
87	Ayurveda Vachaspati	Ayurveda Vachaspati	Post MASTER'S	3	MASTER'S
88	Anu Parangat	Anu Parangat	Post MASTER'S	1	MASTER'S
89	Ayurvedacharya	Ayurvedacharya	BACHELOR'S	5	10 + 2
90	BAMS	Bachelor of Ayurvedic Medicine & Surgery	BACHELOR'S	5 – ½	10 + 2
91	BSMS	Bachelor of Sidha Medicine & Surgery	BACHELOR'S	5 – ½	10 + 2

92	MD (Ayurveda)	Doctor of Medicine (Ayurveda)	MASTER'S	3	BACHELOR'S
93	BNYS	Bachelor of Naturopathy & Yogic Sciences	BACHELOR'S	5	10 + 2
94	BHMS	Bachelor of Homoeopathic Medicine & Surgery	BACHERLOR'S	5 - 1/2	10 + 2
95	MD (Hom)	Doctor of Medicine (Homoeo)	MASTER'S	3	BACHERLOR'S
96	BUMS	Bachelor of Unani Medicine & Surgery	BACHERLOR'S	5 - 1/2	10 + 2
97	MD (Unani)	Doctor of Medicine (Unani)		3	
98	M.Sc (Nursing)	Master of Science (Nursing)	MASTER'S	2	BACHERLOR'S
99	B.Sc. (nursing)	Bachelor of Science (Nursing)	BACHELOR'S	4	10 + 2
100	B.Optom	Bachelor of Optometry	BACHELOR'S	4	10 + 2
101	M.Optm	Master of Opemetry	MASTER'S	2	B.optom
102	BOT	Bachelor of Occupational Therapy	BACHELOR'S	4	10 + 2
103	MOT	Master of Occupational Therapy	MASTER'S	2	BACHELOR'S
104	BPT	Bachelor of Physiotherapy	BACHELOR'S	4 - 1/2	10 + 2
105	MPT	Master of Physiotherapy	MASTER'S	2	BACHERLOR'S
106	B.Sc. (Trauma Care Management)	Bachelor of Science (Trauma Care Management)	BACHERLOR'S	4	10 + 2

107	Pharm D.	Doctor of Pharmacy	MASTER'S	6	10 + 2
108	M.Pharm	Master of Pharmacy	MASTER'S	2	BACHERLOR'S
109	B.Pharm	Bachelor of Pharmacy	BACHERLOR'S	4	10 + 2
110	B.Pharm (Ayu.)	Bachelor of Pharmacy (Ayurveda)	BACHERLOR'S	4	10 +2

The scheme of the aforesaid Notification indicate that entry qualification has been mentioned for the degrees and diplomas and other course mentioned therein. All the entry qualification is 10+2 or above. Thus degree which has to be conferred by the University has to be degrees as enumerated in the above Notification. Notification does not contain as on date any Course Certificate of Pharmacy (Homoeo), entry level of which is Class X.

22. We find substance in the submission of the learned Government Pleader that no course having minimum entry level qualification, i.e. only Class X having been included in Section 22, the restriction regarding award of degree as per Section 22 shall apply

only to the degrees as enumerated in Section 22(3) of the 2010 Act.

23. Executive power under Article 162 is co-extensive with the legislative power of the State and education being in Entry No.25 of List III, the State can exercise the executive power to the extent of the Legislative power under Entry No.25. It is true that executive power of the State cannot be exercised where the field is covered by a Legislation since no executive power can be exercised in contravention of any legislation or rule having force of law.

24. The Apex Court in **Sant Ram Sharma v. State of Rajasthan and others** (AIR 1967 SC 1910) in paragraph 7 observed as follows:

“.....It is true that Government cannot amend or supersede statutory Rules by administrative instructions but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed”.

25. In **Bishambhar Dayal Chandra Mohan v. State of U.P.** ([1982] 1 SCC 39), the Apex Court had occasion to

consider the executive power of the State. It was held by the Apex Court that so long as the State Government does not go against the provision of the Constitution or any law, the width and amplitude of the executive power cannot be circumscribed. The following was held in paragraph 20:

“20. Even assuming that the impugned teleprinter message is not relatable to the two Control Orders, the State Government undoubtedly could, in exercise of the executive power of the State, introduce a system of verification on movement of wheat from the State of Uttar Pradesh to various other States at the check-posts on the border and place restrictions; on inter-district movement of wheat by traders on private account within the State. The executive power of a modern State is not capable of any precise definition. In *Ram Jawaya Kapur v. State of Punjab* 1955 (2) SCR 225: (AIR 1955 SC 549), Mukherjea, C. J., dealt with the scope of Arts, 73 and 162 of the Constitution. The learned Chief Justice observed that neither of the two Articles contains any definition as to what the executive function is or gives an exhaustive enumeration of the activities which would legitimately come within its scope. It was observed : "Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away." It is neither necessary nor possible to give an exhaustive enumeration of the kinds and categories of executive functions which may comprise both the formulation of the policy as well as its execution. In other words, the State in exercise of its executive power is charged with the

duty and the responsibility of carrying on the general administration of the State. So long as the State Government does not go against the provisions of the Constitution or any law, the width and amplitude of its executive power cannot be circumscribed. If there is no enactment covering a particular aspect, certainly the Government can carry on the administration by issuing administrative directions or instructions, until the legislature makes a law in that behalf. Otherwise, the administration would come to a standstill".

26. To the similar effect is another judgment of the Apex Court reported in **DDA v. Joginder S.Monga** ([2004] 2 SCC 297) in which the following was laid down in paragraphs 30 and 36:

"30. It is not a case where a conflict has arisen between a statute or a statutory rule on the one hand and an executive instruction, on the other. Only in a case where a conflict arises between a statute and an executive instruction, indisputably, the former will prevail over the latter. The lessor under the deed of lease is to fix the market value. It could do it area wise or plot wise. Once it does it area wise which being final and binding, it cannot resile therefrom at a later stage and take stand that in a particular case it will fix the market value on the basis of the price disclosed in the agreement of sale.

36. Yet again In **G.S. Dall & Four Mills** (supra), this Court observed as under :

"...Executive instructions can supplement a statute or cover areas to which the statute does not extend. But they cannot run contrary to statutory provisions or whittle down their effect."

27. Another judgment which needs reference is **Union of India v. Central Electrical & Mechanical Engg. Service (CE&MES) Group 'A' (Direct Recruits) Assn., CPWD** ([2008] 1 SCC 354) wherein at paragraph 10 it was held as follows:

“10. It is now a well settled principle of law that an executive order must be passed in conformity with the Rules. Power of the State Government to issue executive instructions is confined to filling up of the gaps or covering the area which otherwise has not been covered by the existing Rules. See *Sant Ram Sharma v. State of Rajasthan and Another*, AIR 1967 SC 1910 and *D.D.A. and Others v. Joginder S. Monga and Others*, 2004 (2) SCC 297. Such office orders must be subservient to the statutory rules”.

28. Learned counsel for the petitioner has referred to and relied on the judgment of the Apex Court in **Paul Manoj Pandian v. P.Veldurai** ([2011] 5 SCC 214). In the above case, the Apex Court had occasion to consider the Government Order dated 16.11.1951 issued in exercise of the executive power. It was submitted that the Government could not have exercised executive power. The following was laid down in paragraphs 46, 47 and 49:

“46. Under Art.162 of the Constitution, the executive power of the State extends to matters with respect to which the State Legislature has power to make laws. Yet the limitations of the exercise of such executive power by the Government are two fold; first, if any Act or Law has been made by the State Legislature conferring any function on any other authority - in that case the Governor is not empowered to make any order in regard to that matter in exercise of his executive power nor can the Governor exercise such power in regard to that matter through officers subordinate to him. Secondly, the vesting in the Governor with the executive power of the State Government does not create any embargo for the Legislature of the State from making and/or enacting any law conferring functions on any authority subordinate to the Governor.

47. Once a law occupies the field, it will not be open to the State Government in exercise of its executive power under Art.162 of the Constitution to prescribe in the same field by an executive order. However, it is well recognized that in matters relating to a particular subject in absence of any parliamentary legislation on the said subject, the State Government has the jurisdiction to act and to make executive orders. The executive power of the State would, in the absence of legislation, extend to making rules or orders regulating the action of the Executive. But, such orders cannot offend the provisions of the Constitution and should not be repugnant to any enactment of the appropriate Legislature. Subject to these limitations, such rules or orders may relate to matters of policy, may make classification and may determine the conditions of eligibility for receiving any advantage, privilege or aid from the State.

49. The respondent could not point out that the said order was

repugnant to any legislation enacted by the State Government or the Central Government nor could he point out that the instructions contained in the said Government Order dated November 16, 1951 were repugnant to any statutory rules or the Constitution. In fact, there was neither any enactment nor any statutory rule nor any constitutional provision as to how the contractor, who has entered into contracts with the Government, should be permitted to contest election, more particularly, when a request is made by the contractor to terminate his contracts so as to enable him to contest the election.”.

The Apex Court upheld the said Government Order holding that neither any enactment nor statutory rule nor any constitutional provision was brought into the notice on which it can be contended that the Government Order dated 16.11.1951 was repugnant to any statutory rule or constitution.

29. From the proposition of law as noted above, it is clear that in exercise of the executive power, the State cannot contravene any legislation or Statute, Rule and executive power is to be subservient to the legislation and rules. But the executive power can be exercised for filling the gap in the legislation or to supplement legislation as has been held by the Apex

Court in **Sant Ram Sharma's case** (supra).

30. In the present case we have already noted that the University is not running any Certificate Course in Pharmacy (Homoeo) nor any such Course or Certificate has been instituted by the Governing Council till date. Thus the Certificate Course which has been initiated by the State is not covered by any of the provisions under the 2010 Act. It is relevant to note that the University has also filed a statement in the Writ Petition wherein the University has stated the following in paragraphs 3 and 4:

“3. It is submitted that there are so many certificate courses conducted by the Director of Medical Education wherein the basic qualification is Secondary School Leaving Certificate. Those courses are treated as certificate courses and are not affiliated to any university. Even prior to the incorporation of this respondent, medical courses were conducted in the state and those courses were affiliated to different universities that existed in the state. During that time also the certificates courses conducted by the director of medical education were not affiliated to any of the universities. University in the general meaning governs the field of higher education and not the certificate level education.

4. The petitioner's contention that only this respondent

university can conduct or govern all the health certificate courses in the State does not have any support in any provisions of the university Act or statutes. On the other hand Chapter XVIII, of the first statutes specifically define what all degrees are included in the faculty of Pharmacy. No certificate course is included in the same. Similarly Chapter XXV of the statutes lists the degree, diplomas and certificates issued by the university and there also no course is included which is below the graduate level of education.”

University's categorical case is that it is not running any Certificate Course entry level of which is Class X. By letter dated 18.08.2015, although the said letter was issued in reference to the present Writ Petition, the University has clearly stated that no permission is required. In Exhibit R6(g) the University has categorically stated the the University is not conducting any Course below Graduate level and hence approval is not necessary to starting Certificate Course below Graduate level.

31. We thus conclude that there is no contravention of any statutory provision by Government Orders, Exts.P5 and P6 and Ext.P1, Prospectus issued for running the Certificate Course in Pharmacy (Homoeo). The

executive power of the Government in exercise of the power Article 162 of the Constitution of India by issuing the Prospectus in no manner impinge upon any statutory provision under the 2010 Act or Statutes or Ordinance. Thus the executive power is within the four corners of the State under Article 162 of the Constitution of India and the contention of the petitioner that the impugned Government Orders are beyond the executive power of the State under Article 162 cannot be accepted.

32. In view of the foregoing discussion, we do find any substance in the contention which has been pressed before us by the learned counsel for petitioner.

Writ Petition is dismissed.

**ASHOK BHUSHAN,
CHIEF JUSTICE.**

**A.M. SHAFFIQUE,
JUDGE.**

VSV