IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on: 24 .11.2022
Pronounced on: 02.12.2022

CSA No.13/2004

MTR. MEHMOODA ***…APPELLANT(S)***

Through: - Mr. Zahoor A. Shah, Advocate.

Vs.

STATE OF J&K & OTHERS ***…RESPONDENT(S)***

Through: - Mr. Sheikh Mushtaq, AAG.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The appellant (hereinafter referred to as the plaintiff) has filed this Civil Second Appeal against the judgment and decree dated 17.10.2001 passerby learned Sub Judge (Forest Magistrate), Srinagar (hereinafter referred to as the trial court) as upheld by the learned Additional District Judge, Srinagar (hereinafter referred to as the 1st Appellate Court), vide its judgment and decree dated 30th of June 2003. Vide the impugned judgment passed by the learned trial court as upheld by the learned 1st Appellate Court, the suit of the plaintiff has been dismissed.

2) The case of the plaintiff before the trial court was that she was appointed as a teacher in the Education Department of the Government of Jammu and Kashmir in the pay scale of Rs.900–1830

in terms of order No.1368–1493 dated 08.05.1989 issued by the District Education Officer. It was pleaded by the plaintiff that initially she was appointed in Block Kangan where she remained posted till 1991 whereafter she was transferred to Zone Batamaloo and she served in Government School, Amirakadal, Srinagar. Vide order No.380DSEK of 1996 dated 03.12.1996, she was transferred from District Srinagar to District Budgam. It was further pleaded that the plaintiff was deputed to undergo the training course in the College of Education and was relieved by Zonal Education Officer, Budgam.

3) On 10th of February 1998, the Chief Education Officer, Srinagar, issued a notice to the plaintiff asking her to produce her appointment order and qualification certificates. This was done by the said officer under the directions of the Administrative Department. The plaintiff is stated to have caused her appearance and explained her position before the Chief Education Officer by informing him that the original records of her appointment are lying with the department. Thereafter vide order No.524 dated 03.04.1998, issued by Director School Education, Kashmir, Srinagar, the services of the plaintiff were terminated.

4) Initially, the plaintiff challenged the notice of show cause that was issued to her, by way of the suit which is subject matter of the present appeal but it appears that afterwards she came to know about the termination of her services. She sought amendment of the plaint and, accordingly, the plaint was amended. Vide the amended plaint,

the plaintiff challenged the order of her termination. In the amended plaint, the plaintiff sought a decree of declaration declaring the impugned order of termination as null and void. A consequential relief of injunction directing the defendants to release all service benefits in her favour was also sought. The main ground for challenging the order of termination that was raised by the plaintiff in her suit was that the said order has been passed without affording any opportunity of being heard to her and without holding any enquiry.

5) The respondent Education Department initially contested the suit by filing its written statement. In their written statement, the defendants pleaded that the plaintiff has managed fraudulent entry in the department, inasmuch as there is no appointment order issued by the defendant Department in her favour. It was also contended that the name of the plaintiff does not figure in any of the selection lists prepared by the recruiting agencies during the relevant period. Thus, according to the defendants, the appointment of the plaintiff is fraudulent and bogus which is non-est in the eyes of law.

6) On the basis of the pleadings of the parties, the trial court framed the following issues:

1. ***Whether the plaintiff was duly appointed as a teacher in the Education Department and has rendered here service in the department? OPP***

2. ***Whether the plaintiff has manager her appointment as teacher in the Education Department by fraudulent means and as such was rightly terminated from the services? OPD***

3. ***Whether the plaintiff is not entitled to any protection under Civil Service Rules which govern the state employees? OPD***

4. ***Whether the plaintiff's suit is not maintainable in view of the dismissal of her earlier suit which she had filed in the court of Judge Small Causes, Srinagar? OPD***

5. ***Whether the plaintiff has no cause of action against the defendants? OPD***

6. ***Whether the suit is not properly valued and no requisite court fee has been paid by the plaintiff? OPD***

7. ***Relief? OP Parties.***

7) After framing of the issues, the defendants stopped appearing in the case and they were set exparte in terms of order dated 28.05.2001 passed by the trial court. Accordingly, the plaintiff was directed to lead evidence in support of her case. The plaintiff, besides examining herself as a witness, has examined two witnesses, PW(1) Nazir Ahmad Munshi, the then Zonal Education Officer, Kangan, and PW(2) Gh. Hassan Parray, Teacher, Primary School, Watal Kadal.

8) On the basis of the exparte evidence led by the plaintiff, the learned trial court, vide its impugned judgment dated 17.10.2001, while deciding issue No.(1), came to the conclusion that the plaintiff was not duly appointed as a teacher in the Education Department and that she has not rendered service in the defendant department on the basis of any valid appointment order. On the basis of this finding, the trial court, while deciding issues No.(2) and (3), came to the conclusion that since no appointment order had been issued in favour of the plaintiff, as such, there was no requirement of holding any

enquiry, particularly when a show cause notice had been issued to the plaintiff and she had failed to produce the appointment order. The trial court further held that in the instant case, the principle of acquiescence would not come to the rescue of the plaintiff. Accordingly, the suit of the plaintiff was dismissed.

9) The judgment of the trial court was assailed by the plaintiff before the 1st Appellate Court by filing an appeal. The 1st Appellate Court vide impugned judgment dated 30 June 2003, upheld the findings of fact recorded by the learned trial court and held that the appointment of the plaintiff is fraudulent in nature and, as such, no enquiry was required to be conducted before terminating her services.

10) The instant appeal was admitted in terms of order dated 27.11.2013 and the following questions of law were framed:

> ***i. The respondents having acquired the continuation of appellant for long period of fifteen years are stopped to terminate the services, on ground of non production of appointment order.***
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> ***ii. The respondents could not have terminated the services of appellant, without following principles of natural justice and affording reasonable opportunity of being heard to her.***
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> ***iii. The service book have been prepared and authenticated by respondents, the onus could not be laid on appellant, to produce the appointment order.***

11) I have heard learned counsel for the parties and I have also gone through the trial court record as well as the record of the 1st Appellate Court.

12) Before dealing with the contentions raised by learned counsel for the parties and answering the questions framed by this Court, it would be apt to notice the legal position as regards the scope of jurisdiction of this Court while deciding a Civil Second Appeal.

13) Section 100 of the Code of Civil Procedure governs the law relating to Civil Second Appeals. As per this provision, the jurisdiction of the High Court to entertain the second appeal is confined only to such appeals which involve a substantial question of law. The scope of this provision was considered by the Supreme Court in the case of **Gurnam Singh (Dead) by Legal Representatives and others vs. Lehna Singh (Dead) By Legal Representatives, (2019) 7 SCC 641.** In the said case, the Supreme Court has observed and held as under:

> *".....As per the law laid down by this Court in a catena of decisions, the jurisdiction of the High Court to entertain second appeal under Section 100 CPC after the 1976 Amendment, is confined only when the second appeal involves a substantial question of law. The existence of "a substantial question of law" is a sine qua non for the exercise of the jurisdiction under Section 100 CPC. As observed and held by this Court in Kondiba Dagadu Kadam [Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, (1999) 3 SCC 722] , in a second appeal under Section 100 CPC, the High Court cannot substitute its own opinion for that of the first appellate court, unless it finds that the conclusions drawn by the lower court were erroneous being:*
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> *(i) Contrary to the mandatory provisions of the applicable law;*
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> *OR*
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> *(ii) Contrary to the law as pronounced by the Supreme Court;*
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> *OR*
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> *(iii) Based on inadmissible evidence or no evidence.*
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> *It is further observed by this Court in the aforesaid decision that if the first appellate court has exercised its discretion in a judicial manner, its decision cannot be*

> *recorded as suffering from an error either of law or of procedure requiring interference in second appeal. It is further observed that the trial court could have decided differently is not a question of law justifying interference in second appeal.*
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> ***14.*** *When a substantial question of law can be said to have arisen, has been dealt with and considered by this Court in Ishwar Dass Jain [Ishwar Dass Jain v. Sohan Lal, (2000) 1 SCC 434]. In the aforesaid decision, this Court has specifically observed and held: (SCC p. 437)*
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> > *"Under Section 100 CPC, after the 1976 Amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so. 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. 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 opposite conclusion was possible. In either of the above situations, a substantial question of law can arise."*

14) From the foregoing observations of the Supreme Court, it is clear that in a Second Appeal under Section 100 of the CPC, the High Court cannot substitute its own opinion for of the 1st Appellate Court unless the conclusions drawn by the courts below are contrary to the law or based on inadmissible evidence or on no evidence.

15) In the light of aforesaid position of law, let us now proceed to answer the questions framed by this Court.

16) The first contention on the basis of which question No.(i), as quoted above, has been framed by this Court, is that that the plaintiff had served with the defendant department for about fifteen years and thus the defendant department had acquiesced in continuation of her

services. According to the plaintiff, in view of this conduct of the defendants, they could not have terminated her services on the ground of non-production of appointment order. In this regard the plaintiff has relied upon the judgment of this Court in the case of **Javed Ahmad Bhat vs. UT & Others** (WP(C) No.370/2022 decided on 18.07.2022) and the judgment of the Supreme Court in the case of **The Nayagarh Co-operative Central Bank Ltd. and another vs. Narayan Rath and another,** (1977) 3 SCC 576.

17) Both the trial court as well as the 1st Appellate Court, have recorded a concurrent finding that the appointment of the plaintiff in the defendant department was fraudulent in nature and there was no appointment order made by any authority in her favour nor her name figured in the select lists of the recruiting agencies issued during the relevant period. In the plaint, the plaintiff had claimed that she was appointed in terms of the order issued by the District Education Officer, Srinagar. But she did not produce the said order when show cause notice was issued to her by the defendants nor did she produce the same during the trial of the case. The only explanation given by the plaintiff in this regard is that she had submitted her appointment order to the department at the time of joining. She did not summon the record from the office from which her appointment order was allegedly issued nor did she summon the record from the office where she had submitted her appointment order.

18) The basis for claiming a legal right to continue in service and to lay challenge to an order of discontinuance in service had to be established by the plaintiff. A person who knocks the door of a court to prove existence of a legal right in his/her favour, is obliged to prove the existence of such a legal right in his/her favour. It was, thus, for the plaintiff to establish existence of a legal right in her favour and to show that a corresponding legal duty was cast upon the defendants to continue her services. In this regard I am supported by the judgment of the Supreme Court in the case of **State of Manipur & Ors vs. Y. Token Singh & Ors, (**2007) 5 SCC 65. In the said case, the Supreme Court has, while dealing with a somewhat similar situation, observed as under:

> ***"18.*** *Moreover, it was for the respondents who had filed the writ petitions to prove existence of legal right in their favour. They had inter alia prayed for issuance of a writ of or in the nature of mandamus. It was, thus, for them to establish existence of a legal right in their favour and a corresponding legal duty in the respondents to continue to be employed. With a view to establish their legal rights to enable the High Court to issue a writ of mandamus, the respondents were obligated to establish that the appointments had been made upon following the constitutional mandate adumbrated in Articles 14 and 16 of the Constitution of India. They have not been able to show that any advertisement had been issued inviting applications from eligible candidates to fill up the said posts. It has also not been shown that the vacancies had been notified to the employment exchange."*

19) From the foregoing enunciation of law on the subject, it is clear that the burden to prove that the plaintiff was appointed as a teacher by the defendants was upon her which, are already stated, she was unable to discharge as she did not produce the appointment order nor

did she make any effort to seek its production from the office of its origin. As per Illustration (g) to Section 114 of the Evidence Act, there is a presumption that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. The fact that the plaintiff did not make any effort to summon the relevant record either from the office of origin of her appointment order or from the office where she is stated to have submitted the same would lead to the inference that no such order was in existence.

20) Having come to the conclusion that the plaintiff had failed to prove her appointment, her mere continuance in the defendant department for about fifteen years would not entitle her to continue in service. The cases relied upon by learned counsel for the plaintiff relate to appointments that were irregular in nature or to the appointments that were made by incompetent authorities. In the instant case, the very appointment of the plaintiff is fraudulent in nature and, in fact, no appointment order has been made in her favour. Therefore, mere continuance of the plaintiff in service for a long period of time would not debar the State authorities from discontinuing such fraudulent appointment and they cannot be compelled to pay salary to the plaintiff on the basis of an action which has never been taken by the defendants.

21) In **Y. Token Singh's** case (supra), the Supreme Court has observed that any action, which had not been taken by an authority

competent therefor and in complete violation of the constitutional and legal framework, would not be binding on the State. The Court further observed that once the authority itself has denied to have issued a letter of appointment, there was no reason for the State not to act pursuant thereto. It was further observed that once the offers of appointment were found to be on the basis of forged documents, the State cannot be compelled to pay salary from the State exchequer.

22) The Supreme Court in the case of **Jainendra Singh vs. State of Uttar Pradesh, (2012) 8 SCC 748,** has, while dealing with a case relating to fraudulent appointment orders, observed as under:

> *"**29.1.** Fraudulently obtained orders of appointment could be legitimately treated as voidable at the option of the employer or could be recalled by the employer and in such cases merely because the respondent employee has continued in service for a number of years, on the basis of such fraudulently obtained employment, cannot get any equity in his favour or any estoppel against the employer.*
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> ***29.**2. xxx xxx xxx xxx xxx*
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> ***29.3.** When appointment was procured by a person on the basis of forged documents, it would amount to misrepresentation and fraud on the employer and, therefore, it would create no equity in his favour or any estoppel against the employer while resorting to termination without holding any inquiry."*

23) From the foregoing enunciation of law on the subject, it is clear that in the case of fraudulent and forged appointments, the appointment orders are to be treated as non-est in the eyes of law and a person seeking enforcement of his/her right on the basis of these forged appointment orders cannot claim equity in his favour on the ground of continuation of his service for a long period of time.

24) Relying upon the foregoing ratio of the Supreme Court, the answer to the first question would be that even if the plaintiff has continued to serve the defendant department for a number of years, they are not estopped from terminating her services. It is further held that in order to succeed in her claim in the suit, it was incumbent upon the plaintiff to show existence of a legal right by production of appointment order or in the alternative to seek its production from the concerned office, which the plaintiff has not done thereby inviting an inference that no appointment order was issued in her favour.

25) Regarding question No.(ii), the learned counsel for the plaintiff has vehemently argued that the services of the plaintiff could not have been terminated without following principles of natural justice and without affording an opportunity of being heard to her. In this regard, learned counsel has relied upon the judgments of the Supreme Court in the case of **Basudeo Tiwary vs. Sido Kanhu University and others,** (1998) 8 SCC 194, and the judgments of this Court in the cases of **Manzoor Ahmad Baqal vs. Municipality and others**, 1999 SLJ 484, and **Mohammad Amin Mir vs. Union of India**, 1999 SLJ 129

26) As already noted, there is a concurrent finding of fact that the appointment of the plaintiff was fraudulent in nature and, in fact, no order of her appointment was ever issued by the defendants nor there is any record of selection showing her participation in the selection process and consequent selection on the basis of which her appointment could have been made. The question arises as to whether

in such circumstances, it was incumbent upon the defendants to hold an enquiry before disengaging services of the plaintiff.

27) The appointment which has never been in existence is non-est in the eyes of law. It is a settled principle of law that if an appointment is non-est in the eyes of law or is based upon forgery and fraud, it is not necessary for the employer to hold an enquiry before terminating the services of such an employee. In this regard, I am supported by the judgment of the Supreme Court in the case of **Kendriya Vidyalaya Sangathan vs. Ajay Kumar Das,** (2002) 4 SCC 503. In the said case, an employee was appointed by an authority whose services had already been terminated. The Supreme Court while dealing with the said case observed that the orders issued after the termination of services of the appointing authority were not valid, therefore, the question of observance of principles of natural justice would not arise.

28) Again, in the case of **Y. Token Singh** (supra) the Supreme Court has, while dealing with a case where offers of appointment were cancelled on the ground that they had been non-est in the eyes of law and the appointment orders were fake ones, held that the appointees were not entitled to hold the posts and, as such, the principles of natural justice were not required to be complied.

29) So far as the judgments relied upon by learned counsel for the plaintiff are concerned, in all those cases the appointments were not fraudulent in nature but the same were either made by an incompetent

authority or were irregular in nature. It is in those circumstances that the Courts have held that the appointees in those cases were entitled to be heard and their services could not be terminated without holding an enquiry. The facts of those cases are distinguishable, inasmuch as in the instant case, the very appointment of the plaintiff is non-est in the eyes of law. Even otherwise, the plaintiff was given a show cause notice affording an opportunity to her to produce her appointment order, which she could not. Even during the trial of the case, the plaintiff could not produce her appointment order nor did she make any effort to summon the record of her appointment from the relevant offices. Therefore, in the facts and circumstances of the case, no enquiry was required to be held before disengaging services of the plaintiff. The question No.(ii) is answered accordingly

30) Regarding question No.(iii), learned counsel for the plaintiff has argued that during the trial of the case, the plaintiff had placed on record service book and examined the concerned Zonal Education Officer to prove its entries and once that was done, the onus to prove that the plaintiff was not validly appointed shifted upon the defendants which they failed to discharge.

31) If we have a look at the record of the trial court, the plaintiff has placed on record photocopy pages of the service book. She has not applied to the Court for summoning of the original service book from the concerned office so that these photocopies could have been compared with the original.

32) As per Section 61 of the Evidence Act, contents of a document may be proved either by primary evidence or by secondary evidence. Section 62 of the Evidence Act defines the 'primary evidence' as production of document itself for inspection of the court whereas, as per Section 63, secondary evidence, inter alia, means certified copies and the copies made from or compared with the original document.

33) Admittedly, the plaintiff did not produce the original service book. Therefore, she did not prove it by production of primary evidence. She produced the photocopies of the service book. The same could have been proved only by comparing the same with the original. The plaintiff did not apply to the Court for summoning of the original record pertaining to her service book so that the same could have been compared with the copies produced by her. Thus, it cannot be stated that the plaintiff has succeeded in proving the contents of the service book.

34) Both trial court as well as 1st Appellate Court have come to a concurrent conclusion that the plaintiff has failed to prove contents of the service book. In a Second Appeal, the jurisdiction of the High Court being confined to substantial question of law, a finding of fact is not open to challenge in second appeal, even if the appreciation of evidence is palpably erroneous and the finding of fact incorrect. Even otherwise, in the instant case, the finding of the trial court, as upheld by the 1st Appellate Court, regarding proof of contents of the service

book of the plaintiff is in accordance with law and therefore, the same does not call for any interference from this Court in the second appeal.

35) Once it was found that the appointment of the plaintiff was fraudulent in nature and there was no evidence on record as regards her appointment, it cannot be stated that the plaintiff had discharged her burden to prove these facts so that the onus of proof could be shifted upon the defendants.

36) For the foregoing discussion, the answer to three questions framed in this second appeal is summarized as under:

(I) *Since the appointment of the plaintiff was fraudulent in nature, merely because she had continued in service for a long period of time would not create any equity in her favour and the defendants were well within their rights to recall her appointment.*

(II) *The continuance of the plaintiff in service being based upon fraud, there was no need for the defendants to hold an enquiry before disengaging her services.*

(III) *The plaintiff having failed to prove the contents of the service book by any admissible evidence, the onus to prove that she was not validly appointed did not shift upon the defendants.*

37) In view of the answers rendered to the aforesaid questions, the appeal is dismissed being without any merit.

38) The trial court record as well as appellate court record be sent back.

(SANJAY DHAR)
JUDGE

Srinagar,
02.12.2022
"Bhat Altaf, PS"

Whether the order is speaking: ***Yes/No***
Whether the order is reportable: ***Yes/No***