

(1973) 06 KL CK 0042

High Court Of Kerala

Case No: O.P. No. 3089 of 1972

Mercy Mathew

APPELLANT

Vs

The Vice Chancellor And Others

RESPONDENT

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**Date of Decision:** June 4, 1973**Acts Referred:**

- Constitution of India, 1950 - Article 226

**Citation:** (1973) KLJ 556**Hon'ble Judges:** N.D.P. Namboodiripad, J**Bench:** Single Bench**Advocate:** M.P.R. Nair, for the Appellant; K.P. Radhakrishna Menon and George Varghese Kannanthanam, Government Pleader, for the Respondent**Final Decision:** Dismissed

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### Judgement

N.D.P. Namboodiripad, J.

The appointment of the 3rd respondent to the post of Professor and Head of the Department of Zoology in a private college by name Fatima Matha National College, Quilon (for brevity, the college) under the management of the 2nd respondent has given rise to these proceedings under Art. 226 of the Constitution. It is common case that the college is affiliated to the University of Kerala, the 4th respondent herein, and that the institution has to be run in accordance with the provisions of the Kerala University Act 9 of 1969 (shortly called the Act). After obtaining an M Sc. Degree in Zoology with a second class, the petitioner succeeded in getting appointment as a Lecturer in the college as early as 1954. On completing service for the requisite number of years she obtained the status of second grade Professor. The college did not provide for studies in Post-graduate course in Zoology at the initial stages. The management applied to the concerned authorities for starting Post-graduate studies in the college; and it appears that the Inspection Commission sent by the University inspected the institution and accorded sanction for commencing the M.Sc degree course in Zoology in 1964, on the understanding that

a person with experience of teaching in Post-graduate classes was added to the staff of the college. The 3rd respondent who was then working in another private college by name Christ College, Irinjalakkuda, was appointed as Additional Professor in the college as he had experience in teaching post-graduate students. The designation of his post was ultimately changed on certain representations made by the present petitioner and the post was redesignated as Lecturer. It is not necessary to pursue further the conduct of the parties with reference to that matter; and it is now common case that as far as the college is concerned the petitioner is senior in service to the 3rd respondent. Act 9 of 1969 came into force On 28/2/1969. At that time, the post of Professor of Zoology in the college was held by one Mr. Kurien who was on extension, and a regular appointment to that post had to be made without undue delay. After the Act came into force appointment of teachers of the college had to be made in conformity with the provisions contained in S. 53 (7) of the Act. The Act underwent certain amendments through another statute by name the Kerala University (Amendment) Act, Act 13 of 1971. An explanation was added to sub-s. 7 of S. 53 by the amending Act. The 2nd respondent management challenged the validity of certain provisions of Act 13 of 1971 inclusive of the amendment to S. 53 (7) through O.P. 2518/1971. Similar questions were raised in other original petitions filed by certain other managements, one of which was disposed of by this court by the judgment reported in [The Rt. Rev. Dr. M.M. John Vs. Govt. of Kerala and Others](#), . It was during the pendency of O.P. 2518/71 that the 3rd respondent was appointed as Professor with effect From 2/8/1971. This court struck down the amendment to S. 53(7) of the Act made by S, 5(4) of Act 13 of 1971. The result was that S. 53(7) of the Act as it stood originally continued to be in force. The appointment of the 3rd respondent was challenged by the petitioner through Ext. P1 petition before the Vice Chancellor, University of Kerala, who is the 1st respondent to this petition, on the strength of S. 53(9) of the Act. The 1st respondent upheld the conduct of the 2nd respondent and passed Ext, P2 order dismissing the appeal. It is the legality and correctness of Ext. P2 order that is challenged in this petition.

2. It was agreed by both sides that the dispute between the contestants has to be resolved on the basis of S. 53(7) of the Act, and consequently, I am not seriously considering any other provision of law. The short contention urged on behalf of the petitioner is that the appointment of the 3rd respondent is not in conformity with S. 53(7) of the Act. I may read the relevant provision in its amended form.

Appointments to the posts other than those referred to in sub-sections (1) and (4) shall be made by the educational agency or the corporate management, as the case may be, by promotion from among the teachers of the college or of all the colleges, as the case may be, on the basis of seniority-cum-fitness, or if there is no person possessing the qualifications prescribed for the post, by direct recruitment.

3. There cannot be much dispute that the basis of the promotion as provided for in S. 53(7) is "seniority-cum-fitness". Occurring as it does in a statute of some importance, the expression "seniority-cum-fitness" cannot claim much elegance or precision. The petitioner wants me to read that expression as meaning that so long as an aspirant's fitness is not in doubt then his seniority in service should be given its due weight, and there is no question of considering any degrees of "fitness". That undoubtedly was not the manner in which the Full Bench of this court construed that provision in [V. Rev. Mother Provincial Vs. State of Kerala and others](#). The court considered the scope of S. 53(7) from all relevant angles. I may read the observations of the court that particularly apply to the question on hand.

At the same time, we would like to make it clear that the test of seniority-cum-fitness prescribed in the sub-section does not mean that promotion is to be on the principle of seniority subject to fitness which is the test adopted for "non-selection" posts in the several service rules of the State. Seniority-cum-fitness means that due and equal regard should be paid both to seniority and to fitness, and, since fitness is a matter of degree, it would appear that a senior person can be overlooked in favour of a junior who is demonstrably more fit for the appointment than he is.

In [The Rt. Rev. Dr. M.M. John Vs. Govt. of Kerala and Others](#), a Division Bench of this court while disposing of the writ petitions challenging certain provisions of Act 13 of 1971 considered the dictum laid down by the Full Bench decision referred to above with regard to the scope of S. 53(7), and observed as, follows:

His Lordship considered the provisions in sub s. (3) as to what should seniority and merit mean: and the learned Chief Justice made it clear that the expression "seniority-cum-fitness" in sub s. (7) meant that due and equal regard should be paid both to seniority and to fitness, and since fitness was a matter of degree, a senior person could be overlooked in favour of a junior who was demonstrably more fit for the appointment than the senior. This meant two or three things: that an unfit person was not entitled to promotion merely because he possessed the necessary qualifications, that, even among fit persons, one might be demonstrably more fit than another, though the former was junior to the latter; and that merit does not mean mere fitness, but fitness of one in comparison with fitness of another, i. e., one being more fit than another.

There cannot, therefore, be any doubt that, according to the decisions of this court, the expression "fitness" in the context of S. 53(7) necessarily involves consideration of degrees of fitness when the appointing authority is of the view that a junior incumbent is better equipped for holding the post than the senior most person. The contention of the petitioner that seniority should be given due weight is certainly correct. But if that be the sole criterion then so long as a post is a promotion post nothing more remains than an automatic promotion of the senior-most man if he is not unfit. That certainly was not the intention of the legislature and that is why the test of seniority-cum-fitness was laid down by the legislature. That "fitness", as held

by this court, necessarily involves an element of comparison. And the question is whether in the instant case the authorities concerned have erred in overlooking the dictum of this court in appreciating the facts that led to the promotion of the 3rd respondent in preference to the petitioner.

4. It is true that the Act by itself does not throw much light as to the scope of the expression "fitness"; it is also true that the decisions of this court referred to above do not consider in detail what exactly are the ingredients which would constitute fitness in cases of this kind. The constituents of "fitness" is not susceptible to precise or exhaustive enumeration; it may vary with the nature of the posts concerned. The question is whether relevant and reasonable standards have been applied by the appointing authority in evaluating the degrees of fitness of the two claimants. The pleadings and the records in this case disclose that one of the questions considered was with respect to the academic qualifications of the petitioner and the 3rd respondent. The petitioner possessed a degree in M. Sc. and she was placed in the second class. The qualifications of the 3rd respondent and not disputed by the petitioner are as follows: The 3rd respondent took the M. Sc. degree of the Agra University in 1952 and he was placed in the first division. Subsequently he obtained a doctorate (Ph. D) degree from the same University. He has also published research papers on various topics in Zoology and he was the recipient of an award from the University Grants Commission for doing research in Zoology. He is a recognised Guide for guiding research students of Zoology in the Kerala University, and he is also a Fellow of the Academy of Zoology, an International Organisation for Zoologists, it may not require much imagination to hold on the basis of these facts that in the matter of qualification, the 3rd respondent is definitely superior to the petitioner.

5. The second aspect which weighed with respondents 1 and 2 in coming to the conclusion that the 3rd respondent is more fit than the petitioner, was the experience in teaching possessed by the petitioner on the one hand and the 3rd respondent on the other. The petitioner started teaching in 1954. Post-graduate course was sanctioned to the college only in 1964. The petitioner began to teach post-graduate students only from 1964 onwards. The experience of teaching post-graduate students as far as the 3rd respondent is concerned is much older. He taught post-graduate students for three and odd years in the Agra University and for about three years in the Christ College, Irinjalakuda before 1964. It was not disputed before me that as Professor and Head of the Department the incumbent of the post in question has to take classes mainly for post-graduate students. That being the position it is experience in teaching post-graduate students that is relevant in considering fitness. The records again show that respondents 1 and 2 took into consideration the capacity of the person to be appointed in the matter of encouraging and guiding research activities amongst students of advanced classes. The petitioner had no experience worth the name in that direction whereas the 3rd respondent had experience to the desired extent. Though not exhaustive, academic

qualifications, teaching experience and capacity to guide research students are factors relevant and apposite in appraising the fitness of a person to hold the post of Professor in an institution coaching students for post-graduate courses. It is not possible, therefore, to hold that the authorities concerned were in any way influenced by irrelevant considerations; and since appraisal of fitness is essentially a matter pertaining to the management, I do not think that Art. 226 of the Constitution with all its conceivable width can be invoked for constituting this court as an appellate authority sitting in judgment over the conduct of the management in that respect. It is also not without significance that under the statute the conduct of the management is subjected to the scrutiny by an appellate authority like the Vice Chancellor of the University. In this case the 1st respondent has elaborately considered the relative merits of both the candidates and he supported the conclusion of the management. I find no legal infirmity in Ext. P2 order, and it has only to be upheld. It was strenuously contended on behalf of the petitioner that the dictum laid down by this court in [V. Rev. Mother Provincial Vs. State of Kerala and others](#), requires reconsideration. According to the petitioner, in the first place, when once this court held that the provision (i. e. S. 53 (7) of the Act) is *infra vires* then any subsequent observation taking away the effect of the provision is as bad as striking down the provision. I do not find anything in the sub-paragraph of Para. 38 of the judgment in that case to support that argument. The second defect, according to the petitioner, in the decision, is that as disclosed by the wording of the provision the legislature intended to give a rather restricted meaning to the expression "fitness", and the expansion of the scope of that expression by the judgment amounts to legislation and not interpretation. Here again, I do not find any basis for that contention in Para. 38 of that judgment. I am not persuaded by the learned counsel to come to the conclusion that the decision of the Full Bench requires any reconsideration. It follows, therefore, that this writ petition is devoid of any merit. It is hereby dismissed. No costs.