

P L D 2015 Supreme Court (AJ&K) 7

Present: Muhammad Azam Khan, C.J. and Raja Saeed Akram Khan, J

NOMAN RAZZAQ---Appellant

versus

FARYAD HUSSAIN CHAUDHARY and 13 others---Respondents

Civil Appeal No.136 of 2012, decided on 21st April, 2014.

(On appeal from the order of the High Court dated 8-5-2012 in Writ Petition No.50 of 2011)

Ch. Muhammad Siddique, Advocate for Appellant.

Sheikh Masood Iqbal, Advocate for Respondent No.1.

Muhammd Younis Tahir, Advocate for Respondents Nos.2 to 10.

Date of hearing: 15th April, 2014.

JUDGMENT

RAJA SAEED AKRAM KHAN, J.---This appeal, by leave of the Court, has been directed against the order of the High Court dated 8-5-2012, whereby the writ petition filed by the appellant has been admitted for regular hearing.

2. The brief facts culminating into this appeal are that respondent No.1 filed a writ petition in the High Court alleging therein that he purchased Plot No. 163-C situate in Sector F-3, Part III, Mirpur which was allotted to Abdul Karim on 4-4-1990. Prior to respondent No. 1, the plot was sold and transferred in the name of two persons and ultimately he purchased the plot on 15-7-2009 against a price of 4.5 million rupees and it was duly transferred in his name. It was claimed that the same place was allotted to one Shamsunnisa, showing it as Plot No. 164-B/3 and forged allotment orders were issued on 13-12-1997 and 7-9-2002. The inquiry was conducted by the M.D,A., and it was found that the appellant's plot, i.e., No. 163-C actually is located at the site of plot No.164-B/3, therefore, it was recommended that the appellant's plot be readjusted at the site of plot No. 164-B/3. After readjustment of the plot, the allottee of plot No. 164-13/3 transferred the same to respondent No.12. A learned single Judge in the High Court sought para-wise comments. After seeking para-wise comments and hearing arguments, writ petition was admitted for regular hearing through the impugned order on 8-5-2012. Hence this appeal by leave of the Court.

3. Ch. Muhammad Siddique, Advocate, the learned counsel for the appellant, argued

that the order passed by the High Court is against law and the Constitution, which is not sustainable in the eye of law. He argued that the appellant filed para-wise comments before the High Court along with objections on the stay order application, where he categorically took the stance that the writ petition is not maintainable on the ground that the appellant has concealed the facts from the Court as he had already filed a declaratory suit in respect of the same plot in the Court of Senior Civil Judge, Mirpur, which is sub judice for adjudication. The learned counsel further contended that in presence of the civil suit, the writ petition was not maintainable as he has already availed the alternate remedy provided under law. He filed the copies of the stay order, plaint and other documents with the written statement/objections but the learned High Court has not taken into account and instead of dismissing the writ petition admitted it for regular hearing without adhering to the law on the subject as the same remedies in a matter cannot be availed at two different forums at the same time. The learned counsel averred that it is also admitted position that the suit was filed on 15-12-2010 before the Civil Court prior to filing of the writ petition before the High Court, which was filed on 22-3-2011. He argued that the order impugned before this Court is not a speaking order, which does not come within the definition of order as no ground has been assigned for admission of the writ petition. He further argued that the learned High Court while passing the impugned order has not given any reason or discussed the objections raised by the learned counsel for the appellant. He also stated that while filing para-wise comments/objections, he raised the point that the writ petition is hit by the doctrine of laches but no finding has been recorded in the impugned order in this regard, which has been passed without due application of judicial mind. He maintained that both the parties are claiming their respective plots at one and the same place and this controversy can only be resolved after recording the evidence, which is not the job of the High Court under the writ jurisdiction. It is celebrated principle of law that the factual controversies cannot be resolved through writ petition. He contended that the appellant constructed a house over the plot measuring 1 kanal, which was purchased by him from respondent No. 11, whereas, the respondent is also claiming the plot on the same place on the strength of transfer letter, while alleging that he has purchased 10 marlas land. The learned counsel drew the attention of this Court towards the prayer clause of the writ petition and the plaint, while arguing that the same relief has been claimed in the suit, which has been prayed in the writ petition. He has relied upon the cases reported as *Akhlaq Ahmed v. Secretary to the Government of Punjab, Local Government and Rural Development Department, Lahore* and 2 others [1998 SCMR 516] and *Nawab Syed Raunaq Ali and others v. Chief Settlement Commissioner and others* [PLD 1973 SC 236].

4. On the other hand, M/s Younus Tahir and Sheikh Masood Iqbal, Advocates, the learned counsel for the respondents, while controverting the arguments advanced by the learned counsel for the appellant, argued that no illegality has been committed by the High court, while passing the impugned admission order. They argued that the relief claimed in the writ petition is quite different, than the relief claimed in the suit, therefore, the writ petition is not barred by law. They contended that the respondent has become aggrieved by the act of the appellant and the official respondents and the only remedy for him was to file the writ petition. He has rightly availed the remedy of writ jurisdiction. They argued that the proceedings of the department have been challenged, which does

not come within the purview of civil suit, whereas, in the suit the declaration has been sought. They further submitted that only admission order has been passed and no final verdict has been given by the High Court as the matter is sub judice before the Hon'ble Court and the appellant has full opportunity to put his version before the High Court. They argued that the points raised before this Court can be argued before the learned High Court and if the Court is convinced, then an appropriate order shall be passed, which stage has not come as yet but instead of pursuing the matter before the High Court, he has approached this Court, which amounts to pre-empt the jurisdiction of the High Court, which is not warranted under law. They have relied upon the cases reported as Azad Government and others v. Sahibzada Ishaq Zafar and others 1994 MLD 2382, Azad Government of the State of Jammu and Kashmir and others v. Maj. General (Rtd.) Muhammad Hayat Khan and another 1995 SCR 283 and Azad Jammu and Kashmir Council and 3 others v. Muhammad Ikram and 3 others 2007 SCR 155.

5. We have heard the arguments of the learned counsel for the parties and perused the record made available along with the other material brought on the record. The controversy involved in the matter is regarding plot No. 163-C, measuring 10 marlas, situated in Sector F-3, part-HI, Mirpur, which was allotted to Abdul Karim on 4-4-1990. Lastly, the same was purchased by respondent No.1 on 15-7-2009 against the consideration of Rs. 4.5 million rupees and the same was transferred in his name, whereas, the appellant is also claiming that his plot, i.e., 164-B/3 measuring 1 kanal is also situated at the same place, meaning thereby, both the parties are claiming that they are owners of the plots situated at the one and same place. It has not been denied by the respondent that a civil suit has also been filed before the civil Court on 15-12-2010, i.e., prior to the writ petition, filed on 22-3-2011. The argument of the learned counsel for the appellant that the same relief has already been prayed in a civil suit, which is sub judice before the Court of competent jurisdiction and the remedy available under law has already been availed, therefore, the writ petition was not competent. To appreciate the argument of the learned counsel for the appellant, it will be useful to reproduce the prayer as sought by respondent No.1 before the Civil Court reads as under:--

The prayer clause of amended writ petition, reads as under:--

"Under the circumstances mentioned above, it is humbly prayed that by accepting this writ petition, an appropriate writ in favour of the petitioner and against the non-petitioners may very kindly be issued by declaring the proceedings of allotment dated 7-9-2002, 16-12-1997 and transfer order dated 24-9-2002 readjustment of all the proceedings of non-petitioners for readjustment allotment of plot No. 164-B/3 at the place of plot No. 163-C Sub-Sector F-3 Part III Mirpur and revising order of plot No. 164-B-3 Sector F-3 part III Mirpur No./CRA/5814-15/2011 dated 22-3-2011 are against the law, without lawful authority and be quashed derogatory to the MDA Act 1974. The impugned order of non-petitioners dated 25-2-2011 regarding Plot No. 164-B/3 sub-sector F/3, part III, Mirpur, measuring 1 kanal allotment dated 7-9-2002, 16-12-1997 and transfer order of the said plot dated 24-9-2002 in favour of non-petitioner No.11, 12 and revising order of Plot No. 164-B-3 sector F-3, part III, Mirpur No./CRA/5814-15/2011 dated 22-3-2011 may also very kindly be set aside by restraining them to readjustment of

Plot No.164/B-3 at the place of Plot No. 163-C sub-sector F-3, part III, Mirpur, measuring 10 marlas in accordance with sector plan, all the proceedings of non-petitioners for allotment and transfer for readjustment of plot No. 164-B/3 at the place of plot No.163-C Sub-sector F-3, part III, Mirpur and revising order of Plot No.164 B-3 sector F-3, part III, Mirpur No./CRA/5814-15/2011 dated 22-3-2011 are against the law, without lawful authority and be quashed. Any other relief which this Hon'ble Court deems fit may also very kindly be granted to the petitioner."

After going through the above prayer clauses made in the plaint and writ petition, it reveals that almost the same relief has been claimed in the civil suit and in the writ petition filed after the institution of the civil suit.

6. For resolution of the point regarding the maintainability of writ petition section 44 of the Azad Jammu and Kashmir Interim Constitution Act, 1974 is relevant, which is reproduced herein below as under:--

"44. Jurisdiction of High Court.--

(1) The High Court shall have such jurisdiction as is conferred on it by this Act or by any other law.

(2) Subject to this Act, the High Court, if it is satisfied that no other adequate remedy is provided by law-

(a) on the application of any aggrieved party, make an order?

(i) directing a person performing functions in connection with the affairs of Azad Jammu and Kashmir or local authority to refrain from doing that which he is not permitted by law to do, or to do that which he is required by law to do; or

(ii) declaring that any act done or proceedings taken by a person performing functions in connection with the affairs of the State or a local authority has been done or taken without lawful authority, and is of no legal effect; or

(b) on the application of any person, make an order?

(i) directing that a person in custody in Azad Jammu and Kashmir be brought before the High Court so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

(ii) requiring a person holding or purporting to hold a public office (in connection with the affairs of Azad Jammu and Kashmir) to show under what authority of law he claims to hold that office; or

(c) on the application of any aggrieved person, make an order giving such directions to the person or authority, including the Council and the Government, exercising any

power or performing any function in, or in relation to, Azad Jammu and Kashmir as may be appropriate for the enforcement of any of the fundamental rights conferred by this Act,

(3)

(4)

(a)

(b)

(5)

The opening words of section 44 of the Azad Jammu and Kashmir Interim Constitution Act, 1974, in subsection (2) provide that 'subject to this Act, the High Court may, if it is satisfied that no other adequate remedy is provided by law.' After bare reading" of the above said Constitutional provision, it is spelt out that the Constitutional jurisdiction of the High Court can only be invoked when there is no other remedy available. In the present case, it is admitted position that the respondent No.1 has already availed the remedy by filing the suit before the Court of competent jurisdiction, which is pending, therefore, the argument advanced by the learned counsel for the appellant that two remedies cannot be availed simultaneously at different fora has substance and in our estimation after filing the suit with the same relief, which has been claimed before the High Court in the writ petition, the writ petition was not competent, therefore, the same has incompetently been filed before the High Court. Reliance is placed on the case reported as Ch. Jan Muhammad v. Ch. Muhammad Ismail and 6 others (2000 YLR 1051), wherein it has been observed as under:--

"5. We have given due consideration to the arguments raised at the Bar. Needless to say that the relief in writ jurisdiction is discretionary one; the writ jurisdiction can be invoked only in the circumstances indicated in the relevant provisions of the Azad Jammu and Kashmir Interim Constitution Act, 1974. It is well settled principle of law that if a civil suit is pending between the parties, none of the parties is legally competent to agitate the matter before the High Court during the pendency of suit; if the civil suit and writ petition are heard simultaneously, that is likely to result in contradictory findings by the Courts.

7. Even otherwise, the contents of the writ petition and the plaint reveal that both the parties are claiming their respective plots situated at the one and the same place. One is claiming that he purchased the plot measuring 1 kanal, whereas, the other is claiming that he purchased plot measuring 10 marlas situated on the same place. Such like controversy cannot be resolved in the writ petition without recording the evidence, which is not the job of the High Court while exercising the powers under section 44 of the Azad Jammu and Kashmir Interim Constitution Act, 1974. It is well settled principle on the subject that the factual controversy cannot be resolved in the writ jurisdiction as has been laid down in a case reported as The Eastern Construction Company v. AJ&K Government and

others [2013 SCR 548], wherein it has been observed as under:--

"6. After going through the contents of the writ petitions and the appeal, we are of the view that the questions agitated before the High Court pertain to factual controversy which can only be resolved after recording evidence which is not the job of the High Court...."

In another case titled Capt. Rtd. Ali Afsar Khan v. Khalid Mahmood [2007 SCR 263] in which it has been held by this Court as under:--

"The above narrated detail reveals that the controversy between the parties is purely in respect of controversial points of facts which in view of law cannot be inquired into in exercise of writ jurisdiction under section 44 of the AJ&K Interim Constitution Act, 1974. Similarly very strong, grounds are required along with a statutory backing to look into the validity or otherwise of the finding recorded by a Tribunal of exclusive jurisdiction."

8. The existence of another adequate remedy is such rule of law which ousts the jurisdiction of the High Court. The extraordinary jurisdiction under section 44 of the Azad Jammu and Kashmir Interim Constitution Act, 1974, cannot be invoked when alternate remedy under law is available to an aggrieved party. It may be observed that according to law, the alternate remedy must be adequate, efficacious, convenient, beneficial, speedy and effective. Where the Court thinks proper that the order impugned in the writ petition is without jurisdiction and unlawful, there would be no bar on filing a writ petition and the Court would not hesitate in entertaining the Constitutional petition although alternate remedy is available. Reliance can be placed in a case reported as Dr. Liaqat Ali Khan and another v. District Returning Officer, District Sargodha and 3 others [2002 SCMR 1632], wherein it has been observed as under:--

"The remedy of election petition provided under the Punjab Local Government Elections Rules, 2000 is available to a contesting candidate after issuance of the notification of result of returned candidate but no such petition can be filed by a person who is not a contesting candidate in the election. The petitioners being no more contesting candidates in the runoff election, would not be in a position to challenge the election of returned candidate through an election petition. Undoubtedly, the Tribunal on the basis of grounds mentioned in Rule 83 of the Rules, can declare an election as a whole to be void. Under the above rule, the Tribunal can exercise power only to an election petition which is filed by a contesting candidate and the petitioners being the contesting candidates in runoff election would not be in a position to avail such remedy against returned candidate, and therefore, they had rightly invoked the Constitution jurisdiction of High Court for redressal of their grievance. It would not be out of place to mention here that even if the statutory remedy available under the law is considered inadequate and inefficacious as the relief being claimed cannot be granted to an aggrieved person in such remedy, the writ petition can be maintained."

9. The Constitution imposes a condition precedent to be met before invoking special

jurisdiction of the High Court that the High Court must be satisfied that the aggrieved person has no other adequate remedy under law to redress his grievance and on such satisfaction it has to embark upon to exercise its jurisdiction, whereas, in this case, admittedly, the respondents have already availed the alternate remedy in the form of civil suit. Reliance can be placed in a case reported as Ghulam Hussain and 3 others v. Muhammad Bostan and 3 others [PLD 1995 SC (AJ&K) 38], it was observed as under:--

"7. The High Court has observed that it cannot be termed that the order is without jurisdiction. On the present record it is not possible to disagree with the High Court. The case cited by Ch.Muhammad Riaz Alam, namely, Muhammad Ismail v. Income Tax Officer (1993 SCR 370) supports him. It was held that there is a distinction between total absence of jurisdiction and violation of law.

8. Even if the contention of Mr. Muhammad Yunus Arvi is accepted a writ petition would be incompetent. This Court has held in Abdul Rehman v. Income Tax Officer (1993 SCR 186) that existence of an adequate remedy is a rule of law barring jurisdiction of the Court and it is not regulatory in nature. It was also held that the High Court can only entertain a writ petition if it finds that alternative remedy is not adequate....."

10. There was no occasion for the High Court to admit the writ petition for regular hearing as disputed questions of the facts cannot be resolved in a writ petition as laid down in a case reported as Azad Government of the State of Jammu and Kashmir through Chief Secretary and 6 others v. Khasmir Steel and Re-Rolling Mills through Managing Director and 3 others [2005 YLR 1834], it was observed as under:--

"13. The disputed questions of fact were raised by the respondent in the writ petition which, as said earlier, could not be resolved without the evidence and detailed inquiry. This point stands settled that questions of fact could not be resolved in exercise of writ jurisdiction by the High Court, unless the facts are admitted from both sides

11. As in para 4 of the memo of appeal, the appellant has stated that in the same matter and between the same parties, the civil suit is already pending which was filed prior to the institution of the writ petition. However, in the prayer clause, the learned counsel has only prayed for setting aside the impugned order dated 8-5-2012. As we have held in the preceding para that a civil suit regarding the same matter is sub judice before the Court of competent jurisdiction and the question raised in the writ petition involved factual controversy, which can only be resolved after recording the evidence, which is not the job of the High Court in writ jurisdiction, therefore, the writ petition is not maintainable.

Resultantly, this appeal is accepted while setting aside the impugned order of the High Court dated 8-5-2012. Consequently, the writ petition filed in the High Court is hereby dismissed with no order as to costs.

