

(1993) 06 GAU CK 0030

In the Gauhati High Court

Case No : Civil Revision No. 293 of 1987

Sudhan Chandra Gogoi

APPELLANT

Vs

Lakhyahira Das

RESPONDENT

Date of Decision : 14-06-1993

Acts Referred:

Assam Administrative Tribunal Act, 1977 — Section 2(e), 2(e), 9(2), 9(2)

Civil Procedure Code, 1908 — Section 9

Civil Procedure Code, 1908 (CPC) — Section 9

Citation : (1993) 2 GLJ 284

Hon'ble Judges : U.L.Bhat, C.J.; R.K. Manisana Singh, J and D.N. Baruah, J

Bench : Full Bench

Advocate : M. Bhuyan, D. Das, B.K. Das, Y.K. Phukan, N. Ahmed, Advocates appearing for Parties

Judgement

U.L. Bhat, C.J.—This revision petition under section 115 of the Code of Civil Procedure, 1908 has been referred to Full Bench on account of the importance of the question involved in the case. The revision has been filed against the finding of the Assistant District Judge. Lakhimpur, North Lakhimpur, on the preliminary issue raised in Title Suit No.26 of 1985. In answering the preliminary issue regarding the jurisdiction of Court, the learned Judge held that the civil Court has jurisdiction to try the suit and the suit is maintainable in its present form. The fifth defendant has filed the revision against the preliminary finding.

2. Plaintiff and the defendant have been working as Assistant Teachers in Mingmang Uriamguri Tribal Middle English School. On the post of the Headmaster becoming vacant on resignation of the incumbent, fourth defendant, Deputy Inspector of Schools, Dhemaji, by order dated 20.6.84 allowed the plaintiff to remain in charge of Headmistress on a temporary basis. Fifth defendant, who claimed to be senior to the plaintiff as Assistant Teacher submitted a representation before the fourth defendant putting forward his claim. By order dated 9.8.84, fourth defendant cancelled the earlier order and allowed fifth defendant to remain in charge of the school temporarily. Plaintiff, thereupon

submitted a representation or appeal to the second defendant, Director of Elementary Education and the first defendant, State of Assam on 21.3.85. Since no action was taken for over six months, she filed an appeal before the Assam Administrative Tribunal under the provisions of the Assam Administrative Tribunal Act, 1977 (for short "the Act"). Meanwhile steps were taken departmentally for making regular selection and appointment to the vacant post under the provisions of the Assam Elementary Education (Provincialisation) Service and Conduct Rules, 1981. Fourth defendant submitted a list of eligible candidates for selection by the Subdivisional Selection Committee which made the selection. The Committee selected the fifth defendant, but not the plaintiff. The select list dated 13.10.85 was duly published by the third defendant, the District Elementary Education Officer. Fifth defendant was duly appointed Headmaster of the school. Thereupon, plaintiff sought permission of the Assam Administrative Tribunal to withdraw the appeal. Permission was granted and on permission being granted, the appeal was withdrawn on 30.11.85. On 12.12.85, plaintiff filed Title Suit No.22 of 1985 in the Munsiff Court, Dhemaji, which was subsequently transferred to the file of the Assistant District Judge. Reliefs in the plaint are :

- (a) Cancellation of the temporary Head Mistresship of the plaintiff and appointment of defendant No.5 as temporary Head Master as illegal and void;
- (b) Strike down and set aside the list of the selection of defendant No. 5 for the post of Head Master, prepared by the Subdivisional Selection Committee.
- (c) Declare the plaintiff as senior most teacher and temporary Head Mistress, entitled for selection and appointment as the permanent Head Mistress of the school.

The claim of the plaintiff is based on the allegation that as Assistant Teacher, she is senior to the fifth defendant.

3. Fifth defendant filed written statement denying the claim of the plaintiff to be senior to him and contending that he is senior to her in the grade of Assistant Teacher. On this basis he justified the cancellation of the charge arrangement made in favour of the plaintiff and supported the charge arrangement made in his favour. He also sought to support the selection made by the Selection Committee and his appointment and denied all other allegations contained in the plaint regarding collusion, malafides etc.

4. Defendants 1 to 4 filed what is styled as preliminary written statement denying that there was any cause of action for the suit or that the suit was maintainable and contending that the civil Court has no jurisdiction to entertain and try the suit under the provisions of the Act. These defendants reserved their right to file additional statement after the preliminary issue was decided.

5. Trial Court framed two preliminary issues on the maintainability of the suit and the jurisdiction of the civil Court and held that it has jurisdiction to entertain and

try the suit. In arriving at this conclusion, the learned Judge held that the suit would have been barred in the normal course, but the facts of the case indicate exceptional circumstance and, therefore, the suit is not barred. The exceptional circumstance indicated is that the selection was made during the pendency of the appeal and that was not reasonable or proper conduct for departmental officers and they ought to have waited for disposal of the appeal by the Tribunal. Defendants 1 to 4 has no authority to publish the select list. Learned Judge also indicated that in such circumstances plaintiff cannot be expected to approach the Tribunal again after exhausting other remedies under section 4 (2) of the Act. Learned Judge also adverted to the allegations of malafides and illegality made in the plaint. He was satisfied that "this is a fit case where the civil Court will exercise: jurisdiction." He distinguished two decisions of the Supreme Court cited before him and relied on the decision of this Court in Bhagavat Singh vs. State Board of Elementary Education Assam Shillong & others, (1983) 2 GLR 96. The finding of the learned Judge is now challenged.

6. We have been referred to catena of decisions of the Privy Council,, Supreme Court and this Court to indicate the principles governing decision on the question of bar of jurisdiction of civil Court. The earliest decision is of the Privy Council in Secretary of State vs. Mask & Co. AIR 1940 SC 105, arising under the provisions of the Sea Customs Act, 1878. The Act did not contain any express bar of jurisdiction. Privy Council held that there was an implied bar of jurisdiction of civil Court on an examination of the provisions of the Act which ensured finality to the order of the statutory authority and of the subject matter relating to the obligation which was created for the first time by the Act. The Privy Council observed that exclusion of jurisdiction of civil Court is not be readily inferred, but such exclusion must either be explicitly expressed or clearly implied. Where the statute creates a liability, not existing in common law and provides also a particular remedy for enforcing it, the party must adopt the form of remedy given by the statute and to that extent there will be bar of jurisdiction of civil Court. The Privy Council also added that even where jurisdiction is so excluded, the civil Court has jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure. In Raleigh Investment Co Ltd vs. The Governor General in Council, AIR 1947 PC 78, the express bar contained in section 67 of the Income Tax Act, 1922 came up for consideration in the context of a suit by an assessee for declaration that certain provisions of the Act were ultra vires and hence the assessment was illegal and for an injunction restraining the Department from making assessment in future and for repayment of the sum assessed. Privy Council indicated that though in form the relief did not profess to modify or set aside the assessment, in substance it did so because the repayment could not be ordered so long as the assessment stood. The suit was held to be barred because in truth it was directed exclusively to a modification of the assessment made under the Act. Even if the provision on the basis of which the assessment was held to be ultra

vires subsequently, the assessment cannot be regarded as a nullity but as a mistake of law made in the course of exercise of jurisdiction. The phrase ""assessment made under the Act" is an assessment finding its origin in activity of the assessing officer acting as such and does not relate to its accuracy in point of law. The use of the machinery provided by the Act and not result of that use, is the test.

7. The two decisions of the Privy Council were considered by the Supreme Court in *Firm of Illuri Subbayya Chetty and Sons vs. State of AP*, AIR 1964 SC 322. In this case an assessee under the Madras General Sales Tax Act, 1939 filed a suit to recover sales tax collected from him illegally. Section ISA of the Act was held to contain an express bar of jurisdiction of civil Court. While approving generally the dicta of the Privy Council, the Supreme Court indicated that observations regarding the two exceptions of the Rule were in somewhat wide terms. According to the Supreme Court, noncompliance of the provisions of the statute referred to by the Privy Council must be noncompliance with such fundamental provisions of the statute as would make the entire proceedings before the statutory authority illegal and without jurisdiction and that it is cases of this character where the defect or the infirmity in the order goes to the root of the order and makes it in law invalid and void that these observations may be invoked in support of the plea that the civil Court can exercise its jurisdiction notwithstanding the bar. See also *Addanki Tiruvenkata Thata Desika Charyulu vs. State of AP & another*, AIR 1964 SC 807. In considering section 20 of the Bombay Sales Tax Act, 1946, in *M/s Kamala Mills Ltd. vs. State of Bombay*, AIR 1965 SC 1942 Bench of 7 (seven) Judges held that no assessment made and no order passed under the Act or the Rules including the assessments and orders not made properly or correctly or made erroneously or based on incorrect findings of facts can be called into question in any civil Court in view of the express bar in the statutory provision. The words used in section 20 were held to be so wide as to encompass even erroneous orders of assessment. The Supreme Court held that the determination of the question whether there is express bar in section 20 must rest on the terms of section 20 themselves, because that is the provision under consideration and decisions on other statutory provisions are not of material assistance, except in so far as general principles of construction are laid down. The Supreme Court indicated that the question of bar either expressly or by necessary implication must be considered in the light of the words used in the statutory provision, the scheme of the relevant provisions, their object and purpose and when there is an express bar, the consideration as to the scheme of the Act and adequacy or sufficiency of remedies provided for may be relevant, but cannot be decisive. But in the case of implied bar such consideration would be very important and may even be decisive.

8. In *Ram Swarup & others vs. Shikar Chand & another*, AIR 1966 SC 893, a Constitution Bench held that jurisdiction of civil Court would be excluded in the light of the provisions in sections 3 (4) and 16 of the UP (Temporary) Control of Rent and Eviction Act, 1947. The Court also observed that the exclusion cannot

operate where the plea raised before the civil Court goes to the root of the matter and would if upheld, lead to the conclusion that the impugned order is a nullity. Illustrations were given of an order required to be passed by a District Magistrate being passed by a person who was not a District Magistrate and order passed by a District Magistrate of another district or an order passed by a District Magistrate without giving notice and an opportunity to make a representation to the tenant. In *M/s KS Venkataraman and Co. (P) Ltd. vs. State of Madras*, AIR 1966 SC 1089, a Constitution Bench held that if the statutory authority acts on the basis of a statutory provision which is ultra vires, to that extent it would be acting outside the Act and a suit to question the validity of such an order would lie in the civil Court and the Tribunal would not be competent to decide the question of ultra vires. Exceptions to the bar of jurisdiction of civil Court were again reiterated in the *State of Kerala vs. M/s N. Ramaswami Iyer and Sons*, AIR 1966 SC 1738.

9. A Constitution Bench of the Supreme Court in *Dhulabhai vs. State of MP & another*, AIR 1969 SC 78 reviewed all the earlier decisions. Referring to the decision in *Secretary of State vs. Mask & Co*, AIR 1940 PC 105, the Supreme Court observed that the presence of the provision barring the jurisdiction was the main reason and existence of an adequate machinery for the same relief was only the supplementary reason. The principles of law governing the matter were summarised in para 32. This decision was followed in *Sree Raja Kandregula Srinivasa etc. vs. State of AP & others*, AIR 1971 SC 71 and *The Premier Automobiles Ltd. vs. Kamalakar Shantaram Wadke & others*, AIR 1975 SC 2238. The latter case relates to ouster of jurisdiction of civil Court under the Industrial Disputes Act 1947 and the principles of construction were summarised in para 23,

10. The principles of law governing the matter are now well established. Exclusion of jurisdiction of civil Court is not to be readily inferred and such exclusion must either be explicitly expressed or clearly implied. Where there is an express bar of jurisdiction of civil Court the matter has to be decided mainly on the language of the statutory provision creating bar, though an examination of the scheme of the statute and objects and purpose of the Act to find adequacy or sufficiency of alternative remedy is relevant though not decisive. Where the contention is of an implied bar, the matter must rest mainly on the examination of the scheme of the Act and objects and purpose of the Act. Where the statute relates to right or liability existing in common law and merely prescribes a remedy, in the absence of any other circumstances, that can be a remedy alternative to the common law remedy. Where the statute creates a right or liability not existing in common law and provides also an adequate remedy for enforcing it and the object, purpose, scheme and provision of the Act indicate the intention to give finality to the order of the statutory authority, it can be held that jurisdiction of civil Court is barred impliedly. Challenge to the provisions of the Act as ultra vires cannot be made before the statutory authority. In case of express or implied bar, the question of correctness, propriety or lawfulness of the assessment is for decision of the statutory authority. However, even where there

is an express or implied bar, the civil Court has jurisdiction to examine cases of noncompliance with such fundamental provisions of statute as would make the entire proceedings before the statutory authority illegal and without jurisdiction and in cases where defect or infirmity in the order goes to the root of the order, and if upheld and renders the order a nullity, as also cases where the statutory Tribunal which is required to act in conformity with the fundamental principles of judicial procedure failing to act in conformity with such principles.

11. We will now advert to the decisions of this Court referred to by counsel of either side. In *Ranjit Chakravarty vs. State of Assam & others*, AIR 1981 Gauhati 1, a civil servant on termination of his employment filed a suit for declaration that he should be deemed to be in service and for recovery of his salary on the ground that the officer who had terminated his employment had no jurisdiction to do so. The matter reached the High Court in second appeal and the learned Single Judge held that the civil Court had no jurisdiction. During the pendency of the Letters Patent Appeal before a Division Bench, the Assam Administrative Tribunal Act, 1977 was enacted. The Act contained a provision of express bar of jurisdiction of the civil Court and also provided that all pending cases before any civil Court or other authority in respect of matters over which the Tribunal has jurisdiction shall stand transferred to the Tribunal and the Court or the authority must transfer the papers to the Tribunal. It was argued that the Letters Patent Appeal must be transferred to the Tribunal. All the three Judges of the Bench who decided the case rejected the contention though for different reasons. Two Judges held that the jurisdiction of the Tribunal related only to orders passed by a competent authority regarding conditions of service and the suit for declaration that the Government servant was in service in the eye of law was not within the jurisdiction of the Tribunal and claim for compensation is not a condition of service. They also commented on the absence of any provision in the Act creating a machinery for execution of decree or order passed by the Tribunal. The third Judge agreed with the conclusion. However, the learned Judge indicated that the Tribunal had jurisdiction to give a declaration as the matter is clearly covered by the definition of conditions of service" and the Tribunal had jurisdiction to direct payment of salary on setting aside the termination order and the decision of the Tribunal would be subject to scrutiny of the High Court under Article 227 of the Constitution. Nevertheless, learned Judge held that the Letters Patent Appeal cannot be transferred to the Tribunal since the Tribunal cannot sit in judgment over the decision of a Single Judge of the High Court.

12. In *Chief Secretary to the Govt. of Assam vs. PC Mahanta*, (1981) 1 GLR 241, the High Court dealt with a suit filed by Government Employees Association challenging a general Government order directing that Government employees, who were on unauthorised absence, will not be paid salary for those days. It was held that the civil Court was not barred into going to the question. In *Bhagavat Singh vs. State Board of Elementary Education, Assam Shillong & others*, (1983) 2 GLR 96, a teacher in a school taken over by the State School Board filed a suit challenging the order by which he was dismissed from service. It was contended

that the suit was barred under section 40 (3) of the Assam Elementary Education Act, 1968. The provision enabled appeal to be filed against the decision and did not bar any jurisdiction. Section 54 provided, inter alia, that no suit for anything done in good faith under the Act shall lie without previous sanction of the Government. It was held that there was no bar of jurisdiction of the civil Court.

13. In *Khagendralal Baishya vs. State of Assam & others*, (1955) 1 GLR 244, a Division Bench held that the definition of the phrase "conditions of service" in section 2 (e) of the Act was not exhaustive and certain conditions of service may not fall within the definition. On the facts, the Court directed the writ petitioner to file an appeal before the Court with an application for condonation of delay. In *Chidananda Bhuyan vs. The State of Assam & others*, (1988) 2 GLR 64, the Court dealt with a suit for recovery of arrear of pay and allowances and compensation for loss. One of us (Manisana, J.) indicated that the question whether jurisdiction of a civil Court is excluded depended on the examination of the plaint and if necessary, of the written statement and if there are disputed facts, evidence may also be required and since the matter was not examined in this light, set aside the order of the trial Court, dismissing the suit on the basis of lack of jurisdiction. In *Tarasankar Chakravarty vs. The Union of India & others*, (1991) 1 GLR 43, [1991 (1) GLJ 114 1 considering the rules relating to Central Reserve Police Forces, a learned Single Judge of this Court held that even assuming that there was bar of jurisdiction of civil Court, since the statutory authority had not acted in conformity with the fundamental principles of the judicial procedure, civil Court had jurisdiction. In Civil Revision No. 41 of 1993, *Jitendra Nath Goswami & another vs. Dharendra Nath Saikia & others*, [1993 (1) GLJ 352] which related to a question of inter se seniority of civil servants, a learned Single Judge held that the jurisdiction of the civil Court is expressly barred under the provisions of the Assam Administrative Tribunal Act. Learned Judge also vacated the *ex parte* order of injunction passed by the lower Court.

14. In the light of the well established principles of interpretation summarised by us, we will consider the question arising in this case. The preamble to the Assam Administrative Tribunal Act, 1977 states that it is an act to provide for the constitution of a Tribunal to adjudicate disputes in respect of certain conditions of service of certain classes of civil servants of the State. Certain observations in the decision in *Chief Secretary to the Govt. of Assam vs. PC Mahanta & others*, (1981) 1 GLR 241 led to the Act being amended by Amending Act III of 1992. The objects and reasons of the Amendment Bill state that the Act is being amended in view of the uncertainties arising about the exclusion of civil Court jurisdiction in service matters on account of the decision and to put the matter beyond doubt.

15. The expressions "civil servant", "civil services" and "conditions of service" are defined in the Act. Section 2 (e) states as follows :

?(e) "conditions of service includes all matters relating to the

(i) appointment, seniority, confirmation and termination of service of a civil servant:

(ii) censure, withholding of increments or promotion, recovery from pay of any loss to the Government, reduction to a lower service grade or post, or to a lower time scale, or to a lower stage in a time scale, denial or variation of pension or denial of the maximum pensions;" (emphasis supplied)

Section 3 requires the State Government to constitute Assam Administrative Tribunal. The manner of constitution and other details are dealt with in section 3. Section 4 of the Act deals with jurisdiction. Subsection (1) states that save as otherwise expressly provided in subsection (2) the Tribunal shall have jurisdiction to entertain and " dispose of appeal prepared by civil servant against any order passed by a competent authority in respect of any condition of service. Subsection (2) states that the Tribunal shall have no jurisdiction with respect to any order passed, when the civil servant has not availed of all the remedies available to him under the relevant service rules, executive instructions or orders. According to the proviso to subsection (2) the Tribunal may entertain an appeal, if any appeal, revision petition or representation filed by the public servant under the relevant service rules before the competent authority has been finally disposed of by the competent authority within a period of six months. Subsection (3) contains an exception to the jurisdiction of the Tribunal in regard to the appeals against any order passed by a competent authority under proviso (a), (b) and (c) of Article 311 (2) and under Rule 56 (b) of the Fundamental Rules. The powers of the Tribunal as civil Court are dealt with in section 6. Under section 7, the Tribunal has power to correct clerical or arithmetical mistakes or errors arising from any accidental slip or omission. Procedure before Tribunal is dealt with in section 8. Tribunal shall have power to regulate its own procedure subject to the provisions of the Act and the Rules. Tribunal shall have power to confirm, modify or reverse the order impugned in any appeal or remand the matter for fresh decision.

16. Clause (a) of subsection (1) of section 9 of the Act states that the order of the Tribunal passed in any appeal under the Act shall be final. Clause (b) invests power of review with the Tribunal. Subsection (2) of section 9, as it originally stood, reads thus :

"Notwithstanding anything contained in any law no civil Court or other authority shall entertain any civil suit or other proceedings with respect to any of the matters which fall within the jurisdiction of the Tribunal or question in any form any order passed by the Tribunal in any appeal or review with respect to any matter when an appeal could have been preferred under the provisions of this Act or with respect to any other matter which arises out of the exercise of powers under this Act." (emphasis supplied) Subsection (2) as amended in 1992 reads thus :

"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 01 question in any form any order passed by the Tribunal in any appeal or review with respect to any matter or with respect to any other matter which arises out of the exercise of powers under the Act." (emphasis supplied) Section 11 states that the Tribunal shall be deemed to be a civil Court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973 and the Contempt of Courts Act, 1971. Section 13 grants to the Tribunal power to make Regulation with the previous sanction of the Government.

17. We agree with respect with the view taken in Khagendralal Uaishya's case, (1985) 1 GLR 244. that the definition of the expression "conditions of service" in section 2 (e) of the Act is not exhaustive. It must, therefore, follow that in regard to matters which do not attract the definition of the expression "conditions of service", Tribunal has no jurisdiction and civil Court will have jurisdiction. The more important question is regarding the jurisdiction of civil Court in regard to "matters which fall within the jurisdiction of Tribunal".

18. Subsection (2) of section 9 contains an express bar of the jurisdiction of civil court. The provision, which begins with nonobstante clause, states, inter alia, that no civil Court shall entertain any suit with respect to any of the matters which fall within the jurisdiction of the Tribunal or question in any form any order passed by the Tribunal with respect to any matter when an appeal could have been preferred under the Act. Therefore, in relation to matters which come within the purview of the Tribunal there is an express and absolute bar on the jurisdiction of the civil Court. The language used in the provision is wide and encompasses all kinds of suits in regard to matters which attract the jurisdiction of the Tribunal. This is made clearer by the 1992 amendment.

19. Learned counsel for the first respondent tries to get over the logic and efficacy of the express bar contained in section 9 (2) of the Act placing reliance on the decision of a learned Single Judge of this Court in PC Mahanta's case, (1981) 1 GLR 241 and contending that the remedy provided under the Act by way of an appeal to the Tribunal is not an effective remedy and, therefore, jurisdiction of civil Court cannot be said to be barred. As already indicated, where it is a case of express bar, the matter must be largely guided by the language used in the provision. An examination of the scheme of the statute and objects and purpose of the Act to find adequacy or sufficiency of alternative remedy is relevant but not decisive. PC Mahanta's case related to a suit filed by the General Secretary of Sadou Assam Karmachari Parishad, for and on behalf of all the members thereof, for declaration as invalid the two Memos issued by the Government to the effect that the absence of all the Government servants from 22nd to 26th and 28th April, 1980 at the call of Organisers of prevalent agitation in Assam would be regarded as unauthorised and that no pay will be given for the above period to those who remained absent without satisfactory explanation. No doubt, deduction or cut in pay of individual civil servant which is not in the

form of "recovery from pay of any loss to the Government" does not fall within the definition of "conditions of service" in section 2 (e) and, therefore, the Tribunal will not have jurisdiction over the matter and consequently civil Court will have jurisdiction. This would have been sufficient to dispose of the matter before the learned Judge. Learned Judge, considering section 4 (2) and the proviso thereto, observed that the Tribunal has no "original jurisdiction" in matters relating to conditions of service of civil servants and even where the proviso attracted, the competent authority must have been approached and period of at least six months must have expired after the approach. Considering Section 9 (3) of the Act, which provided that all suits or other proceedings in respect of any matter over which the Tribunal has jurisdiction and which are pending before any civil Court on the date of coming into force of the Act, shall stand transferred to the Tribunal, learned Judge observed that provision cannot be a ground to bar further jurisdiction in relation to matters which could not have come directly to the Tribunal. The use of the expression "original jurisdiction" in this decision is rather confusing. Evidently what the learned Judge intended to convey by using this expression is that a civil servant can approach the Tribunal by way of an appeal only after he has preferred an appeal, revision or representation before the departmental authority under the relevant Service Rules and in that sense the Tribunal has no original jurisdiction. It is true that even after he approaches a departmental authority, he has to wait for six months for disposal of his grievance by the departmental authority before he can approach the Tribunal. He can approach the Tribunal either if his appeal, revision or representation is rejected or if it is not disposed of within six months. The question is not whether the Tribunal has "original jurisdiction" or "appellate jurisdiction." It appears to us that the distinction sought to be drawn by the learned Judge is really not relevant in deciding the point in issue before us. While agreeing with the conclusion arrived in PC Mahanta's case, as we have already indicated, with respect, we are unable to agree with the reasoning adopted by learned Single Judge.

20. It has been observed in PC Mahanta's case that the right claimed by the civil servant in that case was not created by any statute and it was a right vested in the civil servant by virtue of contract of employment and his status as an employee. We agree that the right of a civil servant to receive pay is a common law right depending on the contract and not a right created by statute. It would be appropriate to remember that "service conditions" provided by statute or statutory rules or executive instructions can be regarded as part of the contract of employment. In PC Mahanta's case it was indicated that since the right to receive pay was a common law right and not a statutory right, the remedy provided by the Act to approach the Tribunal is an alternative remedy furnishing an option to the aggrieved person to choose his remedy before the Tribunal or before the civil Court. With respect, we are unable to agree with this view. The law is not that whenever a common law right is involved, the statute can provide an effective statutory remedy but cannot bar the jurisdiction of the civil Court. If

a statute has created an express bar, the bar has to be respected by Courts. The express bar may not have efficacy if on examination of the scheme of the statute and objects and purpose of the Act it is found that the statutory remedy provided is not adequate or sufficient.

21. The statutory remedy is by way of an appeal to the Administrative Tribunal consisting of Chairman and two Members. The Chairman shall be a senior administrator with wide experience. Of the other two Members, one shall have experience in legal affairs and the other shall have experience in technical matters. Neither the Chairman nor the Members shall be lower in rank than Secretary to the State Government. This is more or less similar to the constitution of the Central Administrative Tribunal with the difference that the statute in regard to the latter provides for a Judicial Member and has fixed more detailed qualifications for the post. The Tribunal has power to summon witnesses, cause production of documents, receive evidence on oath, issue Commission etc. Though an appellate forum, it has all the powers of original forum. The Act does not in any way restrict the power of the Tribunal to interfere with the impugned orders. In the circumstances, we are of the opinion that the statutory remedy provided is adequate,

I effective and sufficient remedy. The fact that aggrieved civil servant has to approach the departmental authority for a remedy, where such a remedy is available under relevant service rules, executive instructions and orders, and has to wait for six months, will not detract from the adequacy, efficacy and sufficiency of the statutory remedy. This condition can be regarded as similar to, though more stringent than requirement of notice under section 80, CPC. We, therefore, hold that the Act provides for an adequate, effective and sufficient statutory remedy. This conclusion would only support the efficacy of the express bar of jurisdiction of the civil Court provided in the statute. We reiterate that this bar would operate only to grievances in relation to orders passed by the competent authority in respect of any condition of service as defined in the Act and not in regard to any condition of service which is not attracted by the definition.

22. Plaintiff is aggrieved by the order cancelling the order by which she was asked to remain in charge of the post of Head Mistress temporarily and placing the fifth defendant in charge temporarily. She also seeks declaration that she is senior most teacher and temporary Head Mistress entitled for selection and appointment as permanent Head Mistress of school. All matters relating to seniority fall within the definition of "conditions of service" by virtue of clause (i) and all matters relating to promotion fall within the definition by virtue of clauses (i) and (ii) of subsection (e) of section 2 of the Act. Therefore, civil Court has no jurisdiction in regard to prayers (a) and (c) of para 16 of the plaint. Plaintiff also sought relief of setting aside the select list prepared by the Subdivisional Selection Committee. Plaintiff has alleged, inter alia, in the plaint that the select list is illegal and without jurisdiction since the Subdivisional Selection Committee

ought to have been constituted by the Director of Elementary Education but was not constituted by that authority and, therefore, the Subdivisional Selection Committee has no legal existence. The allegation in substance is that there has been noncompliance with a fundamental provision of the statute relating to promotion as would make the selection illegal and the plea is such as to go to the root of the proceedings of selection which, if upheld, would render the selection and consequent appointment of fifth defendant a nullity. We are, therefore, satisfied that prayer (b) claimed in para 16 of the plaint falls within one of the judicially recognised exceptions and the civil Court has jurisdiction to examine this question. The view taken by the lower Court is unsustainable and illegal and cannot stand.

23. We, therefore, set aside the impugned order. We hold that the jurisdiction of civil Court is barred only in regard to prayers (a) and (c) of para 16 of the plaint and jurisdiction is not barred in regard to prayer (b) claimed in para 16 of the plaint. The preliminary issues are answered thus.

The lower Court is directed to try the suit in regard to matters within its jurisdiction.