

(2005) 02 GAU CK 0031
In the Gauhati High Court
Case No : S.A. No. 17 of 1997

K. Dutta

APPELLANT

Vs

S. Dutta and Others

RESPONDENT

Date of Decision : 18-02-2005

Acts Referred:

Assam Administrative Tribunal Act, 1977 — Section 2, 9
Assam Secondary Education (Provincialisation) (Amendment) Rules, 1982 — Rule 2
Civil Procedure Code, 1908 (CPC) — Section 100
Constitution of India, 1950 — Article 136
Specific Relief Act, 1963 — Section 34

Citation : (2005) GLT 586 Supp

Hon'ble Judges : A. Hazarika, J

Bench : Single Bench

Advocate : Rajeswar Sharma, for the Appellant; Y.K. Phukan and Dhanesh Das, for the Respondent

Final Decision : Allowed

Judgement

A. Hazarika, J.—Bare essential facts, set out hereinafter, would, in my opinion, be sufficient to appreciate the crux of controversy arising for the decision in this appeal.

2. Defendant has filed the present appeal challenging the judgment and decree dated 9.10.96 passed in the Title Appeal No. 18 of 1991, by the learned Assistant District Judge, Lakhimpur at North Lakhimpur dismissing the appeal filed by the present Appellant/Defendant affirming the judgment and decree dated 25.11.91 passed in the Title Suit No. 14 of 1988 by the learned Munsiff No. 1, North Lakhimpur, decreeing the suit of the Respondent/Plaintiff.

3. The facts in brief of the case is that Plaintiff/Respondents (hereinafter referred to as Respondent) filed the suit being Title Suit No. 14 of 1988 against the Defendants before the learned Munsiff No. 1, North Lakhimpur praying for a decree viz;

(i) For a declaration that the appointment of the Defendant Shri Khargeswar Dutta as the Headmaster of North Lakhimpur Town Higher Secondary School is illegal and forged.

(ii) For a direction to the Managing Committee allowing them to remove the Defendant from the post of Headmaster.

4. The Plaintiff's case as averred in the plaint is that North Lakhimpur Town H.S. School was established by the local people in the year 1981 and the Plaintiffs were elected as member (including the President and Secretary) of the Managing Committee in a public meeting held on 28.10.84 which was approved by the Inspector of Schools, Lakhimpur vide order dated 23.11.1984. One Shri Sevak Hazarika, who was holding the post of Headmaster at the relevant time left the school and the Managing Committee of the School directed the Defendant to act as Headmaster with a condition to submit experience certificates vide Resolution dated 1.5.86, since experience certificate for 10 years is required to hold the post of Headmaster. The Defendant accordingly submitted two certificates as asked for. The Managing Committee after considering the certificates appointed him in the post of Headmaster vide Resolution dated 10.2.1987. The said certificates later on found to be forged and the Managing Committee requested the Inspector of Schools to enquire into the matter vide resolution dated 27.12.87. But the Managing Committee was dissolved illegally and a new Committee was formed and the Defendant became the Secretary of the new Committee and hence the suit.

5. On receipt of the summons the Defendant and the pro forma Defendant had entered appearances and contested the suit by filing separate written statements. As usual, the Principal Defendant took the plea that there is no cause of action for the suit, suit is not maintainable in its present form etc. denying the case of the Plaintiff. His case was that on being satisfied with the certificates, the Managing Committee appointed him to act as Headmaster and the new Managing Committee was formed in accordance with the Rules. He had averred specifically in his written statement that the suit is barred by limitation and the suit is bad for non-joinder of necessary parties and prayed for dismissal of the suit.

The other pro forma Defendants by filing written statements contended that they had not issued any false and forged certificates as averred in the plaint and prayed for dismissal of the suit with costs.

6. On the pleadings of the parties the learned trial Court had framed the following issues, which are quoted hereunder viz;

(i) Whether there is cause of action for the suit?

(ii) Whether the suit is maintainable in the present form and manner?

(iii) Whether the appointment of the Defendant No. 1 as Headmaster of North Lakhimpur H.S. School is illegal?

(iv) Whether the Defendant No. 1 produced documents in support of his candidature were forged and collusive?

(v) Whether the Defendant No. 1 is liable to be removed as prayed by the Plaintiffs?

(vi) Whether the suit is properly valued?

(vii) Relief.

On 19.11.91, another issue was framed by the learned Court below which reads as follows:

(viii) Whether the suit is bad for non-joinder of necessary parties misjoinder of parties?

7. During the trial both the parties adduced evidence in support of their respective claims. The Plaintiff examined 6(six) witnesses and exhibited documents marked as Exts. 1 to 16. The Defendants on the otherhand examined 5(five) witnesses and exhibited documents marked as Exts. "Ka" to "Cha".

8. The learned trial Court, after completion of the trial, on the basis of the evidence and materials on record, decreed the suit by holding that the certificates issued by the Proforma-Defendants (vide Exts. 11, 14 and 16) are forged and collusive and appointment of the Defendants to the post of Headmaster of the School vide resolution No. 2 dated 10.2.1987 of the Managing Committee was directed to remove the Defendant from the post of Headmaster in accordance with law.

9. Aggrieved by the judgment and decree passed by the learned trial Court, the Defendant preferred an appeal being Title Appeal No. 18 of 1991 before the learned Assistant District Judge, North Lakhimpur. The first appellate Court, after hearing the parties and on perusal of the materials on record dismissed the appeal upholding the judgment and decree passed by the learned trial Court.

10. Aggrieved by the judgment and decree of the first appellate Court, the Defendant preferred the instant second appeal, since no specific substantial question of law was formulated at the time of admission of the appeal, with the consent of the parties, I have formulated the following substantial question of law involved in the appeal:

1. Whether the Civil Court ceased to have jurisdiction to proceed with the suit filed by the Plaintiffs-Respondents and whether the Civil Court can pass a decree relating to the service conditions of the Appellant in view of provisions of Assam Administrative Tribunal Act, 1977, as the school was provincialised under the provisions of Assam Secondary Education (Provincialisation) Act, 1977?

2. Whether the Civil Court in view of the provisions of Assam Administrative Tribunal Act, 1977, ceased to have jurisdiction in view of Section 9 of the said Act, as there is a bar of jurisdiction of Civil Court relating to conditions of service

of a civil servant and any suit filed stands automatically transferred to the Tribunal?

3. Whether the State of Assam and Inspector of School, Lakhimpur are necessary parties in the suit and the suit is bad for non-joinder of necessary parties?

4. Whether the suit of the Plaintiff-Respondents is barred u/s 34 of the Specific Relief Act, as the suit was filed for declaration without praying for consequential relief?

5. Whether the Plaintiffs-Respondents have the right to sue?

6. Whether the Plaintiffs suit is maintainable in law and whether the lower appellate Court dismissed the appeal preferred by the Appellant on erroneous findings of facts as well as misconstruing the provisions of law applicable in the instant case?

11. I have heard the learned Counsel Shri R. Sharma, appearing for the Appellant and Dr. Y.K. Phukan, learned Senior Counsel assisted by Shri D. Das, Advocate on behalf of the Respondents Appellants.

12. To consider the rival contentions raised, I have gone through the provisions of the Assam Administrative Tribunal Act, 1977 (hereinafter referred to as Tribunal Act) and the Regulation framed under the Act as well as the provisions of the Assam Secondary Education (Provincialisation) Act, 1977 (hereinafter referred to as Act of 1977) and the Rules made thereunder. Section 2(b) of the Tribunal Act deals with civil servant "Civil Servants" which means a person who is or has been a member of civil service or who holds or has held a civil post in connection with the affairs of the State of Assam Section 2(e) of the Tribunal Act deals with conditions of service which includes all matters relating to the appointment, seniority, confirmation and termination of service of a civil servant etc. Whereas, the Act of 1977 provides for provincialisation of services of employees of different categories now employed in various Secondary Schools in Assam covered by the deficit Scheme. Section 2(ii) deals with "date of appointment" means in relation to any employee, the date on which he joined the service of a school imparting secondary education on and from the date of its coming under Ad-hoc system of grant-in-aid. Section 2(v) provides for "employees" which means a person in the employment of a school working against a regularly sanctioned post and whose appointment has been approved by the school authority wherever such approval was necessary. Section 2(vi) deals with "existing employees" which means an employee who is on the appointed day, in the regular pay role, employee against regular sanction and whose appointment has been approved by the school authority. Section 2(viii) deals with "Managing Committee" which means in relating to any school approved by the State Government and functions on the appointed day. Rule 2(b) of the Rules of 1982 (as amended) provided for "appointing authority" which means the Governor of Assam in respect of posts in Grade-I cadre, the

Director of Secondary Education, Assam, in respect of the posts in Grade II and III cadres and the Inspector of Schools in respect of posts in Grade IV and VII of the service.

13. Conjoint reading of two provisions of the Act and the Rules framed thereunder and the facts pleaded and established, this Court has no hesitation to hold that the Court has the jurisdiction to pass a decree as prayed for and the Assam Administrative Tribunal cannot come in the way because the Appellant was temporarily appointed to act as Headmaster by the Managing Committee before provincialisation of the services of the Appellant and other teachers with effect from 1.5.86 and permanently appointed with effect from 10.2.1987 after the approval of the same by the Inspector of Schools. The School where the Appellant was serving as headmaster was provincialised vide Notification No. 567/91-115 dated 16.11.91 and the services of the teaching and non-teaching staffs of the school were provincialised with effect from 19.11.91 and hence on the date of filing of the suit, the Appellant was not a civil servant as envisaged under the Assam Administrative Tribunal Act and the evidence on record and the manner of proving the exhibits lacks the date when the school came under ad-hoc grants-in-aid system. Therefore, the first two substantial questions raised are answered in the negative and against the Appellant.

14. The third substantial question of law formulated requires consideration of pleadings of both the parties in the light of evidence on record.

The Appellant/Defendant was appointed by Managing Committee of the School while receiving ad-hoc grant i.e. before provincialisation. The appointment was approved by the Inspector of Schools, Lakhimpur vide order dated 23.11.1984. Evidence on record discloses that the school was provincialised vide notification dated 16.11.91. The consequence of the provincialisation of the school is that by virtue of the operation of Assam Secondary Education (Provincialisation) Act, 1977 (hereinafter to be referred to as Act, 1977), the Appellant/Defendant became Government servant and accordingly the Government official viz., Inspector of School, Lakhimpur, by virtue of the aforesaid Act, 1977, is the appointing and removing authority of the Appellant. In spite of this drastic change in the status of the service of the Defendant Appellant, the Plaintiff-Respondent preferred not to implead those authorities as party/Defendant nor made necessary amendment even at the belated stage. In view of this subsequent event of the provincialisation of the school and the nature of service condition of appointment of the Defendants/Appellant having been radically changed, I hold that, the State of Assam and Inspector of School, Lakhimpur are necessary parties to the suit and no effective decree can be passed in their absence, nor any direction can be given to those authorities without impleading them in the suit. Accordingly I hold that the suit is bad for non-joinder of necessary parties. Both the Courts below did not take into consideration this aspect of the matter which goes deep root of the case. Thus this third substantial question of law is answered in favour of the Defendant/Appellant

15. The fourth and fifth substantial question of law involves the question as to whether suit of the Plaintiffs-Respondents is barred u/s 34 of the Specific Relief Act, as the suit was filed for declaration without praying for consequential relief and whether the Plaintiffs-Respondents have the right to sue.

16. Issue No. 2 has been framed by the trial Court regarding maintainability of the suit and both the Courts below answered this issue in favour of the Plaintiff-Respondent without taking relevant facts and materials into consideration.

17. In paragraphs 2, 3 and 4 of the written statement, the Appellant/Defendant specifically challenged the Plaintiffs right to sue, the relief they claimed in the suit was also challenged by them. The case as pleaded in the plaint was also challenged not to be maintainable in law. All these questions were not taken into consideration by both the Courts below in the light of the provision of Section 34 of the Specific Relief Act.

Section 34 of the Specific Relief Act, 1963 provides thus

Section 34. Discretion of Court as to declaration of status or right.-Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the Plaintiff need not in such suit for any further relief:

Provided that no Court shall make any such declaration where the Plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

18. It is now an established principle of law that no suit is maintainable u/s 34 of the Specific Relief Act unless the Plaintiff is a person entitled to some legal character or to some right as to property and the declaration sought is that he is entitled to such character or to such right.

Therefore, in order to succeed in a suit for declaration governed by the provisions of Section 34, Specific Relief Act, it is necessary for the Plaintiff to satisfy the conditions contained in that Section, of such requisites, the first is that the Plaintiff must at the time of the suit be entitled to any legal character or to any right as to any property.

19. In the instant case, in order to get a declaratory decree, the Plaintiff-Respondent is required to satisfy that at the time of filing the suit, he had any legal right or character as to any property. Admittedly, the Managing Committee constituted with the Plaintiffs was dissolved much prior to the filing of the suit and now the management of the school, including the power of removal of any employee is vested with other authorities viz, the State of Assam and Inspector of Schools, Lakhimpur. The Plaintiffs/Respondents has not been able to satisfy as to how the Plaintiffs are effected by the continuation of the service of the Defendant and as to what is the existing right of the present Plaintiffs/Respondents.

Thus these fourth and fifth substantial question of law are answered in favour of the Defendant/Appellant.

20. The sixth substantial question of law involves the question as to whether the Plaintiffs suit is maintainable in law and whether lower appellate Court dismissed the appeal preferred by the Appellant on erroneous findings of facts as well as misconstruing the provisions of law, applicable in the instant case.

21. The materials on record disclose that the learned Court below did not address itself to this aspect of the matter at all and thus committed an error of law in affirming the judgment and decree passed in the suit and dismissing the appeal preferred by the Appellant.

22. Before giving any final decision on the sixth substantial question of law, it is necessary on my part to look into the following concurrent findings of the Courts below in view of the fact as to whether those findings are binding on me in interfering with those findings as erroneous finding of facts.

23. Under Issue No. 3 Defendants appointment was found to be illegal.

Under issue No. 4, it was held that Defendant produced fraudulent documents in order to secure appointment.

Under Issue No. 5, in consideration of findings in Issue Nos. 3 and 4 it was held that, the Defendant is liable to be removed from the post he held.

Thus, in fact, only concurrent finding of fact is the finding under Issue Nos. 3 and 5.

24. The basic question now is whether Plaintiffs suit can be decreed solely on the basis of findings of Issue No. 4 and whether the Civil Court has got jurisdiction to declare the Defendants appointment to be illegal in view of the provision of Section 34 of Specific Relief Act.

25. Since this concurrent finding is based on misconstruing law and evidence as applied to the instant case, the same is not binding on me in order to set aside the decree passed by the trial Court and affirmed by the appellate Court.

26. The appropriate authority so far in taking any action in this regard is the authority in the Education Department, Government of Assam and since no Managing Committee exist to make appointment or for taking disciplinary action against the Defendant on the date of decree of the suit, as the School was provincialised and the service of the Defendant also was provincialised, there is none to take any action on behalf of any non-governmental authority to take appropriate action against the Defendant, the decree passed by the Courts below will never be an enforceable decree. That being the position, I have no hesitation in answering the sixth substantial question of law in favour of the Defendant-Appellant.

27. The Plaintiffs/Respondents have prayed the following relief in the suit, viz-

(a) A decree declaring the appointment of the Defendant, appointed as Headmaster North Lakhimpur Town Higher Secondary School is illegal and forged.

(b) A decree directing the Managing Committee of the School to remove the Defendant from the said post of Headmaster.

28. Now this Court is to see and examine as to whether the learned Courts below erred in law in not considering the questions as to whether the Plaintiff Respondents have right to sue in view of provisions laid down in Section 34 of Specific Relief Act.

29. Admittedly, the suit was filed by the Ex-members of the Managing Committee of the School.

30. Admitted facts in the suit as well as material evidence on record clearly discloses that the Plaintiffs Respondents have "no right to institute the suit", since they were ceased to be the Managing Committee at the time of institution of the suit. Therefore, the further relief allowing the Plaintiffs to remove the Defendant would not be available to the Plaintiffs Respondents, the Ex-Managing Committee of the School, more particularly on the failure, to implead the necessary parties i.e. the existing employers.

31. The learned lower appellate Court below did not take into consideration this aspect of the matter at all and thus committed an error of law in affirming the judgment and decree passed in the suit and dismissing the appeal preferred by the Appellant, thereby necessitating interference by this Court in exercise of power u/s 100 of the Code of Civil Procedure.

32. Regarding interference by High Court with the concurrent finding of facts of the Court below u/s 100 of CPC the Apex Court, time without number, pointed out that, interference with the concurrent findings of the Courts below by the High Court u/s 100 CPC must be avoided unless warranted by compelling reasons.

33. Under what circumstances interference with findings of fact is permissible, has elaborately been dealt with the Apex Court in *Ishwar Dass Jain (Dead) Thr. Lrs. Vs. Sohan Lal (Dead) By Lrs.*, Relevant paragraphs of the same are quoted below:

(9) Ordinarily, this Court does not go into findings of fact in exercise of its jurisdiction under Article 136 of the Constitution of India particularly in appeals against Second Appeal decided by the High Court u/s 100, of the Code of Civil Procedure. But, in certain exceptional cases this Court will not hesitate to interfere if interference is called for and if the High Court has failed to interfere u/s 100, Code of Civil Procedure. After hearing the Appellants in person and the learned Counsel for the Respondent, we are of the view that this one of those exceptional cases in which interference is called for even within the narrow parameters of Section 100, Code of Civil Procedure.

(10) Now u/s 100, CPC after the 1976 amendment, it is essential for the High

Court to formulate a substantial questions of law and it is not permissible to reverse the judgment of the first appellate Court without doing so.

(11) There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered would have led to an opposite conclusion. This principle has been laid down in a series of judgment of this Court in relation to Section 100, CPC after the 1976 amendment. In *Dilbagrai Punjabi Vs. Sharad Chandra*, while dealing with a Second Appeal of 1978 decided by the Madhya Pradesh High Court on 20.8.81 L.M. Sharma, J. as he then was observed that:

The Court (the first appellate Court) is under a duty to examine the entire relevant evidence on record and if it refuses to consider important evidence having direct bearing on the disputed issue and the error which arises as of a magnitude that it gives birth to a substantial question of law, the High Court is fully authorized to set aside the finding. This is the situation in the present case.

In that case, an admission by the Defendant tenant in the reply notice in regard to the Plaintiffs title and the description of the Plaintiff as "owner" of the property signed by the Defendant were not considered by first appellate Court while holding that the Plaintiff had not proved his title. The High Court interfered with the finding on the ground of non- consideration of vital evidence and this Court affirmed the said decision. That was upheld. In *Jagdish Singh Vs. Natthu Singh*, with reference to a second appeal of 1978 disposed of on 5.4.1991, Venkatachaliah, J. (as he then was) held.

Whether the findings by the Court of facts is vitiated by non-consideration of relevant evidence or by an essentially erroneous approach to the matter, the High Court is not precluded from recording proper findings. Again in *Sundra Naicka Vadiyar (dead) by LRs. and another Vs. Ramaswami Ayyar (dead) by his LRs.*, it was held that where certain vital documents for deciding the question of possession were ignored such as a compromise an order of the revenue Court reliance an oral evidence was unjustified. In yet another case in *Mehrunnisa (Smt) and Others Vs. Visham Kumari (Smt) and Another*, arising out of Second Appeal of 1988 decided on 15.1.1996, it was held by Venkataswami, J. that a finding arrived at by ignoring the second notice issued by the landlady and without noticing that the suit was not based on earlier notices, was vitiated and the High Court could interfere with such a finding. This was in Second Appeal of 1998 decided on 15.1.1996.

(12) The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate Court by placing reliance on inadmissible evidence which, if it was omitted, an apposite conclusion was possible. In *Sri Chand Gupta Vs. Gulzar Singh and another*, it was held that the High Court was right in interfering in Second Appeal where the lower appellate Court relief upon an admission of a third party treating it as binding On the Defendant. The admission was inadmissible as against the

Defendant. This was also a Second Appeal of 1981 disposed of on 24.9.1985.

34. Accordingly, in view of the discussions made above, I hold that the Plaintiffs suit is not maintainable in law and is liable to be dismissed. The appeal is allowed and the judgment and decree passed by the learned Courts below are set aside.

35. No order as to costs.