

2000 Y L R 1051

[Supreme Court (AJ&K)]

Present: Sardar Said Muhammad Khan, C.J.

and Muhammad Yunus Surakhvi, J

Ch. JAN MUHAMMAD---Appellant

versus

Ch. MUHAMMAD ISMAIL and 6 others---Respondents

Civil Appeal No.84 of 1999, decided on 21st January; 2000.

(On appeal from the judgment of the High Court dated 16-2-1999 in Writ Petition No. 105 of 1998).

Ch. Muhammad Azam Advocate for Appellant.

Raja Hassan Akhtar Advocate for Respondents.

Date of hearing: 20th January, 2000.

JUDGMENT

SARDAR SAID MUHAMMAD KHAN, C.J.---This appeal has been directed against the judgment of the High Court, dated 16-2-1999, whereby the writ petition filed by Ch. Muhammad Ismail, respondent No. 1, was accepted and he was declared as owner of the open space in dispute to the extent of 1/3rd share.

2. The brief facts giving rise to the present appeal are that Jan Muhammad, appellant herein, Muhammad Ismail, respondent No.1 and Gulzar Hussain, the predecessor-in-interest of respondents Nos.2 to 6, were real brothers. According to the appellant, herein, he was carrying on business while his other two brothers, Muhammad Ismail and Gulzar Hussain, were serving in the Revenue Department; Gulzar Hussain died in the year 1996 and his heirs are impleaded as party in the present proceedings. According to the appellant, as he was engaged in business, household affairs of the family were run by his brothers, Gulzar Hussain and Muhammad Ismail; consequently, he asked Gulzar Hussain to acquire the allotment of Plot No. 5-A situate in sector C-1, Mirpur, in his (appellant's) favour. Thus, he obtained the allotment of the said plot and the price of the same was also deposited by the appellant, herein, through Gulzar Hussain, his brother. It is further the case of the appellant that subsequently, when he started construction of 13 shops and

rooms beneath the same over the plot in question, it turned out that the aforesaid plot was allotted to the appellant and Gulzar Hussain, both. When he protested to Gulzar Hussain, his brother, as to how his name appeared in the allotment chit, he assured him that as the said plot was allotted to the appellant and the price of the same was also deposited by him, the same would be transferred exclusively in his favour whenever he so desired. Subsequently, an open space measuring 586.87 sq. yards adjacent to Plot No.5-A was also regularised in the name of the appellant and Gulzar Hussain, deceased, because Gulzar Hussain told the appellant that as the original Plot No.5-A was allotted to both of them, the open space could also be regularised in favour of both of them. Consequently, the said open space was also got regularised in their favour in the year, 1993 by the concerned authority. Meanwhile, Jan Muhammad, appellant herein, filed a civil suit in the Court of Sub-Judge, Mirpur, on 10-8-1998 alleging that he was exclusively allottee of Plot No.5-A and the aforesaid vacant place and that the construction in form of 13 shops and 14 rooms over the same was also made by him alone and Muhammad Ismail, respondent No.1, and Mazhar Hussain and others, the successors-in-interest of Gulzar Hussain, had no share in the said property; he also challenged the compromise decree, dated 19-9-1989 passed in favour of Muhammad Ismail, respondent No.1, by the Civil Court alleging that the same was obtained by practising fraud and without any compromise by the appellant. Meanwhile Muhammad Ismail, respondent No.1. filed a writ petition in the High Court on 22-8-1998, 12 days after the institution of the civil suit by the appellant, herein, claiming that he being an owner of Plot No.5-A to the extent of 1/3rd share on the basis of compromise decree, was also entitled to 1/3rd share in the said open space which was allotted in favour of the appellant, herein, and Gulzar Hussain. The High Court, after taking necessary proceedings in the writ petition, declared that Muhammad Ismail, respondent No. 1, being owner in Plot No.5-A to the extent of 1/3rd share on the basis of compromise decree, would. also be deemed to be an allottee to the extent of 1/3rd share in the . open space. It is against the aforesaid judgment of the High Court that present appeal has been filed.

3. Ch. Muhammad Azam Khan, Advocate, the learned counsel for the appellant, has raised a preliminary objection that civil suit filed by Jan Muhammad challenging the compromise decree, dated 19-9-1989 was pending in the Court when the writ petition was filed by Muhammad Ismail, respondent, seeking share in the open space. He has argued that in the said suit not only the share of respondent, Muhammad Ismail, in Plot No.5-A which was denied by the appellant but also his interest in the allotment of the open space was challenged. The learned counsel has argued that if the suit filed by Jan Muhammad, appellant, is decreed and the compromise decree, dated 19-9-1989 is held as a result of

fraud, Muhammad Ismail, respondent, would not have any claim to the open space. The learned counsel has argued that where the civil suit was already pending, the High Court was not legally competent to deal with the matter in exercise of writ jurisdiction. He has argued that it is well-settled principle of law that the matter which is subject of litigation between the parties in a civil suit, cannot be agitated by the concerned parties by invoking writ jurisdiction. The learned counsel for the appellant has further argued that he had taken this objection in the written statement and also addressed arguments on the point before the High Court but the point was not resolved. Therefore, the learned counsel for the appellant has argued that the impugned judgment of the High Court passed in writ jurisdiction is not sustainable on this sole ground, especially so when a civil suit is still sub judice in the Trial Court wherein the said points are involved.

Raja Hassan Akhtar, Advocate, the learned counsel for the respondents, has argued that this point has not been specifically agitated by the appellant in the memorandum of appeal filed in this Court or in his concise statement; he did not controvert the argument of the learned counsel for the appellant that the point was not only agitated in the High Court in the written statement filed by the appellant, herein, but was also argued before the High Court. The learned counsel for the respondents has submitted that the judgment of the High Court on merits does not call for interference. He has argued that the contention of the learned counsel for the appellant that the compromise decree obtained by Muhammad Ismail, respondent, was a result of any fraud is without any substance. In alternative, he has submitted that the judgment of the High Court must be kept intact with the observation that if the suit filed by Jan Muhammad, appellant herein, is decreed, the impugned judgment would be of no legal consequence but if the suit filed by the appellant, herein, is dismissed, the impugned judgment would remain operative.

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. Besides, the findings in the writ jurisdiction, even if the writ petition were held to be competent, would create embarrassment to the Trial Court and the same would influence the mind of the subordinate Courts. A reference may be made to the following

authorities of the view that writ petition is not competent if the matter is sub judice in a civil suit: ---

In case reported as *Tanbir Ahmad Siddiki v. Province of East Pakistan* (PLD 1968 SC 185), it has been held that a civil suit was already pending between the parties was itself sufficient to deny the relief in exercise of writ jurisdiction.

In case reported as *A.M.A. Zaman v. The Government of East Pakistan* (PLD 1970 Dacca 589), it has been held that the writ petition and civil suit cannot be proceeded with in the same matter simultaneously.

It follows from what has been stated above that the High Court was not competent to give any finding in the matter in exercise of writ jurisdiction when the civil suit between the parties was pending. Therefore, we accept the appeal, set aside the impugned judgment of the High Court with the observation that if so advised, the respondent may seek appropriate remedy in the appropriate forum after the termination of the proceedings in the civil suit which is presently pending.

Appeal accepted.