

(1993) 03 GAU CK 0028

In the Gauhati High Court

Case No : Civil Revision Nos. 41 of 1993

Jitendra Nath Goswami and Another

APPELLANT

Vs

Dhirendra Nath Saikia and Ors.

RESPONDENT

Date of Decision : 30-03-1993

Acts Referred:

Assam Administrative Tribunal Act, 1977 — Section 4, 4, 9, 9
Civil Procedure Code, 1908 — Section 9
Civil Procedure Code, 1908 (CPC) — Section 9

Citation : (1993) 1 GLJ 312 : (1993) 1 GLR 448

Hon'ble Judges : S.N.Phukan, J

Bench : Single Bench

Advocate : M.Ali, S.S.Sharma, S.P.Roy, R.P.Sharma, J.N.Sharma, G.Das Gupta, B.K.Goswami, B.K.Das, A.K.Roy, A.C.Buragohain, S.N.Deb Nath, Advocates appearing for Parties

Judgement

1. This petition under section 115 read with section 151 CPC is directed against the judgment and order dated 1.2.93 passed by the learned Assistant District Judge No. 1, Gauhati in Misc. Appeal No. 1 of 1993. By the said order, the learned lower appellate Court affirmed the order of adinterim injunction dated 11.12.92 passed by the learned Munsiff No. 3, Gauhati in Misc (J) Case No. 86 of 1992 arising out of TS No. 295 of 1992. Being aggrieved by the two orders, the present petition has been filed by defendont Nos. 3 and 21 of the main title suit.

2. The suit was laid by the respondent No. 1 for declaration and also for injunction against the State of Assam and Secretary, Personnel (A) Department and as many as 21 private defendants who are all the members of Assam Civil Service Senior Grade as per provisions of Assam Civil Service (Class I) Rules, 1960. Plaintiff is also a member of the said service. According to the plaintiff he was recruited and appointed as member of Assam Civil Seivice I (Junior Grade) in the year 1977 and posted as Extra Assistant Commissioner. Subsequently, he was promoted to the Senior Grade of the said Civil Service in the year 1986. Defendant Nos. 3 to 20 were originally members of the Assam Civil Service Class

II and were promoted to Assam Civil Service (Junior Grade) in the year 1979 and defendant No. 21 who was also a member of the Class II was promoted to the above Junior Grade in the year 1980. Plaintiff has alleged that Government published a gradation list dated 1.3.92 and the plaintiff was shown senior to the above private defendants Nos. 3 to 21. By Government notification dated 27.1.92 the seniority of the defendant Nos. 3 to 21 and seven other officers were shown in the seniority list just above the plaintiff though plaintiff claims to be the senior. By another notification dated 19.5.92 in modification of the earlier notification promoted defendant Nos. 3 to 21 to Senior Grade I on different dates, namely, 16.1.87, 18.8.87, 27.1.89, 28.6.89 and 10.11.89. Plaintiff has pleaded that this notification is 10.11.89. Plaintiff has pleaded that this notification is illegal and is liable to be set aside. Plaintiff also prayed for an interim injunction which was granted. It may be stated that though the State Government has made a party, notice under section 80 CPC was not served.

3. Heard Mr. BK Goswami and Mr. BK Das, learned counsel for the defendants/petitioners and Mr. JN Sarma, learned counsel for the opposite parties. Heard also Mr. AC Buragohain, learned Govt Advocate.

4. Main point to be decided is whether the civil Court has jurisdiction to entertain the present civil suit in view of provisions contained in section 9 of the Assam Administrative Tribunals Act, 1977. It may be stated that a point has been urged to make a distinction between maintainability and entertainment of a civil suit by a civil Court as according to Mr. Sarma, learned counsel for the plaintiff/opposite parties, the present question is regarding maintainability of the suit which can be determined only after filing of the written statement and framing of an appropriate issue. Before I consider this point, let me first examine whether the above section 9 bars either expressly or impliedly the jurisdiction of a civil Court. It may be stated that the said section 9 was amended recently by Assam Administrative Tribunal (Amendment) Act, 1992 (Assam Act III of 1992.) I quote below the amended section 9 which runs as follows :

"9. Finality of decision and bar of suit, powers of review of its own order and transfer of pending proceedings.(1) (a) The order of the Tribunal passed in any appeal under the provisions of the Act shall be final.

(b) Notwithstanding anything contained in subsection (1) (a) above, the Tribunal may, on the application of any of the parties, review its own decision or order in any case and may pass such order as it thinks fit: Provided that no such decision or order shall be reviewed unless notice has been given to the opposite parties to appear and to show cause why such order or decision should not be reviewed :

Provided further that an application for review under subsection (1) (b) shall be made within thirty days from the date of decision or order of the Tribunal,

(2) Notwithstanding anything contained in any law, no civil Court or other authority shall entertain any civil suit or other proceedings with respect to any matter relating to any condition of service of any civil servant or question in any

form and order passed by the Tribunal in any appeal or review with respect to any matter or with respect of any other matter which arises out of the exercise of powers under the Act.

(3) Notwithstanding anything contained in any law, all suits or other proceedings with respect of any matter relating to any condition of service of any civil servant and which are pending before any civil Court or other authority on the date of coming into force of this Act, shall stand transferred to the Tribunal and the civil Court or other authority before whom such a suit or proceeding is pending shall transfer all relevant and connected papers and records to the Tribunal and thereupon the Tribunal shall decide the suit and proceedings in the same manner as if they were appeals referred under the provisions of this Act."

5. The statement of objects and reasons of the Amending Bill which may be relevant is quoted below :

"Though the intention behind establishing the Assam Administrative Tribunal under the Assam Administrative Tribunal Act, 1977, appears to have been to create a separate judicial appellate forum for service matters and simultaneously to bar jurisdiction of civil Courts in such matters (refsection 9 (3), due to the interpretation given by the Gauhati High Court in (/981) Gauhati Law Reports 241 of section 9 (2) of the Assam Administrative Tribunal Act, uncertainty has arisen about the exclusion of civil Court's jurisdiction in service matters. Hence, to put this matter beyond doubt, addition of a third clause to section 2 (e) and substitution of the existing section 9 (2) and 9 (3) are necessary."

6. It may be stated that by section 2 of the Amending Act, the following subclause was inserted as subclause (3) after subclause (2) of clause (e) of section 2. The said subclause is as, follows:

"(3). All matters arising out of the application of the Fundamental Rules and Subsidiary Rules."

7. In *Chief Secretary to the Govt. of Assam vs. PC Mahanta*, (1981) 1 GLR 241 as referred to in the statement of objects and reasons, this Court decided in a civil revision, the jurisdiction of the civil Court visavis Assam Administrative Tribunal Act, 1977. A civil suit was filed by the General Secretary of the Sadou Assam Karmachari Parishad on behalf of Government Employees for a declaration that two orders mentioned in the judgment were invalid, illegal and inoperative. By these two orders, the period of absence of Govt. servants was regarded as unauthorised and it was ordered that no pay be given for the said period to persons who remained absent without satisfactory explanation. The learned Munsiff passed an injunction against which this Court was approached on the ground that Munsiff had no jurisdiction to entertain the suit. This Court held that the suit was not barred and the civil Court had jurisdiction to entertain it and accordingly, the petition filed by the Govt. of Assam was dismissed. It was laid down that except where provisions to section 4 of the Act is attracted, the Tribunal has no original jurisdiction in matters relating to condition of service of

the civil servants.

8. It may be stated that the present dispute regarding seniority came before Court twice. By order dated 16.9.91 passed in Civil Rule No. 3887 of 1991, a Division Bench of this Court after hearing the learned counsel for the petitioner and also the learned Govt. Advocate noted that the grievances of the petitioners were nonpreparation of the gradation list of ACS Grade I officers as per Rule 19 of the Assam Civil Service (Class I) Rules, 1960. As the petitioners in that petition were under the apprehension that they may be superseded by junior officers the petition was filed and the Court directed the State Government to dispose of the representations pending before the Government and with that direction the petition was disposed of.

9. The petition which was registered as Civil Rule No. 1471 of 1992 was disposed of by a Division Bench of this Court by order dated 24.7.92. In that case the petitioners were selected and appointed in the year 1977 in the Junior Grade of Assam Civil Service Class I and respondents 2 to 14 who were officers of Class II, were promoted to Class I (Junior Grade) subsequently in the year 1979. The Court noted that under the relevant Rules vacancies in Class I were to be filled up by promotion from Class II. The percentage was initially 30% which was increased to 50% in the year 1977 and the remaining vacancies would be filled up by direct recruitment. In the said writ petition, the petitioners claimed that they were senior to respondents 4 to 22 and it was properly reflected in the gradation list prepared upto 1992. The grievance of the petitioners in that case was that the Government by order date i 27.5.92 promoted respondents 4 to 22 retrospectively wef 31.12.77 thereby treating them senior to the petitioners in relaxation of FR 17 (1). This order dated 27.5.92 was passed by the State Government in view of order of this Court passed in the earlier writ petition registered as Civil Rule No. 3887 of 1991, gist of which has"been quoted. The Court noted that the petitioner filed an appeal dated 6.6.92 which was pending. Couit also recorded that the petitioners rushed to this Court as the Selection Committee which was being constituted under Regulation 3 of the IAS (Appointment by Promotion) Regulation, 1955 was to consider the cases for promotion and In view of the subsequent orders passed on 27.5.92, the writ petitioners apprehended that" their cases will not come within the zone of consideration as they were juniors to the private respondents. This Court disposed of the writ petition with a direction to the respondents to first consider ail the appeals and dispose of these appeals in accordance with Rules and thereafter shall forward the names to the Chairman of the Selection Committee.

10. After the above order was passed by this Court in the subsequent writ petition, State Government disposed of all the appeals by a speaking order and thereafter determined the seniority of the promotees from Class II to Class I basing 1977 as recruitment year. It may be stated that a batch of direct recruitment filed an appeal before the Assam Administrative Tribunal and the appeal has been admitted in respect of seniority and promotion. The Tribunal

held that the question of nomination to IAS was outside the jurisdiction of the Tribunal, the prayer for stay was also rejected. The present plaintiff opposite party did not join in the appeal before the Administrative Tribunal and filed the present suit after stay order was rejected by the Administrative Tribunal.

11. I have stated these facts only to show that the direct recruits to ACS Class I of which the present plaintiff was also a member are fighting several rounds of battle to claim seniority over promotees from Class II regarding inter se seniority mainly for the purpose of seeking nomination to the IAS.

12. As stated above from the copy of the plaint which has been annexed as Annexure II to the petition I find that the plaintiff prayed for a decree that the three notifications issued by the Government dated 27.5.92, 29.5.92 and 1.12.92 annexed as Annexures B, D and F to the present petition are illegal, void and without jurisdiction and also for permanent injunction restraining the State of Assam from giving effect to the said notifications. By notification dated 27.5.92 Government in the Personnel Department in relaxation of FR 17 under FR 5A fixed the seniority of the defendants who were promotees from ACS Class II to Class I wef 31.12.1972 above Smti Gayatri Baruah who was promoted directly to the ACS Class I. By notification dated 29.5.92 and in modification of the earlier notification and in relaxation of FK 17 under FR 5A some of the promotee officers who are defendants were given promotion wef an earlier date. The order dated 1.12.92 was passed by the Government pursuant to the orders passed by this Court on 16.9.91 in Civil Rule No.3887 of 1991. The appeal filed by Smti Gayatri Baruah and others who were recruited directly to ACS Class I was dismissed. This appeal was regarding giving retrospective promotion of ACS Class II officers to Class I.

13. Thus from the prayer made in the plaint, it would be clear that the present dispute before the civil Court is regarding seniority between the officers appointed directly to ACS Class I and officers promoted from Class II to Class I. Though it has been urged that as a consequence of fixation of seniority plaintiff is being deprived from consideration of his case for nomination to IAS this matter is not directly an issue before the civil Court.

14. Section 4 of the Assam Administrative Tribunal Act defines jurisdiction of the Tribunal which, inter alia, provides that the Tribunal shall have jurisdiction to entertain and dispose of appeals preferred by civil servant Against any order passed by the competent authority in respect of conditions of service. In my opinion fixation of seniority is a condition of service and as such there cannot be a second opinion that the present dispute is not within the jurisdiction of the Administrative Tribunal. I have already quoted the amended section 9 of the Act along with the statement of objects and reasons.

15. By the amended section 9, the jurisdiction of the civil Court and other authority in any matter relating to any condition of service of any civil servant is barred. By the said subsection (2) of section 9, a person cannot also file a civil

suit questioning in any form any order passed by the Tribunal in any appeal or review. Thus, it appears that there is an express bar of the jurisdiction of the civil Court in respect of any matters regarding conditions of service of a civil servant. I am fortified in coming to the above conclusion from the statement of objects and reasons, quoted above to the bill by which section 9 of the Act was amended. This amendment was necessary to put an end to the question of exclusion of jurisdiction of civil Court in respect of any matter which is within the exclusive jurisdiction of the Tribunal in view of decisions of this Court as mentioned above. Therefore, I have no hesitation to hold that the jurisdiction of a civil Court is expressly barred in respect of present dispute and in view of section 9 CPC the present suit cannot be entertained.

16. It has been urged before this Court that as written statement has not been filed, the question regarding exclusion of jurisdiction cannot be determined and for that purpose a proper issue has to be framed.

17. I may state here that the jurisdiction does not depend on the defence taken by the defendants in the written statement and this point has to be decided on the allegation made in the plaint. (See AIR 1985 SC 577). Therefore, the contention of nonfiling of written statement has no force.

18. As stated above, it has been urged on behalf of plaintiffs opposite parties that the question of maintainability has to be decided after filing of written statement and framing of issues. A lot of debate was generated during argument regarding the words "entertainment" and "maintainability" and in this connection decisions of the Apex Court, Kerala High Court as well as this Court were cited. (AIR 1968 SC 488, AIR 1991 Kerala 253). In my opinion this point need not detain me as the law has been laid down by the Apex Court.

19. In *Chandrika vs. Baiyalal*, AIR 1973 SC 2391 it was held that where the Court is inherently lacking in jurisdiction, the plea as to jurisdiction may be raised at any stage. In the case in hand that the civil Court has no jurisdiction in respect of the present dispute is so clear as stated above, so it is not necessary to frame an issue after filing of written statement and thereafter decide the question of jurisdiction. To remove any misapprehension, it is made clear that there may be cases where facts are disputed regarding jurisdiction of a civil Court or maintainability of a suit and in such cases, it may be necessary to allow the defendants to file written statement and thereafter frame an issue and take it up as preliminary one. But in the case in hand facts are not disputed and in my opinion also the law applicable.

20. Mr. Goswami, learned counsel has urged that by the impugned order of injunction, two legally constituted authorities are prevented from proceeding with the matter, namely, the Administrative Tribunal before whom some of the similarly situated persons like the present plaintiff have filed an appeal against the orders passed by the State Government and secondly by the injunction the entire process of selection for nomination to IAS under a statutory rules is being

held up. i n this connection, learned counsel has relied on a decision of the Apex Court in Cotton Corporation of India Limited vs. United Industrial Bank Limited, AIR 1983 SC 1272. Prima facie I find force in the contention of Mr. Goswami, but I need not examine this point in depth as I have already held that the jurisdiction of the civil Court is excluded expressly by law. Attention of this Court has been drawn to a decision of the Apex Court in Raja Ram Kumar Bhargava vs. Union of India, AIR 1988 SC 752. In that case the Apex Court, inter alia, held that preexisting right in common law is recognised by the statute and a new statutory remedy for its enforcement provided, without expressly excluding the jurisdiction of the civil Court, then both the common law and the statutory remedies might become concurrent remedies leaving upon an element of election to the persons. This ratio is not applicable to the case in hand inasmuch as the jurisdiction of civil Court has been expressly barred as stated above.

21. Mr. Sarma, learned counsel for the plaintiffopposite party has urged that even if the jurisdiction of a civil Court is barred, the civil Court has jurisdiction to examine as to whether the provisions of any statute has been complied with or not or whether the statutory Tribunal under the said statute has acted in conformity with the fundamental principle of judicial procedure. In this connection, learned counsel has placed reliance in Gurbax Singh vs. The Financial Commissioner, AIR 1991 SC 435. In paragraph 19 of the judgment, the Apex Court reiterated the above law as laid down by the Privy Council in Secretary of State vs. Mask and Company, AIR 1940 PC 105. This law was reiterated by the Apex Court in the earlier decisions also.

22. But the above ratio is not applicable in the case in hand inasmuch as the statutory Tribunal, namely the Administrative Tribunal has not disposed of any appeal and that apart the orders of the State Government which have been challenged in the civil suit are under examination by the Administrative Tribunal.

23. It may be stated that while admitting the appeal filed by the similarly situated persons, the Administrative Tribunal held that question of preparation of a penal to nomination of IAS is outside the jurisdiction of the Tribunal and accordingly directed the appellants before the Tribunal to seek remedy in the appropriate forum. The order of the Tribunal dated 5.12.92 has been annexed as Annexure III to the affidavitinopposition filed by the plaintiffrespondents before this Court. In view of the above fact Mr. Sarma has urged that the plaintiff cannot approach the Central Administrative Tribunal as he is not a member of the IAS and as such civil Court is the appropriate authority. Learned counsel has placed reliance in a decision of the Apex Court in Ishar Siogh vs. National Fertilizers, AIR 1991 SC 1546. in that case the Apex Court laid down if for a part of the reliefs the suit is maintainable in the Forum where it has been laid it is not open for the Forum, to shut out its doors to suitor. According to Mr. Sarma as part of the reliefs claimed by the plaintiffs is outside the jurisdiction of the Administrative Tribunal, civil Court can entertain the suit.

24. I am unable to accept the contention of Mr. Sarma as in my opinion in the

plaint, the specific relief claimed is for a decree for declaration that three orders of the State Governments stated above are illegal, void and inoperative. Therefore before the civil Court, the question of nomination to IAS was not agitated. I may add here that in the above order, the learned Tribunal while rejecting the stay petition ordered that the notification would be subject to the final orders of the appeal pending before the Tribunal. In other words, if the other similarly situated officers like the present plaintiff can obtain a favourable order from the Tribunal, any nomination made to the IAS may have to be reconsidered. I can only hope that the Tribunal will expedite the matter.

25. For the reasons stated above, I find merit in the present petition and accordingly, it is accepted by setting aside the impugned order dated 1.2.93 passed by the learned Assistant District Judge No. 1, Gauhati in Misc. Appeal No.1 of 1993. Consequently ex parte injunction order passed by the learned Munsiff No.3 in Misc. (J) Case No.86 of 1992 arising out of TS No.295 of 1992 is also set aside. No costs.