

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K. SURENDRA MOHAN

&

THE HONOURABLE MR. JUSTICE SHAJI P. CHALY

WEDNESDAY, THE 16TH DAY OF SEPTEMBER 2015/25TH BHADRA, 1937

OP(KAT).No. 10 of 2015 (Z)

AGAINST THE ORDER IN OA 1740/2012 AND ORDER IN UN-NUMBERED R.A. OF 2014 IN
O.A. NO.1740 OF 2012 OF KERALA ADMINISTRATIVE TRIBUNAL, THIRUVANANTHAPURAM

PETITIONER/APPLICANT:

DR. P. BONNY NATESH, AGED 54 YEARS
S/O. SRI P K NATESAN
ASSOCIATE PROFESSOR IN SURGICAL GASTROENTEROLOGY
MEDICAL COLLEGE, THIRUVANANTHAPURAM-695011
RESIDING AT NANDANAM VL-65, LAW COLLEGE ROAD
VANCHIYOOR P O, THIRUVANANTHAPURAM-695035

BY ADVS. SRI. O. V. RADHAKRISHNAN (SR.)
SMT. K. RADHAMANI AMMA
SRI. ANTONY MUKKATH
SRI. K. R. RANJITH
SRI. C. PANIL RAJ
SRI. JOS LEO JOSE

RESPONDENTS/RESPONDENTS 1 TO 3:

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1. STATE OF KERALA
REP BY ITS SECRETARY TO GOVERNMENT
HEALTH AND FAMILY WELFARE DEPARTMENT
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM
KERALA-695001
 2. DEPARTMENTAL PROMOTION COMMITTEE (HIGHER) FOR PROMOTION
TO THE POST OF PROFESSOR UNDER THE MEDICAL EDUCATION SERVICE
REPRESENTED BY ITS CONVENOR AND SECRETARY TO GOVERNMENT
HEALTH AND FAMILY WELFARE DEPARTMENT
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM
KERALA-695001
 3. DR. RAMESH RAJAN
ASSOCIATE PROFESSOR, SURGICAL GASTROENTEROLOGY
MEDICAL COLLEGE, THIRUVANANTHAPURAM, KERALA-695011
- R3 BY ADVS. SRI. ELVIN PETER P.J.
SRI. T. G. SUNIL (PRANAVAM)
SRI. K. R. GANESH
- R1 & R2 BY GOVERNMENT PLEADER SRI. M. MOHAMMED SHAFI

THIS OP KERALA ADMINISTRATIVE TRIBUNAL HAVING BEEN FINALLY HEARD ON
16-09-2015, ALONG WITH OPKAT. 33/2015, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:

APPENDIX

PETITIONER(S)' EXHIBITS

P1:-PHOTOCOPY OF THE ORIGINAL APPLICATION NO 1740/2012 WITH ANNEXURES A1 TO A16

P2:-PHOTOCOPY OF THE REPLY STATEMENT OF THE 1ST RESPONDENT-GOVERNMENT

P3:-PHOTOCOPY OF THE REJOINDER STATEMENT OF THE APPLICANT

P4:-PHOTOCOPY OF THE REPLY STATEMENT OF THE 3RD RESPONDENT

P5:-PHOTOCOPY OF THE REJOINDER FILED BY APPLICANT TO THE REPLY STATEMENT OF THE 3RD RESPONDENT

P6:-PHOTOCOPY OF THE GO(RT) NO 3559/2012/H&FWD DATED 29/10/2012 OF THE 1ST RESPONDENT

P7:-PHOTOCOPY OF THE PROCEEDINGS/ORDER NO F5/6767/92/DME/K.DIS DTD 12/5/92 OF THE JOINT DIRECTOR IN CHARGE, MEDICAL EDUCATION TVM

P8:-PHOTOCOPY OF THE LETTER NO GE6/B/4922 DTD 30/7/2012 OF THE SR.ACCOUNTS OFFICER, ACCOUNTANT GENERAL(A & F), THIRUVANANTHAPURAM

P9:-PHOTOCOPY OF THE LETTER F5/3059/2010/DME DTD 21/6/2012 OF THE DIRECTORATE OF MEDICAL EDUCATION, THIRUVANANTHAPURAM

P10:-PHOTOCOPY OF THE ORDER DTD 12/2/2014 IN OA NO 1740 OF 2012 OF THE KERALA ADMINISTRATIVE TRIBUNAL, THIRUVANANTHAPURAM BENCH

P11:-PHOTOCOPY OF THE JUDGMENT DTD 21/8/2014 IN OP(KAT) NO 277 OF 2014 OF THIS HON'BLE COURT

P11(A):-PHOTOCOPY OF THE UNNUMBERED RA OF 2014 IN OA NO 1740 OF 2014 WITHOUT ANNEXURES WITH CONDONATION OF DELAY M A NO 1398/2014

P12:-PHOTOCOPY OF THE ORDER DTD 21/10/2014 IN UN-NUMBERED R A OF 2014 IN OA NO 1740 OF 2012 OF THE KERALA ADMINISTRATIVE TRIBUNAL, THIRUVANANTHAPURAM BENCH

RESPONDENTS' EXHIBITS:

EXT.R3(a) – TRUE COPY OF G.O.(P) NO.352/2014/H&FWD DATED 12.12.2014 ISSUED BY THE GOVERNMENT.

//TRUE COPY//

P.A. TO JUDGE

smv

**K. SURENDRA MOHAN
&
SHAJI P. CHALY, JJ.**

O.P.(KAT) Nos.10 and 33 of 2015

Dated this the 16th day of September, 2015

JUDGMENT

Shaji P. Chaly, J.

The above original petitions are filed against the order of Kerala Administrative Tribunal in O.A. No.1740 of 2012 dated 12.2.2014 and order in un-numbered R.A. of 2014 in O.A. No.1740 of 2012 and O.A. No.2173 of 2012 dated 12.2.2014 and order in un-numbered R.A. Of 2014 in O.A No.2173 of 2012 dated 21.10.2014, respectively. O.A. No.1740 of 2012 was dismissed by Ext.P10 order dated 12.2.2014 rejecting the claim of the petitioner for promotion as Associate Professor and Professor in preference to respondent No.3 and the order in un-numbered R.A. in O.A. No.1740 of 2012 was dismissed holding that the same was belated and there is no provision for condonation of delay. O.A. No.2173 of 2012 was filed challenging Ext.P6 order and to declare that the applicant was entitled to be granted promotion/placement as Associate Professor under Career Advancement Promotion Scheme w.e.f.

31.03.2006 as against 31.05.2008 in Annexure – A3 and other consequential reliefs.

2. Since there are common factual aspects, it is only appropriate that both the Original Petitions are disposed of together.

3. Brief facts for the disposal of the Original Petitions are as follows:

4. O.A. No.1740 of 2012 was filed by the petitioner seeking a declaration that Annexure-A9 select list for placement as Professor in Surgical Gastroenterology in terms of paragraph 7.6(b) of Annexure – A11 Career Advancement Scheme as illegal and claiming that the applicant was entitled to be granted placement as Professor in preference to the 3rd respondent. The petitioner has also sought a direction to the respondents 1 and 2 to consider him for placement and promotion as Associate Professor in Surgical Gastroenterology under the Career Advancement Programme (CAP) in terms of paragraph 7.5.(a) (ii) of Annexure A-11 reckoning his entire service rendered with Post Graduate Degree and granting such placement w.e.f.31.05.2006 and consider him for placement and promotion as Professor in accordance with paragraph 7.6.(b) of Annexure –

A11 order w.e.f 31.05.2009 or on the basis of his placement as per Annexure-A3 in preference to respondent No.3 and for other substantive and ancillary reliefs.

5. Petitioner entered service as Tutor in Gastroenterology Surgery, later on re-designated as Lecturer Gastroenterology Surgery on the advice of the Kerala Public Service Commission (hereinafter called "the PSC") as per order dated 12.01.1990 of the Director of Medical Education, Thiruvananthapuram. Petitioner joined duty on 12.02.1990. Petitioner possessed M.S. Degree at the time of his appointment as Lecturer in Gastroenterology Surgery as evidenced from Annexure – A2. The appointment of the petitioner in that cadre was regularized w.e.f.12.02.1990 as per order dated 04.07.1990 of the Director of Medical Education. The probation of the petitioner as Lecturer was declared w.e.f 11.02.1992 A.N. as per order dated 12.5.1992 of Director of Medical Education. Thereafter, petitioner was promoted as Assistant Professor as per Annexure-A1 order dated 11.4.1997 and the petitioner joined the said post on the said date itself.

6. Thereafter, petitioner availed leave without allowances for taking employment abroad for five years w.e.f. 26.9.1997 as

per Government Order dated 31.7.1997. On completion of 5 year period of leave, petitioner applied for extension of leave without allowances for another two years w.e.f. 26.9.2002 and the same was granted as per G.O. Dated 19.03.2003. Even though on completion of the said extended period of leave, further extension was sought for by the petitioner, same was rejected and he was directed to re-join duty. Accordingly, petitioner reported for duty and as per Government Order dated 29.11.2005, petitioner was posted in the open vacancy as Assistant Professor Surgical Gastroenterology in Medical College, Kozhikode with immediate effect. Petitioner joined duty at Medical College, Kozhikode w.e.f. 23.12.2005 F.N. as per order dated 24.12.2005 of the Principal, Medical College, Kozhikode. The period between 26.09.2004 to 22.12.2005 was regularized as 'non-duty' without forfeiture of past service in terms of Rule 3 of Appendix XIIA of KSR as per Government Order dated 24.7.2007. Thereafter, the probation of the petitioner was declared in the cadre of Assistant Professor by order dated 5.9.2007 w.e.f. 08.04.2006 as per Annexure- A-1(a) order.

7. In the meanwhile, petitioner was selected for admission

to Post Graduate Super Specialty Course 2006 in M.ch in Gastroenterology. Accordingly petitioner was relieved from Medical College, Kozhikode w.e.f. 31.12.2006 and as per Government Order dated 04.11.2006, petitioner was granted deputation for undergoing M.ch course at Medical College, Thiruvananthapuram. Petitioner passed M.ch in Surgical Gastroenterology in July 2009 and he was issued with Annexure-A-2 (a) provisional certificate dated 17.08.2009 by the University of Kerala. Thereafter, petitioner was granted Career Advancement Promotion as Associate Professor w.e.f. 31.05.2008 on completion of 10 years service as per Annexure – A3 order dated 29.02.2012. Thereafter, Government Order dated 29.10.2012 modified the date of Career Advancement Promotion as Associate Professor w.e.f. 17.08.2011 as against 31.08.2008 originally granted as per Annexure A3 dated 29.2.2011. Ext.P6 order was passed and served on the petitioner during the pendency of O.A. No.1740 of 2012 and accordingly petitioner challenged the same by filing O.A. No.2173 of 2012 seeking to quash Ext.P6 order and to declare that petitioner was entitled to be granted promotion/placement as Associate Professor under CAP w.e.f. 31.05.2006 as against 31.5.2008 and for other

consequential reliefs.

8. It was the further contention of the petitioner that the Medical Council of India (MCI) in exercise of its power under Section 33 of the Indian Medical Council Act issued Annexure A5 “Minimum qualification of teachers in Medical Institutions Regulation 1998” and as per regulation 2, the minimum qualification for appointment as a teacher in various departments of a Medical College shall be as specified in Schedule I and II thereunder. As per the said schedules annexed to the regulation the qualification prescribed for appointment as Associate Professor and Professor in Surgical Gastroenterology is M.ch (Surgical Gastroenterology or M.S. (Surgical Gastroenterology) with two years special training in Surgical Gastroenterology. Note 4, Schedule II provides that for all teaching appointments to posts higher than Tutor in higher specialties i.e. Cardiology, Neurology, Thoracic Surgery, Pediatric Surgery, Urology, the candidates must possess Post Graduate Degree qualification in the specialty concerned. It was further contended that Government of Kerala had issued revised rules dated 07.04.2008 governing the qualification and method of appointment to the faculties in Medical Education Service,

whereby M.ch Surgical Gastroenterology was prescribed as the requisite educational qualification for the posts of and above that of Assistant Professor in that specialty. But the Assistant Professors who were in service as on 07.04.2008 were protected from the fulfillment of the provisions therein which read that "9. Nothing in these rules shall adversely affect those already in service as Assistant Professors on the date of commencement of these rules."

9. Thereupon it was contended by the petitioner that he was granted promotion as Assistant Professor under CAP on 29.2.2012 much after his representation and that immediately thereafter petitioner has submitted Annexure – A7 representation before the Government and since he apprehended convening Departmental Promotion Committee (DPC) for promotion to the post of Professor and that he understood that his name was not in that zone of consideration he submitted Ext.P8 representation. It was the further contention of the petitioner that the DPC met on 7.5.2012 did not consider the case of the petitioner and the select list dated 27.6.2012 was published as per Annexure – A9 by which the 3rd respondent was the only Associate Professor selected for

promotion as Professor for the year 2012. petitioner was appointed as Lecturer in 2002 and promoted as Assistant Professor on 16.6.2007. He was not qualified for regular promotion as Associate Professor, for which 5 years experience in the cadre of the Assistant Professor was necessary. It was further contended that no select list of Assistant Professors was drawn for regular promotion to the cadre of Associate Professor. The vacancy of Associate Professor was available since 01.05.2009 and petitioner was entitled to be considered and promoted against that vacancy in preference to 3rd respondent.

10. It was also contended that since the petitioner understood that respondents 1 and 2 were taking steps to withdraw even the placement granted to the applicant under CAP as per Order dated 29.2.2012 as Associate Professor Annexure A10 representation was submitted before the Government espousing his claim that he was entitled to the placement and promotion as Associate Professor w.e.f. 31.05.2006 as per the relevant paragraphs of Annexure – A11 CAP Scheme. It was also contended by the petitioner that 3rd respondent was granted placement as Associate Professor under CAP as per order dated 18.4.2011 w.e.f. 04.11.2008 and at the

same time petitioner's placement under CAP was unnecessarily delayed till February 2012 and the petitioner continued to be the senior most in the department and thereafter he was entitled to be considered for regular promotion as well as placement as Associate Professor and Professor in preference to the 3rd respondent.

11. Apart from other contentions, it was contended that petitioner was entitled to be promoted to the post of Associate Professor and Professor in preference to the 3rd respondent as he was far junior to the petitioner. In that circumstances petitioner has sought to set aside Annexure – A9 select list and sought declaration that petitioner was entitled to be granted placement as Professor in preference to the 3rd respondent based on Annexure – A3. Apart from other consequential reliefs, petitioner has sought relief No.3 as follows “III. Direct the respondents 1 and 2 to convene a DPC for regular promotion of Assistant Professor to the cadre of Associate Professor without any further delay and consider the case of applicant in terms of Annexure A6 order dated 7.4.08.”

12. Respondents 1 and 2 and the 3rd respondent have filed replies, to which the petitioner has filed rejoinders and after

evaluating the facts and circumstances of the case put forth by the petitioner KAT has passed Ext.P10 order dated 12th February, 2014 holding that the petitioner was not entitled to be appointed as claimed by him since he did not have the prescribed qualification during the relevant period. But at the same time the challenge raised by the petitioner against Annexure – A9 order to the extent the same concerns the promotion of the 3rd respondent who was a Assistant Professor directly appointed to the post of Professor was interfered with by the Tribunal holding that the appointment of the 3rd respondent from Assistant Professor to Professor is against the method of appointment as per Annexure A6 Special Rules. Thereupon the appointment of the 3rd respondent was declared as invalid. But at the same time held that the 3rd respondent, even if his promotion to the post of Professor is set aside, was entitled to get promotion as Associate Professor and Professor in preference to the petitioner as he had acquired M.ch qualification as early as on 04.11.2006. Thereupon the State Government was directed to convene DPC and consider the claim of the 3rd respondent for promotion having regard to the date of occurrence of vacancies and the persons qualified in the

feeder category at the relevant time and the same was directed to be done within a period of three months from the date of receipt of a copy of the order.

13. In view of the order passed in O.A. No.1740 of 2012, O.A. No.2173 of 2012 was also dismissed holding that there was nothing wrong with Annexure A4 dated 29.10.2012 or re-constituting the promotion as per CAP revising it w.e.f. 17.8.2011. It is thus aggrieved by the said order petitioner has preferred O.P.(KAT) No.33 of 2015.

14. Consequent to the dismissal of O.A. 1740 of 2012 petitioner had earlier preferred O.P.(KAT) No.277 of 2014 mainly contending that the Tribunal misdirected itself in adjudicating the entitlement of the petitioner in the light of Annexure A6 rules which came into force w.e.f. 07.04.2008 and that the claim of the petitioner should have been dealt with in the context of Annexure A5 regulations issued by the Medical Council of India which held the field till 07.04.2008. A Division Bench of this Court found that the said contention was not a contention urged before the Tribunal and in that view of the matter the said course of action was found to be impermissible and held that the remedy available to the petitioner was to move

the Tribunal itself by way of review petition and therefore, declined to entertain the Original Petition. It is in that context that the petitioner preferred un-numbered R.A of 2014 in O.A. No.1740 of 2012 and un-numbered R.A. of 2014 in O.A. No.2173 of 2012. The review petitions were dismissed by the Tribunal holding that in view of the judgment of the Apex Court in **Union of India v. Chitrlekha Chakravarthy** in Civil Appeal No.6213, the Tribunal did not have power to condone the delay and therefore, the Review Application filed belatedly could not be sustained under law. Even though it was held that there was no provision for condonation for delay, learned Tribunal has heard the petitioner on merits and held that the petitioner had put forth his claim relying on Annexure A6 rules for promotion to the post of Associate Professor and that the case was heard and disposed of in open court in the presence of the parties. The Tribunal further held that all the contentions raised by both sides were dealt with and every point pleaded before the Tribunal was considered while pronouncing the order. It was also noted by the Tribunal that the petitioner has put forward a new case relying on Annexure A5 MCI norms. Relying on Annexure A5, the petitioner contended in the Review Application

that only two years experience is prescribed in Annexure A5 norms issued by the MCI. The Tribunal found that in Annexure-A17, the incumbent should have 5 years experience as Assistant Professor for promotion to the post of Associate Professor and that the appointing authority and the applicant were governed by the special rules and that if the special rules were not framed in tune with the regulations of the MCI, the applicant may have a cause of action to challenge it. Relying on the decisions of the Apex Court as well as this Court, it was held by the Tribunal that the applicant was bound by the rules framed by the Government invoking Section 2 of the Kerala Public Services Act and therefore, going by Annexure A7 also, the petitioner did not have the required experience of 5 years in the post of Assistant Professor. In view of the petitioner availing leave without allowances within a period of 5 months from his promotion to the post of Assistant Professor on 11.4.1997, the Tribunal also found that the petitioner could complete 5 years service only by July, 2010 and in the meanwhile Annexure A6 rules came into force on 07.04.2008 and therefore, the claim of the petitioner for promotion in the light of the rules existing prior to the issuance of Annexure A6 was plainly untenable. It was also found that

such a claim was made without proper pleadings in the original application and without amending the same and therefore the applicant does not have a case on merits also.

15. It is thus challenging these orders in the Review Applications also, the above said Original Petitions were filed by the petitioner.

16. Heard learned Senior Counsel Sri.O.V.Radhakrishnan for the petitioner, the learned counsel Sri.Elvin Peter. P.J. for the 3rd respondent and the learned Government Pleader Sri. Muhammed Shafi for respondents 1 and 2.

17. The thrust of the contentions advanced by the learned Senior Counsel for the petitioner was that Annexure A5 regulations issued by the Medical Council of India invoking the power conferred on it under Section 33 of the Indian Medical Council Act has supremacy over Annexure A6 order issued by the State Government invoking its power under Article 162 of the Constitution of India. The learned Senior Counsel has invited our attention to Entry 66 of List I of Schedule 7 of the Constitution of India and contended that since power to determine standards in institutions for higher education or research and scientific and technical institutions, is included in

the union list, the Central Government alone have the power to prescribe standards in the field of higher education and therefore, Annexure A5 regulation passed by the Medical Council of India had supremacy to Annexure A6 order passed by the State Government fixing qualification in the matter of appointment of faculties to the medial education. Learned Senior Counsel further contended that even if a qualification is prescribed by the State Government superior to the minimum qualification fixed under Annexure A5 regulation, the same was unconstitutional and ultravires as provided under Article 254(1) of the Constitution of India. Learned Senior Counsel further contended that the qualification prescribed by the State Government as per Annexure A6 requiring a candidate to possess M.ch to be posted to the cadre of Professor invoking its power under Entry 25 of List III of Schedule 7 of the constitution was directly in conflict with Entry 66 referred supra and therefore as provided under Article 254(1), Annexure A6 was repugnant to Annexure A5 and therefore the qualification prescribed under Annexure A5 is to be taken into account for considering the qualification of the petitioner as well as the 3rd respondent. The contentions so made was the subject matter of

the review filed by the petitioner before the Administrative Tribunal, which was in fact also considered on merits and the Tribunal held that Annexure A6 rule issued by the State Government was valid in law. Learned Senior Counsel relied Schedule II of Annexure A5 wherein the qualification is prescribed to the teachers under Surgical Gastroenterology which reads as follows:

<i>SURGICAL GASTROENTEROLOGY</i>		
(A) Professor	M.ch (Surgical Gastroenterology)/M.S. (Surgery) with two years special training in Surgical Gastroenterology.	(i) As Reader/Associate Professor in Surgical Gastroenterology for four years in a recognised medical college/teaching institution. <u>Desirable</u> (ii) Minimum of four Research publications indexed in Index Medicus/national journal and one International Journal.
(B) Reader/Associate Professor	-do-	(i) As Assistant Professor/Lecturer in Surgical Gastroenterology for two years in a recognized medical college/teaching institution. <u>Desirable.</u> (ii) Minimum of four Research publications indexed in Index Medicus/national journals.
(c) Assistant Professor/Lecturer	-do-	(i) Requisite recognized specialization qualification in the subject. (ii) Three years teaching experience in Surgical Gastroenterology in a recognised medical college as Resident/Registrar/Demonstrator/Tutor
(D) Tutor/Demonstrator/resident/registrar	MBBS	

18.Counsel contended that M.ch (Surgical

Gastroenterology)/M.S. (Surgery) with two years special training in Surgical Gastroenterology is the qualification prescribed for the post of Assistant Professor/Lecturer, Reader/Associate Professor and Professor and therefore, the prescription of the State Government for M.ch qualification as per Annexure A6 as the minimum qualification to the aforesaid posts could not be sustained under law in view of the supremacy of Annexure A5 regulation issued by the Medical Council of India invoking its power under Section 33 of the Indian Medical Council Act.

19. In that context, the learned counsel contended that if he was granted his rightful promotion to the grade of Associate Professor on and w.e.f.31.05.2006 he would become eligible for further promotion to the cadre of Professor on and w.e.f. 31.05.2009, which was also declined to the petitioner on a misreading of Annexure A12 G.O. dated 29.10.2010. It was further contended that as per Annexure A12 those Assistant Professors who have P.G. Degree to their credit will be promoted as Associate Professor on completion of 8 years in all cadres put together and will be placed in the appropriate stage in pay band of Rs.37400 – 64,000 with academic grade pay of Rs.9,000/- w.e.f. 01.01.2006 or later as the case may be subject to fulfilling

academic performance requirements to be specified. It was the further contention of the learned Senior Counsel that the legal effect of Annexure A12 G.O. dated 29.10.2010 was that for CAP to the grade of Associate Professor the only requirement for Post Graduate Degree holders was 8 years total service and for those possessing super specialty degree with 5 years service in the super specialty department and therefore he contended that Annexure A12 G.O. dated 29.10.2010 was misread and wrongly denied CAP to the petitioner with effect from the date on which he completed 8 years of service with Post Graduation viz., 31.05.2006.

20. Learned Senior Counsel further contended that Annexure A6 is only an order passed under Article 162 having no legal or binding force in view of Annexure A5 regulation and the same was not an order passed invoking Section 2 of the Kerala Public Services Act. Learned Senior Counsel further contended that if Annexure A6 was constituted under Section 2 of the Kerala Public Services Act, definitely the same would have contained reference to Section 2 of the Kerala Public Services Act and in the absence of the same Annexure A6 can only be treated as an executive order which will have no manner of

supremacy over Annexure A5 regulations prescribed by the Medical Council. Learned Senior Counsel also contended that Annexure A6 is a Government Order and if it was an order passed invoking Section 2 of the Kerala Public Services Act, it would have been mentioned as SRO. In order to substantiate the contention that Annexure A6 order is repugnant to Annexure A5 regulations, learned Senior Counsel has brought our attention to the decisions in **Dr.Preeti Srivastava and another v. State of M.P. and others** [(1999)7 SCC 120] and **Maa Vaishno Devi Mahila Mahavidyalaya v. State of Uttar Pradesh and others** [(2013) 2 SCC 617] and canvassed the proposition that the qualification prescribed could not be altered by an executive order like Annexure A6 passed by the State Government and if at all such an order was passed and the same comes in conflict with Annexure A5, Annexure A5 will supersede the said executive order passed by the State Government in view of Article 254 of the Constitution of India. In the first among the decisions cited supra, learned counsel has drawn our attention to paragraph 35 wherein Entry 66 of List I and Entry 25 of List III of Schedule 7 were discussed and held as follows:

“A State has, therefore, the right to control

education including medical education so long as the field is not occupied by any Union legislation. Secondly, the State cannot, while controlling education in the State, impinge on standards in institutions for higher education. Because this is exclusively within the purview of the Union Government. Therefore, while prescribing the criteria for admission to the institutions for higher education including higher medical education, the State cannot adversely affect the standards laid down by the Union of India under Entry 66 of List I. Secondly, while considering the cases on the subject it is also necessary to remember that from 1977, education, including, inter alia, medical and university education, is now in the Concurrent List so that the Union can legislate on admission criteria also. If it does so, the State will not be able to legislate in this field, except as provided in Article 254.”

21. Learned Senior Counsel has also invited our attention to paragraph 52 to 57 to contend that the Medical Council of India has been set up as an expert body to control minimum standards of medical education and to regulate their observance and it has implicit power to supervise the qualification or eligible standards for admission into medical institutions. Referring specifically to paragraph 52, learned Senior Counsel contended that in accordance with the power conferred under Section 20

r/w Section 33 of the Indian Medical Council Act, the Council has framed regulations which govern postgraduate medical education and these regulations, therefore, are binding and the State cannot, in the exercise of power under Entry 25 of List III, make rules and regulations which are in conflict with or adversely impinging upon the regulations framed by the Medical Council of India for postgraduate medical education. It was further contended that since the standards laid down are in the exercise of the power conferred under Entry 66 of List I, the exercise of that power is exclusively within the domain of Union Government and the power of the State under Entry 25 of List III is subject to Entry 66 of List I. Learned counsel has invited our attention to paragraphs 59 and 60 of the latter decision cited supra and contended that since the Medical Council is the authority constituted under the Central Act with responsibility of maintaining educational standards and judging upon the infrastructure and facilities available for imparting such professional education, same shall take precedence over the views of the State as well as that of the University. It was further contended that the State concerned and the affiliating university have a role to play but it is limited in its application

and they cannot lay down any guidelines or policy which would be in conflict with the Central statute or the standards laid down by the Central body. Thus learned Senior Counsel contended that since the field was primarily covered by the Union list, the State can exercise any legislative power under List III Entry 25, but such law cannot be repugnant to the Central law and further that when the State law is irreconcilable with the Central law, the State law must give way in favour of the Central law to the extent of repugnancy. So also the Learned Senior Counsel has invited our attention to paragraph 6 of the judgment of the Apex Court in **Syndicate Bank v. Ramachandran Pillai and Others** reported in [2011(15) SCC 398] and contended that if any executive instructions are to have the force of statutory rules, it must be shown that they were issued either under the authority conferred on the Central Government or a State Government or other statutory authority by some statute or the Constitution. Guidelines or executive instructions which are not statutory in character, are not laws, and compliance therewith cannot be enforced through courts and therefore, he contended that Annexure A6 is only a Government order which has no force of law.

22. Thus taking into account the principles so laid down by the Hon'ble Apex Court in the decisions cited supra learned Senior Counsel contended that by virtue of the qualifications prescribed under Annexure A5 by the Medical Council of India, the State Government did not have power to issue Annexure A6 by which the minimum qualification was fixed as M.ch to various posts. Learned Senior Counsel contended that even an enhanced qualification could not be fixed by the State Government as per Annexure A6, in view of Annexure A5 regulations by which the qualifications are prescribed by the Medical Council of India referred earlier.

23. Yet another contention advanced by the Learned Senior Counsel was that since M.S. with special training in Surgical Gastroenterology is equated with M.ch and since when the petitioner joined in the service itself, he had MS (Surgery) and after acquiring two years experience, he became qualified to the promotional post since, M.ch is equated with MS(Surgery) with two years training in Surgical Gastroenterology. Therefore, the Learned Senior Counsel contended that since M.ch and MS (Surgery) are equated a person holding M.ch cannot be given precedence and so also M.ch is an equivalent degree with M.S.

and two years experience for the purpose of appointment to the posts in Surgical Gastroenterology. Thereupon, Learned Senior Counsel contended that the qualification prescribed as M.ch is an equivalent degree with MS(Surgery) and therefore, the petitioner was entitled to get seniority in all respects against the 3rd respondent.

24. On the other hand, learned counsel for the 3rd respondent contended that Annexure A6 order is an order passed validly by the State Government with the intention of prescribing superior qualification to the teachers to maintain higher standards and quality in the field of medical education. Learned counsel also contended that even assuming that Annexure A6 is an order passed under Article 162 of the Constitution, the same was valid and has binding force. It was also contended by the learned counsel that Annexure A6 was in no way conflict with Annexure A5 since Annexure A5 regulations issued by the Medical Council prescribed only minimum qualification, and merely because the State Government fixed a superior qualification for the appointment of Assistant Professors/Lecturer, Readers/Associate Professor and Professor, the same is in no way conflict with Annexure A5 regulation.

Learned counsel further contended that he has absolutely no quarrel with the principles laid down by the Hon'ble Apex Court in the decisions cited supra and he further contended that in order to implement the principles laid down in those decisions, a superior qualification is prescribed by the State Government for the appointments.

25. Learned counsel also contended that going by the principles laid down by the Apex Court in the judgment cited supra the Hon'ble Apex Court has held that law formulated by the State Government shall not be in conflict with the law constituted by the Centre and merely because an enhanced qualification was fixed for appointment, the same can never be said to be in conflict with Entry 66 of List I of Schedule 7. Therefore, learned counsel for the 3rd respondent contended that viewed in any circumstances Annexure A6 order issued by the State Government was never in conflict with Annexure A5 MCI regulations and therefore, the learned counsel contended that the petitioner did not acquire qualification when the post fell vacant. Learned counsel also contended that the petitioner did not have a case at any point of time that a post was vacant to which he was entitled to get appointment when he made his

claims before the State Government or before the Administrative Tribunal. Learned counsel also contended that it was the duty of the petitioner to establish that he was entitled to be appointed to a post and the State Government did not have any duty to show that there was a post vacant to satisfy the claim of the petitioner. Therefore, since the petitioner having not done so, he was not entitled to get any relief and the Tribunal was right in dismissing O.A. No.1740 of 2012.

26. Learned counsel for the 3rd respondent also contended that the petitioner always had inconsistent pleadings which by itself was a sufficient ground to non-suit the petitioner. In fact counsel pointed out that in the Original Application before the Tribunal, the petitioner has sought relief depending on Annexure A6 order passed by the Government and therefore at a later point of time petitioner was not at liberty to turn around and attack Annexure A6 order. Learned counsel also pointed out that the contention regarding invalidity of Annexure A6 in view of Annexure A5 regulations was made for the first time when the impugned order of the Tribunal was earlier challenged before this Court in OP(KAT) No.277/2014 and thereafter in the Review Application filed before the Tribunal.

27. Learned counsel also contended that the first vacancy of Associate Professor occurred on 27.11.2008 on promotion of one Kuruvila as Professor which is evident from Annexure – R3 (e). Therefore, he contended that at that point of time petitioner had not acquired M.ch qualification prescribed as per Annexure A6 for the post of Associate Professor.

28. Learned counsel has invited our attention to the decision in **V.Balasubramaniam v. T.N. Housing Board** [AIR 1998 Supreme Court 6] in order to canvass the proposition that any order issued by the State Government is a valid law as provided under Article 162 of the Constitution and also to establish that such orders have co-equal strength with any legislation made by the State legislature unless the order is repugnant to any legislation made by the State or the Parliament. Learned counsel also invited our attention to the judgment reported in **Basheer v. Saiful Islam** [2014(4) KLT 521] F.B. in order to canvass the proposition that the experience prescribed under the regulations should be one gained after acquiring the basic educational qualification and not the total period of service as claimed by the petitioner. So also the judgment of a learned Single Judge of this Court in **Ajith**

George v. State of Kerala reported in 2006(3) KLT 743 was pressed into service to point out that the State has competence to prescribe higher standards than what have been prescribed by AICTE. So also the judgment in **Biju v. University of Kerala** reported in [2008(1) KLT 707] was brought to our notice and invited our attention to paragraph 7 of the said judgment wherein judgment in **Dr.Preeti Srivastava** (supra) was referred and held that the State has every power to prescribe a higher qualification for appointments than the one prescribed by an authority under a Central statute and held that the regulations of the UGC fixes the benchmark qualification, but if the university or the State Government feels that in the colleges under them, a higher qualification should be prescribed, the same will not amount to a legislation or a subordinate legislation, repugnant to the UGC Act or the regulations framed thereunder. It was further held that if some qualification more is prescribed, it cannot be taken as contrary but only as complementary or supplementary to the prescription already made by the Council. So also learned counsel invited our attention to the judgment in **Krishnadevi Malchand Kamathia v. Bombay Environmental Action Group** reported in [2011(1) KLT S.N.71 (Case No.95)]

SC] wherein the Apex Court held that even if an order is void, it required to be declared so by a competent forum and it was not possible to ignore the same because in his opinion the order is void and contended that Annexure A6 order was never sought to be set aside. Apart from the same, counsel has invited our attention to paragraph 13 of the judgment in **Bharat Singh & others v. State of Haryana & others** reported in [AIR 1988 S.C. 2181] to canvass the proposition that in order to establish a point requiring substantiation by facts, party raising the point must plead and annexe to the petition not only the facts but also evidence in proof of the facts and contended that the petitioner has never proved that he was entitled to be appointed to a post vacant during a particular period and therefore the very maintainability of the application itself was at stake on that sole ground.

29. After appreciating the rival contentions of the parties, the material pleadings, the evidence on record and the principles of law laid down by the Apex Court as well as this Court cited *supra*, we have to consider the contention advanced by the learned Senior Counsel for the petitioner. According to us, the contention advanced by the Learned Senior Counsel that since

Annexure A5 is a legislation brought into force prescribing minimum qualification for appointment of teachers to medical institutions by invoking Section 20 r/w. Section 33 of the Indian Medical Council Act, the same is a legislation brought forth by invoking exclusive power of the Centre provided under Entry 66 List I of Schedule 7, the State Government was not at liberty to fix a superior qualification for appointment by issuing Annexure A6 can never be sustained. Even going by the proposition made in the judgments cited by the learned Senior Counsel for the petitioner the intention of prescribing minimum qualification is to maintain a minimum standard in the institutions of higher education sector and therefore, the State prescribing an enhanced qualification as the minimum for appointing the Lecturers to various posts of the medical education cannot be termed in conflict with Entry 66 List I. Moreover, under Entry 25 List III of the constitution, the State has got power to legislate. Moreover, Article 162 of the constitution enables the State to issue executive orders which are equal in strength to the legislations made with the only prohibition that such executive orders or guidelines or notifications should in no way interfere with the legislations made either by the State or the Centre. In

that view of the matter, the contentions advanced by the learned Senior Counsel for the petitioner can never be sustained under law. A learned Single Judge of this Court had occasion to consider the impact of judgment of the Hon'ble Apex Court in **Preeti Srivasthava** referred supra in the judgment in **Ajith George** cited supra and held that fixing an enhanced qualification against the minimum qualification prescribed is within the legislative competence or otherwise of the State Government and that will not be repugnant to exclusive powers of the Centre under Entry 66 of List I. We endorse the said view.

30. Moreover, in Annexure A5, the objectives of prescribing the minimum qualification is recited which reads thus:

“2. Objectives:

Appointment of medical teachers, with minimum qualification and experience in various departments of medical colleges and institutions imparting graduate and post-graduate medical education is a necessary requirement to maintain a standard of teaching.

Minimum qualifications for appointment as a teacher in various departments of a medical college or institution imparting graduate and post-graduate education shall be as specified in the Schedules I and II annexed with these regulations.”

31. Therefore, the objectives will also show that, by the

regulations the Medical Council of India had thought of prescribing only the minimum qualifications for appointment of medical teachers and that will not stand in the way of State Government fixing a superior qualification for making appointments to the posts prescribed, as done by Annexure A5 regulations. Therefore, the contention advanced by the learned Senior Counsel that by virtue of the provisions contained in Annexure A5, no manner of alteration including an enhanced qualification could not be fixed by the State Government as per Annexure A6 is unsustainable. So far as the contention of the learned Senior Counsel that Annexure A6 is only an order of the Government which cannot have any force under law cannot be sustained in view of Article 162 of the Constitution itself. Article 162 stipulates that the executive power of a State shall be extended to the matters with respect to which the legislature of the State has power to make laws but further provides 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 the constitution or any law made by the Parliament upon the Union or authorities thereof. Moreover,

Entry 25 of List III of Schedule 7 empowers the State Government to make laws. Therefore, the only restriction that is contemplated under Article 254 of the Constitution, is that the the law made by the State shall not be repugnant to the legislation made by the Centre invoking its power under Entry 66 List I. In that view of the matter also, the State was empowered to constitute Annexure A6. There is force in the contention of the learned counsel for the 3rd respondent that whether Annexure - A6 is an order issued by the State Government drawing its power from Article 162 of the constitution or Section 2 of the Kerala Public Services Act, the repugnancy of the same is limited to the limitations prescribed thereunder and Article 254 of the Constitution.

32. According to us, Annexure A6 is in no way repugnant to Annexure A5 and therefore, the contention advanced in that regard cannot be sustained under law. We find also force in the contention advanced by the learned counsel for the 3rd respondent that the petitioner never had consistent pleading and moreover, there was not even sufficient pleading in the application filed before the Tribunal as well as these Original Petitions for the reason that the petitioner has not pleaded that

there was a post to which he sought appointment. Learned counsel for the 3rd respondent has also brought our attention to a Full Bench decision of this Court in **Basheer v. Saiful Islam** reported in [2014(4) KLT 521(FB)] by which he canvassed the proposition that the experience/qualification acquired should be after appointment to the post concerned and not the whole period of his service in a particular cadre or category. The said judgment was rendered by this Court with reference to Rule 10AB of Part II KS & SSR wherein it was stipulated that unless otherwise specified in the recruitment rules the qualification and experience prescribed in the rules shall be gained after acquiring basic educational qualification prescribed for the post. The same was the position considered by a Division Bench of this Court in **Sirajudheen v. Kerala Public Service Commission** reported in [2011(2) KLT 268]. Therefore, the contention of the learned Senior Counsel that the acquisition of experience prescribed under Annexure A6 is not experience after acquiring the post graduate super specialty degree cannot be sustained under law.

33. Taking into account the entire factual and legal situations and also the principles laid down by the Apex Court as

well as this Court in the decisions referred above, we are of the considered opinion that the order passed by the KAT does not require any interference. It is also made clear that we have considered the grounds raised by the petitioner in the Review Petitions filed before the Administrative Tribunal also and still we do not find any reason to arrive at a different conclusion than the one arrived at by the Administrative Tribunal. Petitioner has failed to point out any illegality, arbitrariness or other legal infirmities so as to warrant our interference invoking our power under Article 227 of the Constitution of India.

Resultantly Original Petitions fail and accordingly they are dismissed.

Sd/-
K. SURENDRA MOHAN
JUDGE

Sd/-
SHAJI P. CHALY
JUDGE

smv