

Dr. Sharmad vs The State Of Kerala on 10 January, 2025

Author: Dipankar Datta

Bench: Prashant Kumar Mishra, Dipankar Datta

REPORT

2025 INSC 70

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 13422 OF 2024
[Arising out of SLP(C) NO. 18592 OF 2017]

Dr. SHARMAD

VERSUS

STATE OF KERALA AND OTHERS

... APPELLANT

...RESPONDENT

WITH

CIVIL APPEAL NO. 13423 OF 2024
[Arising out of SLP(C) NO. 24851 OF 2019]

Dr. SHEELA T.A. AND OTHERS

VERSUS

STATE OF KERALA AND OTHERS

... APPELLANT

...RESPONDENT

JUDGMENT

DIPANKAR DATTA, J.

CIVIL APPEAL NO. 13422 of 2024

1. This appeal, by special leave, carried by the appellant¹ to this Court takes exception to the judgment and order dated 20th January, 2017 of a Division Bench of the High Court of Kerala at Ernakulam² allowing Dr. Sharmad High Court a writ petition³ presented by the third respondent⁴. The High Court set aside the judgment and order dated 15th March, 2013 of the Kerala Administrative Tribunal at Thiruvananthapuram⁵, which dismissed the original application⁶ of Dr. Jyothish filed under Section 19 of the Administrative Tribunals Act, 1985 in limine.

2. A short question arises for decision in the appeal. It is, whether the High Court was justified in interfering with the order granting promotion to Dr. Sharmad to the post of Assistant Professor, Department of Neurosurgery, Medical Education Service, Health and Family Welfare Department, Kerala⁷ on 06th February, 2013.

3. For the purpose of a decision on this appeal, it would be appropriate to note the respective profile of Dr. Sharmad and Dr. Jyothish. The same is indicated in a tabular form hereunder:

Dr. Sharmad	Dr. Jyothish
Appointed as Lecturer (with MBBS) on 22.10.1999.	Appointed as Lecturer, with M. Ch degree, on 09.03.2005.
Promoted as Assistant Professor on 11.01.2007.	Promoted as Assistant Professor on 22.07.2008.
Acquired M. Ch degree on 31.07.2008.	-----
Completed 5 years on the post of Assistant Professor, after acquisition of M. Ch degree, on 30.07.2013.	Completed 5 years on the post of Assistant Professor on 21.07.2013.
Promoted as Associate Professor on 06.02.2013.	Promoted as Associate Professor in May, 2023.
Promoted as Professor on 09.05.2023.	Promoted as Professor on 11.11.2024.

To retire on 31.05.2029. To retire on 30.04.2031. Dr. Jyothish Tribunal OA 476 of 2013 the said post

4. It is not in dispute that the vacancy on the said post of Associate Professor, which is the bone of contention in this appeal, arose on 13th November, 2012. For recruitment in the Medical Education Service under the Health and Family Welfare Department, Govt. of Kerala, rules under the proviso to clause (2) of Article 309 of the Constitution of India have not been framed. However, recruitment from time to time has been made in terms of Government Orders issued by the relevant department. At the time of occurrence of the vacancy on the said post of Assistant Professor, Government Order dated 07th April, 2008 was in force. It was issued in “supersession of all existing rules and orders in force regarding qualification and method of appointment of the faculties under Medical Education Services”. The said G.O. provided qualifications for appointment in Branch – I i.e. Administrative Cadre and Branch – II i.e. Teaching Cadre. The discipline of neurosurgery was included under Head ‘C’ of Branch - II i.e. medical (super specialties). The categories of faculties covered by the said G.O. were (i) Professor,

(ii) Associate Professor, and (iii) Assistant Professor.

5. Insofar as Branch – I i.e. Administrative Cadre is concerned, the same bore two posts i.e. Director of Medical Education and Joint Director of Medical Education/Principals of Medical Colleges. Under the column experience, we find the requirement for appointment on the posts of Director of Medical Education and Joint Director of Medical Education/Principals to be common. The same reads as under:

G.O. “Minimum 10 years of Physical Teaching Experience in Government Medical Colleges (under Medical Education Department in Kerala) after acquiring postgraduate degree”.

(emphasis supplied)

6. For recruitment and appointment on the posts of Professor, Associate Professor and Assistant Professor, the educational qualifications appear to be the same. An aspirant must have the degree of M. Ch in Neurosurgery or DNB (Neurosurgery). The experience criteria required for the said three posts, however, vary. The same are set out hereunder:

Professor Associate Professor Assistant Professor One year Physical Five years
Physical Three years Physical Teaching experience Teaching experience Teaching
experience as Associate as Assistant as Senior Lecturer/ Professor. Professor.
Lecturer.

7. If the experience criteria required for appointment on the posts under Branch - I i.e. – Administrative Cadre are juxtaposed with the experience criteria required for appointment on the teaching posts of Professor/Associate Professor/Assistant Professor, what stands out is that in case of posts in the teaching cadre, the words “after acquiring postgraduate degree” are conspicuous by its absence under the column ‘experience’.

8. Dr. Jyothish claimed before the High Court that notwithstanding absence of such words under the column experience for Branch - II i.e. Teaching Cadre, the said requirement has to be read into it. Reference was made by him to Rules 10 and 28, Part II of the Kerala State and Subordinate Services Rules, 19589 to contend that Dr. Sharmad did not possess the requisite experience to satisfy the mandatory eligibility qualifications and was illegally appointed on promotion to the said post of Associate Professor by the official respondents. On the contrary, Dr. Sharmad claimed, in light of the criteria for experience for appointment in Branch - I i.e. Administrative Cadre, that it is not the requirement of G.O. dated 07th April, 2008 that an aspirant ought to have 5 (five) years physical teaching experience as an Assistant Professor (regular) after acquiring postgraduate degree. In such view of the matter, the official respondents did not commit any illegality in promoting Dr. Sharmad as an Associate Professor even before efflux of 5 (five) years since acquisition of the degree of M. Ch.

9. The official respondents sought to defend the promotion of Dr. Sharmad to the said post of Associate Professor by referring to G.O. dated 14th December, 2009 issued by the Health and Family Welfare Department on the subject of pay and allowances, inter alia, of the members of the Kerala Medical Education Service. According to them, G.O. dated 14th December, 2009 abrogated G.O dated 07th April, 2008 and in terms of the former, Dr. Sharmad did satisfy the eligibility criteria for promotion to the said post of Associate Professor. While providing for revised scale of pay for Associate Professors, G.O. dated 14th December, 2009 laid down as follows:

KS and SSR 1.5 Revised scale of Associate Professors

a) Medical & Dental

i) ***

ii) Incumbent Assistant Professors with five years (for teachers with Super specialty degree in the concerned discipline this will be two years after acquiring Superspeciality degree) teaching experience as Assistant Professor in the current pay scale of Rs. 12000-18300 including Time Bound Higher Grade service and a total service of 8 years after acquiring Post Graduate Degree (5 years for Superspeciality degree holders) in all grades put together will be promoted and placed in the pay band of Rs.37,400-67,000 with Academic Grade Pay of Rs.9,000 and shall be redesignated as Associate Professors; however they will have to publish two Research papers within a period of two years promotion in Peer Indexed/National Journals as per MCI/DCI regulations;

however for teachers of Dental Colleges, as per the Dental Council of India regulations, only Post PG teaching experience will be reckoned as eligible service for placement as Associate Professor.

iii) Incumbent Assistant Professors who have not completed 5 years teaching service (or having less than 2 years service for superspeciality degree holders) in the cadre of Assistant Professor (including TBCP/CAP grade) as on 01.01.2006 will be placed in the appropriate stage in the pay band of Rs.15,600-39,100 and Academic Grade Pay of Rs.8,000/-, till they complete the required period of 5/2 years respectively. Thereafter on completion of 5 years service as Assistant Professor, including Time Bound Cadre Promotion grade in pre-revised scale (2 years for superspeciality degree holders) and a total service of 8 years after acquiring Post graduate Degree (5 years for superspeciality degree holders) in all grades put together, they will be promoted and placed in the appropriate stage in the Pay band of Rs.37,400-67,000 with Academic Grade pay of Rs.9,000/- and redesignated as Associate Professor, subject to fulfilling academic performance requirements to be specified. However they will have to publish two Research papers within a period of two years in Peer Indexed/National Journals as per MOI regulations; provided that for Dental College teachers, only post PG teaching experience will be reckoned as per Dental Council of India norms for promotion.”

10. Though the claim of Dr. Jyothish failed before the Tribunal, as noticed above, he succeeded before the High Court which went on to hold that reliance placed by the official respondents on G.O. dated 14th December, 2009 was absolutely misplaced. The High Court further held that Dr. Sharmad lacked 5 years physical teaching experience as Assistant Professor after acquiring the degree of M. Ch. and, therefore, ought not to have been promoted ahead of others who did satisfy the eligibility criteria. Arguments of Dr. Jyotish relying on Rules 10 and 28 of the KS and SSR were accepted. Accordingly, the High Court set aside the appointment on promotion of Dr. Sharmad to the said post of Associate Professor and directed the official respondents to convene a review Departmental Promotion Committee meeting for the purpose of drawing an appropriate select list to fill up the said post of Associate Professor. It was also observed that while preparing the select list, the relevant recruitment rules in force, namely, G.O. dated 07th April, 2008 and the relevant provision of Rule 28 of Part II, KS and SSR shall be looked into while excluding G.O. dated 14th December, 2009 from consideration.

11. We have heard Mr. Giri and Mr. Chitambaresh, learned senior counsel representing Dr. Sharmad and Dr. Jyotish, respectively. We have also heard Mr. C.K. Sasi, learned counsel for the official

respondents.

12. The eligibility criteria for appointment on posts borne in Branch – I i.e. Administrative Cadre and in Branch – II i.e. Teaching Cadre, in the absence of recruitment rules framed under Article 309 of the Constitution, are provided by G.O. dated 07th April, 2008 which is the executive order governing recruitment. That is a position, which is accepted even by Dr. Jyotish. According to him, Dr. Sharmad does not qualify in terms thereof.

13. Law is settled that in the absence of rules, recourse to recruitment based on executive orders could be taken. Even without examining whether G.O. dated 14th December, 2009 had any application to the promotional appointment in question, it would be just and proper to focus on the requirements of G.O. dated 07th April, 2008.

14. The contents under the column 'experience' in G.O. dated 07th April, 2008, extracted supra, have been read. A plain and literal reading does not lead to the conclusion that 5 years' experience of physical teaching as an Assistant Professor after acquiring M. Ch. degree is one of the requisite qualifications.

15. Strong reliance has been placed by Mr. Chitambaresh on Rule 10(ab) of Part – II, KS and SSR. A perusal of certain provisions of the KS and SSR would be of profit:

2 (15) "Service" means a group of persons classified by the State Government as a State or a Subordinate Service as the case may be.

2 (16) "Special Rules" shall mean the rules in Part III applicable to each service or class of service.

10. Qualifications - (a)(i) The educational or other qualifications, if any, required for a post shall be as specified in the Special Rules applicable to the service in which that post is included or as specified in the executive orders of Government in cases where Special Rules have not been issued for the post/service.

(ii) Notwithstanding anything contained in these rules or in the Special Rules, the qualifications recognised by executive orders or standing orders of Government as equivalent to a qualification specified for a post, in the Special Rules or found acceptable by the Commission as per rule 13(b)(i) of the said rules in cases where acceptance of equivalent qualifications is provided for in the rules and such of those qualifications which pre-suppose the acquisition of the lower qualification prescribed for the post, shall also be sufficient for the post. ***

16. Turning to Rule 10(ab), it appears to have been incorporated in 1993 by an amendment. The text of Rule 10(ab) reads:

“Where the Special Rules or Recruitment Rules for a post in any service prescribe qualification of experience, it shall, unless otherwise specified, be one gained by

persons on temporary or regular appointment in capacities other than paid or unpaid apprentices, trainees and casual labourers in Central or State Government service or in Public Sector Undertaking or Registered Private Sector Undertaking, after acquiring the basic qualification for the post:

Provided that the experience gained as factory workers on daily wages of a permanent nature may be accepted, if the service is continuous and not of a casual nature.”

17. ‘Recruitment Rules’ is used in Rule 10(ab) as an alternative to Special Rules, without the same being defined. To understand what ‘Recruitment Rules’ would mean in the context, one may simultaneously read Rule 10(a)(i) extracted supra.

18. Thus, without ‘Recruitment Rules’ being defined, it can take colour from Rule 10(a)(i) and be understood to mean and include executive orders of the Government in a case where Special Rules are absent.

19. Even if the KS and SSR were applicable, nothing turns on it because Rule 10(ab) itself consciously uses the expression “unless otherwise specified”. The Tribunal briefly assigned a reason as to how such expression was material for dislodging the argument of Dr. Jyotish. While we concur with the Tribunal, we wish to elaborate a little further for the sake of clarity.

20. Our reading of Rule 10 of the KS SSR, as originally framed in 1958, together with the amendments incorporated in it from time to time, including Rule 10(ab), leads us to the irresistible conclusion that Rule 10 is entirely irrelevant and immaterial for appointment on promotion in the Administrative and Teaching Cadres of the Medical Education Services. The recruitment rules with which we are concerned, i.e., G.O. dated 07th April, 2008, was issued at a point of time when Rule 10(ab) had already found its way in the KS and SSR by an amendment. G.O. dated 07th April, 2008 was issued superseding all existing rules and orders in force on the method of appointment of the faculties under medical education service. The executive must, therefore, be deemed to be aware of what the KS and SSR, which are the general rules, provided. Notwithstanding the same, G.O. dated 07th April, 2008 was issued governing recruitment in two branches i.e. Administrative and Teaching Cadres. G.O. dated 07th April, 2008 is, thus, a special rule as distinguished from a general rule like the KS and SSR. Rule 10(ab), on its own showing, having referred to the expression “unless otherwise specified”, the same has to be given some meaning or else it would be rendered redundant. It is well settled that no word, no phrase and no expression used in a legislation should be excluded as surplusage, while the courts embark on a course of interpretation. In our reading, the distinction in the qualifications for posts in Branch-I and Branch-II in G.O. dated 07th April, 2008 would constitute the specification which is excluded from the purview of Rule 10(ab) and such rule had / has no application to the promotional appointment in question. The Tribunal was quite right in its observation.

21. We also propose to assign one other reason, in continuation of the one discussed above, to support the view of the Tribunal that the original application of Dr. Jyotish did deserve in limine

dismissal.

22. This is a case where the maxim *expressio unius est exclusio alterius* (meaning whatever has not been included has impliedly been excluded) would apply. In G.O. dated 07th April, 2008, the words “after acquiring postgraduate degree” are specifically included in the column for experience qua eligibility criteria for appointment on the posts of Director of Medical Education and Joint Director of Medical Education/Principals of Medical Colleges, i.e., posts in Branch – I i.e. Administrative Cadre. If, indeed, it were the intention of the executive that aspirants for the said post of Associate Professor, or, for that matter, for the post of Professor were required to have physical teaching experience in the feeder posts for specified number of years “after acquiring postgraduate degree”, it defies reason as to why the same qualification was not included for appointments on promotion to posts borne in Branch – II i.e. Teaching Cadre but included for the posts borne in Branch – I i.e. Administrative Cadre. The submission on behalf of Dr. Jyotish that posts borne in the Administrative Cadre have responsibilities different from those borne in the Teaching Cadre, though attractive at first blush, pales into insignificance primarily for the reason that insistence of physical teaching experience of a specified number of years with a particular postgraduate or super speciality degree would seem to be more required and demanding for appointment on posts in the Teaching Cadre rather than those in the Administrative Cadre. We are, thus, minded to hold that the exclusion of the words “after acquiring postgraduate degree” is deliberate and conscious and the contentions advanced by Mr. Chitambaresh, to the contrary, do not commend acceptance.

23. Note to Rule 28(b)(1A) of Part – II, KS and SSR also does not come to the rescue of Dr. Jyotish. The provision therein would apply if on the relevant date there is no qualified candidate for promotion. That is not the case here. As on the date of occurrence of vacancy i.e. 13th November, 2012, Dr. Sharmad had physical teaching experience of more than 5 years as Assistant Professor (he having joined on 11th January, 2007). He being eligible, in terms of the recruitment rules, there was no occasion for invoking the said note. The High Court erred in placing reliance on Rule 28(b)(1A).

24. It is now time to consider the decisions cited by Mr. Chitambaresh.

25. *Shesharao Jangluji Bagde v. Bhaiyya s/o Govindrao Karale*¹⁰ was relied on for the proposition that experience gained has to be subsequent to the acquisition of qualification. What this Court in paragraph 3 held is this:

“3. *** Normally when we talk of an experience, unless the context otherwise demands, it should be taken as experience after acquiring the minimum qualifications required and, therefore, necessarily will have to be posterior to the acquisition of the qualification. However, in the case of a promotion the same interpretation may not be just or warranted. It would 1991 Supp (1) SCC 367 depend on the relevant provisions as also the particular type of experience which is required. ***” (emphasis supplied)

26. It is clear as daylight that what this Court held and what is argued as a proposition of law are at variance. The particular type of experience required by G.O. dated 07th April, 2008 was possessed

by Dr. Sharmad; hence, this decision does not come to the rescue of Dr. Jyotish. Furthermore, an examination of the ratio of the decision favours the case of Dr. Sharmad. Not only does the passage begin with '(N)ormally' leaving room for cases which are other than normal, this Court also qualified that experience required should be deemed to be experience gained after acquiring the minimum qualifications, unless the context otherwise demands. This is crucial. Also, such a general interpretation may not arise in case of promotional appointments. G.O. dated 07th April, 2008, read as a whole, evinces without any ambiguity the view of the Government that where the experience had to be gained posterior to the acquisition of qualification, it had directly stated so. Thus, in the context of this case, absence of such a stipulation gives rise to but one conclusion, that the Government did not demand such post-qualification experience for the posts under consideration here. Although, normally, experience gained after acquiring a particular qualification could justifiably be insisted upon by the employer, there could be exceptions and the present case is one such exception. It is well settled that the intention of the rule framer has to be assessed on both parameters i.e. the words used and that of necessary implication. The requisite of post-qualification experience being present in Branch – I, and absent from Branch – II, necessarily implies that it was not a requirement for appointments on promotion to posts borne in Branch – II.

27. The next decision cited is Arun Kumar Agarwal (Dr.) v. State of Bihar¹¹ for the proposition that if a candidate is available with super speciality, he should be given preference. We need to read paragraph 12 of the decision to understand what precisely was held by this Court. The relevant sentence reads:

“12. *** Thus the appellant having a degree in superspeciality and also having research work or working experience has been rightly given preference in the matter of appointment to the post of Assistant Professor in Neurosurgery over respondent 5 who did not have a degree in superspeciality.”

28. Arun Kumar Agarwal (Dr.) (supra) is distinguishable on facts. Since 'preference' has been referred to, it goes without saying that the ratio thereof could apply where other qualifications / things being equal, preference is given to an aspirant having higher qualification. In the case before us, although both Dr. Sharmad and Dr. Jyotish were holders of M. Ch. degrees, as on date of occurrence of the vacancy on the said post of Associate Professor i.e. 13th November, 2012, Dr. Jyotish did not have the requisite experience of 5 years physical teaching as an Assistant Professor (he admittedly having been promoted to such post only on 22nd July, 2008). Question of preferring Dr. Jyotish to Dr. Sharmad did not arise at all since the former was 1991 Supp (1) SCC 287 deficient insofar as experience on the post of Assistant Professor is concerned.

29. The upshot of the aforesaid discussion leaves us with no option but to hold that the impugned judgment and order of the High Court is unsustainable. The same is set aside and the judgment and order of the Tribunal restored, with the result that the original application of Dr. Jyotish shall stand dismissed.

30. Civil Appeal No. 13422 of 2024 is, thus, allowed. Parties shall, however, bear their own costs.

31. Pending application, if any, stands disposed of.

32. The High Court, vide the impugned judgment and order dated 4th April, 2017, modified the order dated 9th January, 2015 of the Tribunal under challenge before it and disposed of the original petition¹² preferred by Dr. R. Jayaprakash. This appeal, by special leave, is directed against the said judgment and order.

33. Promotion from the post of Senior Lecturer to the post of Assistant Professor in Paediatrics was the subject matter of consideration in the original application before the Tribunal. Whether three years' physical teaching experience gained after acquisition of Post Graduate (PG) qualification is the prescribed condition that an aspirant was required to fulfil, fell for examination. The Tribunal held that experience gained only after acquiring PG qualification would count.

34. The operative part of the High Court's order reads as follows:

"In the said circumstances, the impugned order passed by the Tribunal in T.A. No.4858/12 to the extent it held that Rule 10(ab) of the General Rules is applicable in the matter of promotion to the post of Assistant Professor in the Medical Education Department is confirmed. However, the consequential direction issued by the Tribunal to the first respondent to review promotion of the applicant and respondent Nos.4 to 6 and assign the dates of promotion to the post of Assistant Professor, having due regard to the date of occurrence of the vacancy and the date of acquisition of Post Graduate qualification in the feeder category, stand set aside."

35. The decisions cited by Mr. Romy Chacko, learned senior counsel for the impleading applicants have been considered.

36. Indian Airlines Ltd. v. S Gopalakrishnan¹³ laid down the law upon consideration of the general information instructions which clearly indicated that the experience would be computed after the date of acquiring necessary qualifications. That is not the case here. The requirements in Indian Airlines Ltd. (supra) are strikingly dissimilar to the recruitment rules governing promotional appointments, which are under consideration. This decision, therefore, is of no assistance to Mr. Chacko.

37. The decisions of the High Court, viz., Sirajudheen v. Public Service Commission¹⁴, Rabi v. State of Kerala¹⁵ and A. Basheer v. Saiful Islam A.¹⁶, once again did not have the occasion to consider G.O. 2001 (2) SCC 362 1999 (1) LLN 408 2007 SCC OnLine Ker 418 2014 SCC OnLine Ker 18469 dated 07th April, 2008 since the recruitment in question in all three cases were in different departments of the Govt. of Kerala. The said decisions having been rendered upon examination of rules

governing appointments on the posts of Assistant Motor Vehicle Inspector, Reader in Political Science and Assistant Professor in the Kerala Dental Education Service, respectively, which are at variance with G.O. dated 07th April, 2008, these three decisions of the High Court also do not help Mr. Chacko.

38. Having regard to the findings and conclusions that we have recorded while allowing Civil Appeal No. 13422 of 2024, the judgment and order under challenge dated 4th April, 2017 cannot be sustained in law. The same is set aside with the result that the original application of Dr. R. Jayaprakash shall stand dismissed.

39. Thus, Civil Appeal No. 13423 of 2024 too stands allowed.

40. Pending application, if any, stands disposed of.

.....J. (DIPANKAR DATTA)J. (PRASHANT
KUMAR MISHRA) New Delhi.

January 10, 2025.