(1997) 12 GAU CK 0014

Gauhati High Court

Case No: Writ Appeal No. 308 of 1997 in Civil Rule No. 3933 of 1996

Tilak Gogoi		APPELLANT
	Vs	
Prabin Chutia and Others		RESPONDENT

Date of Decision: Dec. 8, 1997

Acts Referred:

- Constitution of India, 1950 - Article 139, 215, 226, 32

Citation: (1998) 2 GLR 40

Hon'ble Judges: M. Ramakrishna, C.J; D. Biswas, J

Bench: Division Bench

Advocate: B.K. Sharma, P.K. Tewari, M.K. Choudhury, T.N. Srinivasan and P.C. Kalita, for the Appellant; S.S. Dey, Addl. Sr. G.A., N.C. Phukan, S.C. of Dibrughrh University and B.K. Bhattachajjee, for the Respondent

Judgement

M. Ramakrishna, C.J.
Mr. Tilok Gogoi, working as Assistant Teacher of Gogamukh Nagar High School, P.O. Gogamukh, district Dhemaji was one of the Respondents in a writ petition in Civil Rule No. 3933 of 1996, in which Mr. Prabin Chutia, the first Respondent herein, was the Petitioner. In the writ petition he has sought for the following relief for the reasons slated in the writ petition:

It is, therefore, prayed that your Lordships would be pleased to admit this application, call for the records of the ease and issue a Rule calling upon the Respondents to show cause as to why the services of the Petitioner shall not be regularised against the sanctioned vacant post of Assistant Science (Bi). Teacher by declaring and holding that the Respondent No. 6 is not qualified to that post or as to why such further or other order or order shall not be passed as deemed fit and proper", and consequential reliefs.

This petition was opposed by the Appellant by filing a statement of objections by way of a counter. While considering the facts and circumstances of the case, including the pleadings of the writ petition, the learned Single Judge of this Court referred to an affidavit sworn to by an authority of the Dibrugarh University (Respondent No. 3 in the writ petition). In the said affidavit it has been stated that Shri Tilok Gogoi, the contenting Respondent in the writ petition, played a trick with the Court and obtained an order misleading the Court. It is further stated that according to the allegation found in the affidavit, Mr. Tilok Gogoi never passed B.Sc. examination and the University has pointed out that the certificate as well as the mark sheet produced by him along with the writ application were found forged and that they are not genuine documents. After verifying the contents of the affidavit filed by the University authority, the learned Single Judge proceeded to hold as follows:

Accordingly order dated 6.2.97 passed in Civil Rule No. 2927/96 shall stand revoked and quashed. Shri Tilok Gogoi shall be immediately thrown out from service by the authority and the arrear pay which was paid to him on the basis of the order of this Court shall be realised from him inasmuch he obtained the order by producing forged and fake certificate before this Court.

2. Apart from the strictures made against Mr. Tilok Gogoi, the learned Single Judge proceeded to issue further directions as follows:

Gogamukh Police Station also shall register a case as against this Tilak Gogoi and initiate necessary inquiry. A copy of the order shall be given to Shri Prabin Chutia, the Petitioner and he shall produce the same to the Officer-in-charge, Gogamukh Police Station to initiate criminal prosecution as against this Tilak Gogoi for misleading the Court by producing a fake and forged certificate.

3. It appears, not being satisfied with this situation, the learned Single Judge also in exercise of power under Article 215 of the Constitution of India purportedly issued the following direction:

Further in exercise of my suo motu power I direct that Shri Tilok Gogoi, Asstt. Teacher of Gogamukh Nagar High School, P.O. Gogamukh, district Dhemaji shall appear in person before this Court on 7th July, 1997 to explain as to why necessary steps should not be taken as against him for misleading the Court. Office shall issue the notice directly.

4. Aggrieved by this order of the learned Single Judge, the Appellant presented this appeal challenging the correctness and legality of the orders under appeal.

5. Although this matter has been set down for consideration under "Orders" column, with the consent of both parties, we dispose of this matter finally.

6. The legal arguments advanced by learned Counsel for the Appellant in support of the grounds taken in the appeal are that:

(1) Regard being had to the provisions of law under Article 226 of the Constitution of India, the power to issue a writ by virtue of the said provision of the law by a writ Court is co-extensive, inasmuch as, the power that can be exercised by a Single Judge of this Court under Article 226 of the Constitution, is also exercisable by the appellate Court with a view to take a second look of the orders made by the learned Single Judge.

(2) Such power has been circumscribed and limited only to issue a writ in favour of the Petitioner according to the circumstances existing in each case with a view to give relief to the parties. An order made by the writ Court in exercise of such powers, though appealable in a writ appeal before a Division Bench, such an order cannot be either quashed or set aside either by the same Judge who passed the order or by another Judge merely because at a later stage that learned Judge found that such an order was obtained by a Petitioner based upon fraud or on such other grounds.

Therefore, the power exercised by the learned Single Judge in the instant case to quash and set aside the earlier order made by him (learned Single Judge) in another writ petition in Civil Rule No. 2927/96 cannot be said to be proper and in accordance with law, In such an event, though the power under Article 226 of the Constitution of India to be exercised by a writ Court, is found to be co-extensive or co-ordinate, the propriety demands that a learned Judge, while so exercising power under Article 226 of the Constitution of India and having passed certain orders earlier, either he (learned Single Judge) or any other Judge exercising similar power under that provision of the law cannot either quash or set aside such an order at a later stage, inasmuch as, according to the submission made by learned Counsel for the Appellant, such a power does not contemplate to have been vested in the writ Court.

(3) It is untenable for the writ Court to have formed an idea or having come to a conclusion, solely based upon an affidavit sworn to by an authority of the University against whom no relief is sought for, in the writ petition, and that too, without providing an opportunity to the aggrieved person to have a say in the matter and pass a stricture or any other order that would affect his rights. Such an act would be contrary to the principles of natural justice as well, as it would result in miscarriage of justice.

Therefore, the learned Counsel submits that this is a fit case to set aside the order of the learned Single Judge made in Civil Rule No. 3933 of 1996 on 4th June, 1997.

7. Contrary to this argument advanced by learned Counsel for the Appellant, the argument of the learned Counsel appearing for the contesting Respondent (first Respondent in the appeal) maintains that when it was brought to the notice of the writ Court by a responsible authority of the University that there was a fraud committed on the Court to snatch away an order with a view to secure a job, the Court would certainly act upon such information and proceed to give relief to the parties besides imposing punishment on the wrongdoer. The learned Counsel appearing for the University also takes a similar view in support of this contention of learned Counsel for the first

Respondent.

8. However, Mr. S.S. Dey, learned Addl. Sr. Govt. Advocate, who has been requested in this case to assist the Court to arrive at a just conclusion, in view of the disputes between the parties as well as the action on the part of University, has fairly submitted that apart from maintaining the salutary principles of applying the law as it is referable to the provision of Article 226 of the Constitution of India, the Court must also see that the image of the Judiciary requires to be maintained and its action must be transparent. He has further submitted that in the given eventualities resulting in the orders of the learned Single Judge, the best course of action would be, to set aside the order under appeal and to issue a direction to the University to hold an enquiry against the alleged misconduct or misrepresentation, including the element of fraud, referred to in the affidavit presented by the University authority pointing out a finger to the Appellant and thereby taking appropriate action, if such person is found to be at fault, and that will serve the purpose.

9. We will now examine the first contention urged by the learned Counsel for the Appellant with a view to understand the propriety of the Court when such powers are exercised intending to give relief to the parties. By a perusal of the provisions of Article 226 of the Constitution of India, we can gather that this power can be exercised by the High Courts, which could be said to be for a two-fold purpose, namely, for the enforcement of -

(a) fundamental rights, as well as, of

(b) non-fundamental or ordinary legal rights.

When we refer to the phrase "for any other purpose" at the end of Article 226, it makes the jurisdiction of the High Courts to issue the writs more extensive than that of the Supreme Court under Article 32 of the Constitution of India, inasmuch as, these words are absent from Article 32, and therefore, the Supreme Court may have power to issue writs for "other purpose" only if such power is conferred by legislation (Article 139). But Article 226 of the Constitution of India itself confers upon the High Courts very wide powers to issue the writs for the enforcement of fundamental rights as well as for "other purpose". We also see that the powers of the High Courts under Article 226 of the Constitution of India are not limited only to issue "prerogative writs", but also for issuing directions, orders and writs which can travel beyond the contents of the writs which are normally issued as writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari. Indeed, apart from granting of the prayer made by the Petitioner in the writ petition, the Court has the power-

(1) to give consequential relief"s such as, ordering repayment of money realised without the authority of law or under an invalid law. (Please see, State of Madhya Pradesh Vs. Bhailal Bhai and Others,

(2) In proper cases, declaratory relief may be granted in a petition under Article 226, namely, declaring some act of a statutory body to be ultra vires and like, even though such relief was not available in proceeding for a prerogative writ under English Law, (Please see, Bidi, Bidi Leaves" and Tobacco Merchants Association Vs. The State of Bombay,

10. In State of Kerala Vs. Kumari T.P. Roshana and Another, referring to the power of the Supreme Court under Article 32 and that of the High Courts under Article 226 of the Constitution of India, the Supreme Court held that:

The Court can, under Article 32 or 226, give any direction requiring affirmative action or positive activity where, under the corresponding "prerogative writ", the Court could only set aside the order complained of.

11. In a case where a party or a Petitioner was found to have obtained an order or relief at the hands of the Court on the grounds of frauds or misrepresentation, no doubt, the Court exercising such power under Article 226 of the Constitution of India can certainly pass an order to undo such orders obtained either by fraud or by misrepresentation. It is further made clear that when a Court is dealing with a case in exercise of power under Article 226 of the Constitution of India, it cannot enter into disputed questions of fact with a view to investigate into the matter. In D.L.F. Housing Construction (P) Ltd. Vs. Delhi Municipal Corpn. and Others, the Supreme Court held that one of the grounds against exercise of the discretion, in such cases, would be that the right claimed by the Petitioner is not capable of being established in the proceeding under Article 226 because it requires a detailed examination of the evidence as may be had in a suit. The object of Article 226 is the enforcement of and not the establishment of a right, or title. (Please see, Thakur Amar Singhji Vs. State of Rajasthan, A petition under Article 226 of the Constitution of India cannot be converted into a suit. Therefore, in that view of the matter, it is further held in the Union of India (UOI) Vs. Ghaus Mohammad, that in general, therefore, a disputed question of fact is not investigated in a proceeding under Article 226 of the Constitution, particularly where an alternative remedy is available. (Please see, Jai Singh Vs. Union of India and Others,

12. The High Courts would not, while exercising power under Article 226 of the Constitution, give relief to the parties in -

(a) claims arising out of breach of contract or tort;

(b) where the determination is that of an expert body, in the absence of mala fides;

(c) where the petition rests on allegations of malice in tact.

Dealing with citizens approaching the Court seeking relief in a petition under Article 226 of the Constitution of India, the Supreme Court observed in Maganlal Chaganlal (P) Ltd. Vs. Municipal Corporation of Greater Bombay and Others, that an application under

Article 226 of the Constitution of India would be refused without a hearing on the merits or a rule nisi (sic) discharged, if it appears that the applicant has made a deliberate concealment of material facts with a view to mislead the Court. (Please see, State of Haryana v. Karnal Distillery AIR 1917 SC 781).

13. Thus, there is no doubt about the fact that any Court dealing with a petition under Article 226 of the Constitution of India, would not entertain such a petition with a view to give relief to the parties if the Court comes to a conclusion that the averments of the petition are based upon misleading facts or concealment of material facts.

In Dr. Vijay Kumar Kathuria Vs. State of Haryana and Others, referring to the facts and questions of law arising in that matter, the Supreme Court held that:

But if the result of the examination and hearing is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has been set in motion by means of a misleading affidavit.

In other words, a person committing an act of suppression or misrepresentation before the Court shall have no right of audience and the Court would simply refuse to hear him.

14. In Chancellor v. Bijayananda (1994) 1 SCJ 121 (Paras 6-7), the Supreme Court further held, regard being had to the facts of the case, that:

The Court may, in its discretion, refuse to grant relief to a Petitioner who has not approached the Court with clean hands and produces some documents at the hearing without giving any opportunity to the proper persons to contradict or explain them.

(Emphasis supplied)

In Ramachandra Ganpat Shinde and another Vs. State of Maharashtra and others, the Supreme Court further held that where a collusive order is obtained by abuse of the process of the Court by playing fraud on the Court the High Court must correct the order when the facts are brought to its notice. In M.V. Venkataramana Bhat Vs. Returning OFficer and Tahsildar and others, the Supreme Court held that where by abusing the process of the Court an exparte order was obtained which deprived two members of a Panchayat from exercising their franchise which materially affected the election of Sarpanch, it was the duty of the High Court to provide suitable remedy. In other words, it is always open to the High Court to mould the relief in favour of the parties.

15. In the instant case, referring to the facts and circumstances under which the orders of the learned Single Judge came to be passed in Civil Rule No. 3933 of 1096 dated 4th June, 1997, as we have mentioned in the earlier paragraphs, that at the time of hearing of the writ petition certain affidavit said to have been sworn to by an Officer of the University, has been produced in the Court which discloses that the Appellant was found to have obtained the order from the Court by producing fake certificate and mark sheet. The other

allegation is that he never passed the B.Sc. examination. Therefore, the document which were produced by him were not genuine. The question is therefore, whether it would be proper for the writ Court to place reliance upon such an affidavit sworn to by a third person and to quash the order made by the learned Single Judge in the earlier writ petition exercising similar power under Article 226 of the Constitution of India.

16. We may mention here that either in the pleading of the writ petition or the defence plea taken by the Respondents, nowhere it was stated that the Appellant was able to secure the job by evil method, either by producing fake certificates or a document which is not believable. Secondly when such effort was made by the University to disqualify the Appellant, which is not the subject matter of the writ petition, we expect that the Court should ask the person concerned to traverse the statement found on oath as to whether he has to say anything by providing an opportunity to have a say in the matter. It is very unfortunate that without taking recourse to this line of action, the learned Judge proceeded to jump at the conclusion and to set aside the order solely depending upon the affidavit.

17. Let us see in a petition under Article 226 of the Constitution of India at the time of consideration in the Court if a new point is raised by either of the parties, how it is to be dealt with. The Supreme Court, in S.R. Tewari Vs. District Board Agra and Another, in paragraph 14, a Bench of three Judges held that:

The question raised is one primarily of fact; and it was never raised, nor explored in the High Court on proper pleadings. It would be taking the Board by surprise to allow the Appellant to make out this new case at this stage.

The Appellant was therefore not allowed to raise this question at all. What we would like to observe is that the approach of the learned Single Judge to grasp at the affidavit and to jump to the conclusion that the Appellant has committed some offence. Let us presume that there is some force in the affidavit. But the principles of natural justice requires audi alterern partem has to be complied with in a case of this type. He has to be afforded an opportunity of traversing the allegation and to have a say in the matter as it was a new point raised suddenly in the open Court. Without resorting to these principles of natural justice if the Court were to come to a conclusion, that would result in miscarriage of justice.

18. At the outset we are of the view that the learned Single Judge ought not to have considered this question in a petition presented by the writ Petitioner seeking appropriate relief. Secondly, the learned Single Judge should not have quashed an order made by him in the earlier writ petition in Civil Rule No. 2927/96 dated 6th February, 1997, solely depending upon the allegation in the affidavit of the University authority in the second writ petition in Civil Rule No. 3933/96. Assuming for the purpose of argument that the Respondent was able to make out a case, it is for the Court to consider and to assess as to what is the material fact that could be acceptable to the Court. These are the matters

which will have to be considered providing opportunity to both parties. Since it has not been considered, we have been left with no alternative but to set aside the order.

19. We are of the view that in order to do justice, we direct the University to hold a discrete enquiry to find out as to whether the allegation found in the affidavit was true and proper.

In view of the foregoing, we make the following order:

(1) This appeal is allowed in part. The orders made by the learned Single Judge in Civil Rule No. 3933/96 dated 4th June, 1997 are set aside. The matter stands remitted to the writ Court to consider the entire case afresh, not being influenced by the affidavit of the University and to dispose of the matter after hearing learned Counsel of both sides.

(2) The Controller of Examinations, Dibrugarh University (4th Respondent herein) is hereby directed by issue of writ of mandamus that he shall discretely hold an enquiry into the allegation made against the Appellant in the affidavit sworn to by him in Civil Rule No. 3933/96 and to record appropriate finding.

A copy of the report shall be submitted to the writ Court within a period of 6(six) weeks.

(3) After the disposal of the writ petition in accordance with the law, it is also open to the University to take appropriate measure to deal with the student, namely, the Appellant, in accordance with the law.

20. Let a copy of this order be given to the learned Counsel for the University for doing the needful.

21. Parties to bear their own costs.