**IN THE HIGH COURT OF GAUHATI**

RSA No. 28 of 2001

Decided On: 30.01.2013

Appellants: **Shri Prabhat Chandra Baruah, Retired Deputy Inspector of Schools, by Caste Hindu, Resident of Biswajit Bora Road Near Jaimati Pathar, Tezpur, Mouza-Mahabhairab, Dist.-Sonitpur, Assam**
**Vs.**
Respondent: **Srimati Ujjala Kalita, Asstt. Mistress of 61 Saikia Chuburi L.P. School, Dekargaon, Tezpur, by Caste Hindu, Resident of Village Barjhar Saikia Chuburi, Mouza-Halleswar, Dist.-Sonitpur, Assam and State of Assam, Represented by the Secretary to the Govt. of Assam, Ministry of Education, Dispur, Assam**

**Hon'ble Judges/Coram:**Brojendra Prasad Katakey, J.

**JUDGMENT**

**B.P. Katakey, J.**

1. This appeal by the defendant No. 1 is directed against the judgment and decree dated 16.03.2001 passed by the learned District Judge, Sonitpur at Tezpur, in Money Appeal No. 1/2001, whereby and where under the appeal preferred by the present appellant has been dismissed by affirming the judgment and decree dated 14.02.2000 passed by the learned Civil Judge (Junior Division) No. 1, Tezpur, in Money Suit No. 20/1998. By the said judgment and decree the suit of the plaintiff/respondent for damages has been decreed. The plaintiff/respondent instituted Money Suit No. 20/1998 in the Court of the learned Civil Judge (Junior Division) No. 1, Tezpur, against the present appellant and the State of Assam as defendants, praying for a decree for Rs. 15,000/- as compensation for pain and mental agony and Rs. 10,000/- towards the litigation expenses, contending inter alia that despite the notification of the Government dated 19.01.1996 withdrawing temporarily the powers of appointment and transfer of teachers of L.P. Schools from all the Deputy Inspector of Schools, w.e.f. 01.02.1996, the appellant/defendant No. 1 has passed an order of transfer dated 14.10.1996 transferring the plaintiff/respondent from No. 61 Saikia Chuburi L.P. School, Dekargaon, Tezpur to Teleria L.P. School, Teleria and though the Deputy Commissioner subsequently on the representation filed by the plaintiff/respondent directed the appellant/defendant No. 1 not to give effect to the said transfer order, the same having not been followed, the plaintiff/respondent had to approach the High Court in Civil Rule No. 5966/1996 challenging the order of transfer. It has further been contended that despite passing of the interim order by the High Court in the said Civil Rule, the appellant/defendant No. 1 did not comply with such interim order and ultimately on being directed to appear in person when the appellant/defendant No. 1 appeared before the High Court, an order was passed by the High Court and consequently the appellant could resume her duties in the earlier place of posting. According to the plaintiff/respondent because of the conduct of the appellant/defendant No. 1, she has suffered pain and mental agony for which she claimed compensation of Rs. 15,000/- apart from the litigation expenses of Rs. 10,000/-.

2. The defendant No. 1 on receipt of the summons entered appearance and contested the suit by filing written statement contending inter alia that the plaintiff/respondent is not entitled to the damages, that there was no ban for transfer, that the transfer is a condition of service and that the suit has been filed without availing the efficacious alternative remedy available by way of departmental appeal as well as the proceeding before the Assam Administrative Tribunal. The defendant No. 1 has also denied causing any damage to the plaintiff/respondent. The defendant No. 1, therefore, prayed for dismissal of the suit. The defendant No. 2 the State of Assam did not contest the suit and hence the suit proceeded ex-parte against it.

3. The Trial Court, based on the pleadings of the parties, framed the following issues for determination:-

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

(ii) Whether the defendant No. 1 caused sufferance to the plaintiff deliberately, if so, whether the plaintiff is entitled to compensation for such suffering as prayed for? And

(iii) To what other relief/reliefs are the plaintiff entitled?

4. The Trial Court upon appreciation of the evidence on record, both oral and documentary, as adduced by the parties, decreed the suit of the plaintiff to the tune of Rs. 25,000/-, which includes Rs. 15,000/- as damages for pain and mental agony and Rs. 10,000/- towards the litigation expenses incurred in filing the writ petition before the High Court. Being aggrieved the defendant No. 1 preferred Money Appeal No. 1/2001, which, however, has been dismissed vide judgment dated 16.03.2001. Hence the present appeal.

5. The appeal has been admitted for hearing on the following substantial questions of law:-

(i) Whether the respondent No. 1 has right to claim the damages without accepting the transfer order.

(ii) Whether the suit filed by the respondent No. 1 is maintainable without exhausting the remedy available under Rule 10 Part-II of the Assam Elementary Education (Provincialised) Rules, 1977?

(iii) Whether the suit is maintainable when the same was filed during the pendency of the Civil Rule and that the stay order was vacated by the order of this Court?

(iv) Whether the suit is barred by Section 26 of the Assam Elementary Education Provincialisation Act and Assam Administrative Tribunal Act, 1977?

6. I have heard Mr. T.C. Khetri, learned Sr. counsel for the appellant. None appears for the respondents, though the names of the learned counsel are reflected in the cause list.

7. It has been contended by Mr. Khetri, learned Sr. counsel for the appellant that since the claim of the plaintiff is for damages towards the pain and mental agony as well as for litigation expenses allegedly incurred in filing the writ petition before the High Court, it is the burden on the plaintiff to prove such pain and mental agony suffered and also the litigation expenses incurred. The learned Sr. counsel submits that the plaintiff having failed to prove the damages caused to her, because of the order of transfer, even if such transfer order was contrary to the Government notification dated 19.01.1996, the Court below ought not to have passed the decree. The learned Sr. counsel further submits that though the appellant has preferred Money Appeal No. 1/2001 before the learned District Judge, the First Appellate Court has not discussed anything relating to the damage caused to the plaintiff/respondent and also the quantum of damage to which she is entitled to. The learned Sr. counsel, therefore, submits that it is a fit case where the proceeding may be remitted to the learned First Appellate Court for deciding the appeal afresh, on the basis of the evidence already adduced by the parties and upon hearing the parties.

8. It appears from the judgment dated 16.03.2001 passed by the First Appellate Court that nothing has been discussed as to whether the plaintiff has suffered any pain and mental agony and also the damages to which the plaintiff is entitled to. The suit of the plaintiff being for damages for suffering pain and mental agony, apart from the litigation expenses allegedly incurred, the burden lies on the plaintiff to prove the same. The Appellate Court being the final Court on facts is also required to record the finding relating to such claim, which has not been done. The First Appellate Court has also not discussed any evidence as to whether the plaintiff could prove the expenses incurred for pursuing the litigation before the High Court for which the amount of Rs. 10,000/- has been decreed. The First Appellate Court did not discuss even anything in that regard.

9. In view of the above, the judgment and decree passed by the First Appellate Court in Money Appeal No. 1/2001 cannot be sustained and hence the same is set aside. The case is remitted to the First Appellate Court for deciding the Money Appeal No. 1/2001 afresh on the basis of the evidence available on record. The parties are directed to appear before the First Appellate Court on 04.03.2013. The First Appellate Court, if the plaintiff does not appear on the date fixed, shall issue notice. The Money Appeal being pertaining to the year 2001, the same shall be decided within 45 days from the date of appearance of the parties.

10. The Registry is directed to send down the records forthwith so as to reach the Court of the learned District Judge, Sonitpur at Tezpur on or before 22.02.2013. The second appeal is allowed to the extent indicated above. No cost.