

(2011) 12 GAU CK 0002

In the Gauhati High Court

Case No : Regular Second Appeal No. 80 of 2011

Dibakar Deka

APPELLANT

Vs

Uttar Kampith Mahavidyalaya and Others

RESPONDENT

Date of Decision : 02-12-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 11, 100, 109, 110, 80
Constitution of India, 1950 — Article 133(1)

Citation : (2012) 1 GLD 626

Hon'ble Judges : Anima Hazarika, J

Bench : Single Bench

Advocate : K. Sarma, N. Deka, D. Das, A. Hussain and Ms. K.M. Sarma, for the Appellant; S. Sarma, for the respondent No. 3/defendants No. 13 and T.K. Bhuyan, Standing Counsel, Education Deptt., for respondent/defendant Nos. 4 and 5, for the Respondent

Final Decision : Dismissed

Judgement

Anima Hazarika, J.—This appeal u/s 100 of the CPC ("the Code" for short) is preferred by the plaintiff-appellant herein against the judgment and decree dated 20.12.2008 passed by the learned Civil Judge, Nalbari in Title Appeal No. 4 of 2008 allowing the appeal thereby setting aside the judgment and decree dated 29.03.2008 passed by the learned Civil Judge No. 2, Nalbari in Title Suit No. 27 of 2000 wherein the declaration and permanent injunction as sought for by the plaintiff-appellant was allowed. Heard Mr. K. Sarma, learned counsel appearing for the appellant. Also heard Mr. S. Sarma, learned counsel for respondent No. 3 and Mr. T.K. Bhuyan, learned Standing Counsel, Education Deptt. for respondent Nos. 4 and 5.

2. The appeal came up for hearing under Order XLI, Rule 11 of the Code wherein the substantial questions of law has been formulated by the counsel of the appellant which are quoted hereunder :--

(i) Whether the learned First Appellate Court is correct in deciding the issue No.

4 in favour of the respondent No. 3/defendant No. 13, Bhabesh Deka, holding him senior to the appellant without the formal appointment letter issued by the authority in his (i.e. Bhabesh Deka) name thereby reversing the findings arrived at by the learned trial Court in favour of the appellant ignoring Exhibit 1, the appointment letter, issued in the name of the appellant by the authority?

(ii) Whether the first Appellate Court is correct in reversing the findings arrived at by the learned trial Court in issue No. 8 decided in favour of the appellant-plaintiff?

(iii) Whether the learned First Appellate Court is correct in setting aside the findings recorded by the learned trial Court without discussing and appreciating the evidence both oral and documentary available on the records and without any perversity in the judgment passed by the learned trial Court?

3. To answer the substantial questions of law as formulated, the Court is required to summarize the facts of the contesting parties. The same is thus briefly stated as follows"-

The appellant claims to be an Office Assistant of Uttar Kampith Mahavidyalaya (Junior College) [in short "UKM College"] who was appointed on 10.07.1995. The Governing Body and the Principal and Secretary of UKM College had sent the list of staff pattern of the teaching and non-teaching staff to the Government of Assam in response to the Government letter dated 06.11.1996 and in the said list the name of the appellant was shown at Serial No. 1, which, however, was subsequently changed and the name of the defendant No. 3 was shown at Serial No. 1 in the payment register and daily attendance register though he was unauthorizedly absent from duty for which he was asked to show cause on 27.04.1995 and therefore the acts of the defendants to place the name of the defendant No. 13 at Serial No. 1 in the payment register and daily attendance register has caused great prejudice to the plaintiff in respect of his service conditions, his name being excluded from the staff pattern of the UKM College, whereas the defendant No. 14 has undertaken process to approve the subsequent changed list and if the defendant No. 14 is not restrained, he will suffer irreparable loss and injury requiring to injunct the defendant No. 14 from approving the list whereby the staff pattern of non-teaching staff of UKM College has been changed from its earlier list and hence filed the suit seeking the following reliefs :--

(a) Declaring that the report of the defendant No. 3 to the President Governing Body/Managing Committee UKM Junior Jagara submitted on 02.12.1998 affecting the service of the plaintiff is illegal inoperative and not binding on the plaintiff;

(b) A decree declaring that the plaintiff is entitled to hold the post of UDA in the event of Govt. of Assam taking over the Junior College;

(c) That any report after the staff pattern omitting the name of the plaintiff with a view to dis-stabilise the service of the plaintiff cannot take effect;

(d) Mandatory decree requiring the defendant No. 1 to furnish staff pattern to include the name of the plaintiff as in No. 1 position of the non-teaching staff cashier accountant;

(e) Permanent as well as temporary injunction;

(f) Cost of the suit;

(g) Any other relief or reliefs to which the plaintiff is otherwise entitled may be granted.

4. In the written statement the defendant No. 3 who also represented the defendant No. 1 and the defendant No. 13 contested the suit jointly contending inter alia that the defendant No. 13 was the founder Office Assistant of the UKM College who was appointed and working since 1983 but the defendant No. 13 was put under suspension, which, however, was withdrawn considering the dedicated long service and suggestion of the general meeting of the college held on 10.09.1995 and the suspension order of the defendant No. 13 has been withdrawn without any break in his service and that the plaintiff is junior to the defendant No. 13 in service who joined service only on 10.07.1995 and therefore no injustice/injuries has been caused to the plaintiff and as such there is no cause of action and prayed for dismissal of the suit. The defendants however, took other defences as available under Order VIII of the Code.

5. On the pleadings of the parties, the following issues were framed:-

1. Whether there is cause of action for the suit?
2. Whether the suit is maintainable in its present form and barred under the provisions of Assam Administrative Tribunal Act?
3. Whether the suit is bad u/s 80 of the CPC?
4. Whether the plaintiff has got his required qualification and seniority to be included his name to gradation list as senior to defendant No. 13?
5. Whether staff patterns list approved by Director of Secondary Education is illegal?
6. Whether the plaintiff is entitled to the relief as prayed for?
7. To what other relief/reliefs, the parties are entitled to?
8. Whether the defendant No. 13 got suspended for his unauthorised absence and can claim seniority of the plaintiff?

6. During the trial the plaintiff examined three witnesses, whereas the defendant examined four (4) witnesses, besides exhibiting documents in their favour.

7. It is however noticed that the case of the plaintiff was earlier dismissed by the learned Civil Judge (Jr. Div.) No. 2 on 11.07.2005 whereupon an appeal was taken on the file of the learned Civil Judge, (Sr. Div.) Nalbari. The learned

appellate Court remanded the matter to the learned trial Court after setting aside the issue Nos. 3, 4, 6 and 7 directing to decide the issues afresh in accordance with law.

8. On remand the learned trial Court has held that notice u/s 80 of the Code is not required since no relief is claimed against the newly impleaded defendant Nos. 14, 15 and 16, more so, when the defendant Nos. 14, 15 and 16 did not appear and contested the suit.

In regard to issue No. 4, the learned trial Court after going through the evidence on record and the averments made in the pleadings of the parties including Exts 1, A, B, C and J has held that from those exhibits it could not be ascertained as to whether the defendant No. 13 was appointed in accordance with statutory rules prior to the appointment of the plaintiff and came to a finding that the defendant No. 13 was not appointed as Office Assistant by the Governing Body under the statutory Rules whereas the plaintiff has got his required qualification and seniority to be included his name in the gradation list as senior to the defendant No. 13 and accordingly decided the issue No. 4 in the affirmative and in favour of the plaintiff.

While deciding the issue No. 8 the learned trial Court has held that the defendant No. 13 was suspended on 06.05.1995 and the suspension order was subsequently withdrawn on 10.09.1995 (vide Ext-A) and therefore cannot claim seniority over the plaintiff and accordingly decided the issue No. 8 in the negative and in favour of the plaintiff.

Relating to issues Nos. 6 and 7, the learned trial Court has held that since there is no appointment letter in favour of the defendant No. 13, which he has miserably failed to prove, whereas the plaintiff has proved his appointment letter, therefore the plaintiff is entitled to the relief Nos. (a), (b) and (c) of the plaint thereby decided the issue in the affirmative and in favour of the plaintiff.

9. Being dissatisfied with the judgment and decree of the learned trial Court on remand, the defendant No. 13 took up the matter on the file of the learned Civil Judge being Title Appeal No. 4 of 2008. The learned appellate Court after perusal of the evidence on record and the pleadings of the contesting parties allowed the appeal referring Exhibits, including paragraph 8 of the plaint whereby decided the issue Nos. 4 and 8 in favour of the defendant No. 13 holding that the staff pattern list as approved by the Director of Secondary Education, Guwahati was not illegal and accordingly decided issue Nos. 6 and 7 in favour of the defendant No. 13/appellant and hence the Regular Second Appeal.

10. In support of the substantial questions of law as formulated/Mr. K. Sharma, learned counsel appearing for the appellant would contend that the learned Appellate Court has committed an illegality in holding that the defendant No. 13 is senior to the plaintiff in absence of appointment letter not being issued by the competent authority in favour of the defendant No. 13 and therefore the issue No. 4 decided in favour of the defendant No. 13 requires interference u/s 100 of

the Code.

11. Mr. Sharma, would further contend that the seniority claimed by the defendant No. 13 in issue No. 8 over the plaintiff has been correctly decided by the learned trial Court. But without appreciating the evidence both oral and documentary available on record and inspite of the fact that there is no perversity in the judgment passed by the leaned trial Court, the learned appellate Court reversed the findings arrived at by the learned trial Court and hence requires interference in exercise of power u/s 100 of the code.

The learned counsel has referred the following decisions in support of the case:--

1. 2005 (Supp) GLT 481 (Abdul Karim v. Ashok Das & Ors.).
2. 2004 (Supp) GLT 347 (Nitya Hari Mazumdar & Ors. v. State of Tripura).

12. Countering the attack, Mr. Sharma, learned counsel appearing for the defendant No. 13 (respondent No. 3) would contend that the findings arrived at by the learned lower Appellate Court do not require to be interfered with, more particularly, the decision arrived at while deciding the issue Nos. 4 and 8. The learned counsel in support of issue Nos. 4 and 8 would further contend that material Exts. vide Exts. A, B and C alongwith the pleadings of the parties would disclose that the defendant No. 13 had joined the college much earlier than the plaintiff, however, the defendant No. 13 was put under suspension on 06.05.1995, whereas the plaintiff joined the college on 10.07.1995 which would go to show that the defendant No. 13 is senior to him and an employee putting under suspension would not lose his seniority even if the suspension order is revoked after joining the college by the plaintiff as held by the learned trial Court while deciding the issue No. 8 and as such no interference is called for when there is no perversity while rendering the findings arrived at by the First Appellate Court.

The following decisions have been referred to by the learned counsel appearing for the defendant No. 13/respondent No. 3, in support of his submission :--

1. (1984) 2 GUR 101 (Mrs. Maya Dutta v. State of Assam & Ors.)
2. (2010) 2 SCC 239 (K.K. Kantian (Dead) by LRs v. Koolivathukkal Karikkan Mandi & Ors.)
3. Bharatha Matha and Another Vs. R. Vijaya Renganathan and Others,
4. Dinesh Kumar Vs. Yusuf Ali, .

13. Considered the arguments advanced by the contesting parties. Perused the evidence on record including the pleading of the parties. Admittedly the appellant filed the suit seeking the reliefs mainly relief Nos. (a), (b), (c) as indicated above. Initially the suit was dismissed and on appeal the case was remanded back to the learned trial Court. On remand the learned trial Court decreed the suit only on the ground that no appointment letter has been proved by the

defendant thereby the reliefs as sought for has been decreed.

14. On appeal by the defendant before the learned Appellate Court, the learned appellate Court allowed the appeal on issue Nos. 4 and 8. It is also noticed that earlier, the learned trial Court dismissed the suit of the plaintiff relying on Exts. B, C and J. In Ext. J, the defendant No. 13 has been shown as LDA and joined on 22.11.1983, the same, however, the learned appellate Court could not find in the lists of Exhibits though on remand, the trial Court has scrutinized Ext. J and held that it could not be ascertained as to whether the defendant No. 13 was appointed in accordance with statutory rules prior to the appointment of the plaintiff but did not decide whether the defendant No. 13 joined on 22.11.1983 and the plaintiff has joined on 10.07.1995 and answered the issues on the affirmative thereby set aside the judgment rendered by the learned trial Court.

15. In the above background, the Court now is required to answer as to whether the findings arrived at by the learned appellate Court is illegal, based on no evidence, both oral and documentary. A bare reading of paragraph 8 and 12 of the plaint on his own admission of the plaintiff would disclose that the defendant No. 3 who claims to be an employee of the college was absent for a long period from the college for which he was asked to show cause for absence from duty on 27.04.1995 and later on put under suspension on 06.05.1995. The suspension was, however, withdrawn on 10.09.1995 without any break and hence the defendant No. 13 is senior to the plaintiff who has joined the college on 10.07.1995 and the revocation of the suspension order has been exhibited as Ext- A dated 10.09.1995 referring the suspension letter dated 06.05.1995. Therefore, Exts. A, B, C, and D has proved that the defendant No. 13 has joined the college much earlier than the plaintiff. In paragraph 12 of the plaint the plaintiff has admitted that the name of the defendant No. 13 was not sent in the staff pattern to the authorities in the earlier report due to his suspension, even if the Court accepts that the defendant No. 13 was appointed not in accordance with statutory Rules. Therefore, the case of the appellant has been demolished by himself and hence there is no perversity in deciding the issue Nos. 4 and 8 by the learned Appellate Court, requiring any interference by this Court.

16. In Abdul Karim (supra), the decision referred to by the learned counsel for the appellant, the Court while dealing with the substantial question of law has referred the decision of the Apex Court rendered in Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., , wherein at paragraphs 12 and 14, the Hon"ble Apex Court has held as thus :--

12. The phrase "substantial question of law, as occurring in the amended Section 100 is not defined in the Code. The word substantial, as qualifying "question of law" means of having substance, essential, real, of sound worth important or considerable. It is to be understood as something in contradistinction with-technical, of no substance or consequence, or academic merely. However, it is clear that the Legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done

in many other provisions such as Section 109 of the Code or Article 133 (1) (a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In *Guran Ditta v. T. Ram Ditta*, the phrase "substantial question of law" as it was employed in the last clause of the then existing Section 110, CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case as between the parties. In *Sir Chunilal v. Mehta and Sons Ltd. v. Century Spg and Mfg Co. Ltd.*, the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in *Rimmalapudi Subba Rao v. Noony Veeraju*, "when a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand, if the question was practically covered by the decision of the highest Court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular facts of the case it would not be substantial question of law

and laid down the following test as proper test, for determining whether a question of law raised in the case is substantial:

the proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.

13. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involved in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by Court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial

one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.

The Court while deciding the case of Abdul Karim (supra) has held that the plaintiff Nos. 1 and 2 filed the suit for declaration of their joint title, rights and interest, joint recovery, possession and confirmation of possession over the suit land. But the plaintiff No. 2 filed a petition seeking to withdraw from the suit on 17.03.1990 and the said petition was directed to be put up at the time of judgment. No objection was either invited from the plaintiff No. 1 and/or the defendants. The suit was decreed and on appeal it was affirmed culminating in preferring the Regular Second Appeal. The Court while delivering the judgment in Abdul Karim (supra) at para 14 has held as thus:--

(14) Bearing in mind the rival submissions made before me on behalf of the parties and as to what a substantial question of law means, when I consider this appeal, what attracts my attention is that when the petition seeking to withdraw from the suit was filed by plaintiff No. 2 as far back as on 17.03.1990 the petition was directed to be put up at the time of judgment. No objection on this petition was either invited from the plaintiff No. 1 and/or the defendants. Even at the time of hearing of the arguments as the judgment of the learned trial Court shows, the learned trial Judge merely asked the learned counsel for the plaintiff No. 1 if the said petition should be disposed of before the final judgment was delivered. As, to the query so made, the learned counsel for the plaintiff No. 1 submitted that the claim of the plaintiff No. 1 would not depend upon the disposal of the said petition the learned trial Judge disposed of the said petition along with the judgment. The question is not as to whether the plaintiff No. 1 had no objection to the plaintiff No. 2's withdrawal from the suit, the question is as to whether the leave to withdraw from the suit could have been granted while delivering the judgment and thereby deny to the plaintiff No. 1 the consequential opportunity of allowing necessary amendments to be made in the plaint, for, the earlier suit was instituted by two plaintiffs seeking declaration of their joint title, rights and interest, joint recovery of possession and confirmation of possession over the suit land and that with the withdrawal of one of the plaintiffs from the suit, the whole nature of the claim of the plaintiff No. 2 had changed from joint rights, title and interest to exclusive rights title and interest.

But the case referred is not applicable, in the case in hand, because the findings arrived at by the learned appellate Court did not suffer from perversity requiring interference u/s 100 of the Code.

17. In Nitya Hari Mazumdar (supra), the decision referred to by the learned counsel for the appellant, this Court has held that the power u/s 100 of the Code can be exercised only when there is substantial question of law and not otherwise. However, the Court has held that if the finding of facts recorded by Courts below where there is no basis of any legal evidence on record, or based

on non-reading or misreading of evidence or suffers from any legal infirmity which materially prejudices the case of one of the parties or is perverse the Court is empowered to interfere with such findings of facts. The case (Nitya Hari) related to adverse possession of the government land where both the Courts below dismissed the suit and on appeal the Court has held that apart from the oral assertion by the appellant no concrete details of the nature of occupation with proper proof is found and hence affirmed the judgments of both the Court below. In the instant case, the learned appellate Court has dealt with the matter along with the pleadings of the parties extensively including Exts. 1, A, B and C and held the issue Nos. 4 and 8 in favour of the defendant No. 13. No perversity is found in the judgment rendered by the appellate Court and there is no substantial question of law involved which require interference u/s 100 of the Code.

18. The case of Mrs. Maya Dutta (supra) cited by the leaned counsel appearing for the defendant No. 13 has no application in the instant case. The relief as sought for in relief No. (b) would indicate that Section 9 of the Code would not bar the suit of the plaintiff which is not either expressly or impliedly barred.

19. The decisions referred to in Bharath Matha (supra) and Dinesh Kumar (supra), the Apex Court has held that if the findings of fact recorded by Courts below are perverse being based on no evidence or on irrelevant material, appeal can be entertained and it is permissible for Court to re-appreciate evidence. The findings recorded by the learned lower appellate Court in the instant case are based on evidence and on the pleadings of the parties which is not perverse and hence no interference is required. The case of K.K. Kantian (supra) relates to non-formulation of substantial question of law which is not applicable in the case in hand.

20. In the above background, based on evidence, the issue Nos. 4, 6, 7 and 8 has rightly been decided by the learned lower appellate Court which do not come within the purview of substantial question of law as envisaged u/s 100 of the Code, hence requires no interference.

21. The off-shoot of the above discussion is that there is no merit in this appeal. Consequently, the appeal stands dismissed. However, considering the facts and circumstances of the case, the parties are directed to bear their own costs. Send down the lower Court record.