

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE EJAZ AFZAL KHAN
MR. JUSTICE QAZI FAEZ ISA

CIVIL APPEAL NO. 1256 OF 2008

*(On appeal from the judgment dated
4.7.2008 in C.R. No.430/2003 passed
by the Lahore High Court Lahore)*

Allah Ditta

.... Appellant

VERSUS

Ali Muhammad

.... Respondent

For the Appellant : Mr. Younas Khan Naul, ASC

For the Respondent : Mr. Ahmed Bakhsh Bharwana, ASC
Mr. Nazir Ahmed Bhutta, ASC

Date of Hearing : 5th November 2015

JUDGMENT

QAZI FAEZ ISA, J. This appeal has been preferred against the judgment dated 4th July 2008 of a learned Single Judge of the Lahore High Court, Lahore, who accepted the civil revision petition and set-aside the judgment and decree of the learned Additional District Judge dated 15th February 2003 and restored the judgment dated 11th September 2002 of the learned Civil Judge who had decreed the pre-emption suit filed by the respondent.

2. Mr. Younas Khan Naul, the learned counsel for the appellant, stated that the appellate court had rightly set aside the judgment of the trial court as the respondent (plaintiff in the suit) had failed to establish his right as co-owner or *shafi sharik*, in terms of the explanation to section 6 of the Punjab Pre-emption Act, 1991 ("the

Act") as he did not own any property in Khata No. 170 wherein was situated the sold property, i.e. 21 kanal and 12 marla situated in Khata No. 170, Murabba No.47, Qilla No. 12-9-18/1, Mauza Wahga Kalika, Tehsil and District Jhang ("**the said property**"). The learned counsel next contended that the respondent had also failed to establish his alleged right as a participator in the "*special rights attached to the immovable property*" or *shafi khalit* as per the explanation in section 6 of the Act since the Jhang-Sargodha Road, which was contiguous to the land of the respondent and the said property, could not be categorized as a "*right of passage*" to the respondent's land nor could the respondent establish that the said property shared the "*right of passage of water or right of irrigation*" with the respondent's land. As regards the alleged entitlement as *shafi jar* only a corner of the respondent's land touched a corner of the said property, therefore, the respondent's land could not be categorized as being "*adjacent to the immovable property being sold*" as per the explanation in section 6 of the Act. Therefore, the appellate court had rightly set-aside the findings of the trial court, which were clearly contrary to the facts and the evidence. Regarding the determination by the trial court of the sale price as being one hundred and fifty thousand rupees the learned counsel stated that such finding was arrived at without any evidence and contradicted the price of one hundred and ninety thousand rupees stipulated in the sale mutation. The learned counsel contended that the judgment of the appellate court was well reasoned whereas that of the trial court, which was maintained by the High Court, was conjectural and contrary to the established principles of pre-emption laws. It was lastly contended that the informant Faqir Muhammad (PW-2) did not mention the time of making the immediate demand or *talb-i-muwathibat*.

3. On the other hand the learned counsel for the respondent relied upon the judgments of the trial court and of the High Court; he stated that the respondent had established his rights as *shafi sharik*, *shafi khalit* and *shafi jar*. With regard to the sale price the learned counsel stated that one hundred and ninety thousand rupees shown in the sale mutation was false and had been exaggerated to forestall the respondent to exercise his right to pre-empt the said sale.

4. We heard the learned counsel at length and with their assistance examined the documents on record. We enquired from the learned counsel whether any of the exhibited documents establish the respondent's right of pre-emption as *shafi sharik* and / or *shafi jar*, since the judgment of the trial court and also of the High Court was silent in this regard, whilst the appellate court had determined, that:

"The plaintiff has presented copy of Jamabandi Ex.P.5 in support of his contention which negates his version. He was owner in Khatas No. 162/156 while the disputed land is situated in Khata No. 170, therefore, his contention that he was co-owner in the Khata is not correct."

The learned counsel responded by referring to the statement of the Patwari (PW-1) and the map produced by him, as under:

"بر حلف بیان کیا کہ نقل عکس شجرہ EX.P-1 بمطابق ریکارڈ درست ہے جو میرا قلمی دستخطی ہے۔ ریکارڈ متعلقہ ہمراہ لایا ہوں بغرض ملاحظہ پیش کرتا ہوں"

However, the aforesaid exhibit (EX.P-1) merely shows that a corner of the said property touches a corner of the respondent's land, and nothing further. The learned counsel for the respondent could not refer to any document to show that the respondent was a co-owner or co-sharer in the corpus of the undivided immovable property wherefrom the said property had been sold. The High Court too did not delve into this matter, but still proceeded to set aside the

determination of the same by the appellate court, by simply stating that, "*Aks Shajra on record clearly mentions that the land of the petitioner is adjacent to the disputed land*"; whether the two lands were *adjacent* or not would be relevant for the determination of the respondent's right as *shafi jar* but not to ascertain whether the respondent was a *shafi sharik*. Therefore, the finding of the appellate court that the respondent was not a *shafi sharik* was unexceptionable.

5. We next consider the respondent's purported capacity as *shafi jar*. In this regard the respondent had also placed reliance on the aforesaid exhibit (EX.P-1) however an examination of this document reveals that the western corner of the said property merely touched the southern corner of the respondent's land. This in our opinion would not meet the requirement of the two properties being "*adjacent*" to each other in terms of the explanation to section 6 of the Act. With regard to this very aspect there is a precedent of the Lahore High Court (that had escaped the notice of the learned judge as well as the learned counsel appearing before the High Court) which was the case of Muhammad Ayub v. Hazrat Mansha (2006 MLD 1001) wherein Jawwad S. Khawaja, J (as he then was) had held:

"The entire concept of contiguity in matters of pre-emption is based upon the premise that the owner of land sharing a common boundary with land, which is subject-matter of a pre-emption suit, should have a right superior to that of a purchaser who does not own land having a common boundary with the suit-land. In the present case it is quite evident that the suit-land has no common boundary with the land owned by the respondent/plaintiff in Square No.88. The mere fact that Killa No. 25 in Square No.88 has one corner touching the corner of Killa No.1 in Square No.102, which is part of the suit-land, does not result in any shared boundaries between the two and, as such, cannot be treated as being contiguous. It, therefore, follows that the ownership of the respondent/plaintiff in Killa No.25 of Square No.88 does not vest in him a superior right of pre-emption in respect of the suit-land."

6. We now proceed to consider whether the respondent could be categorized as *shafi khalit*. The main Jhang-Sargodha Road which can be accessed by both the lands cannot be categorized as a "*right of passage*". The respondent had also failed to establish that there was "*right of water or right of irrigation*" running through the said property bringing water to the respondent's land, therefore, the respondent had also failed to establish his right as *shafi khalit*. The plaintiff had stated that his tube-well supplied water to the said property whereas his witness Faqir Muhammad (PW-2) had contradicted him by stating that the said property was irrigated from the tube-well of Shaiq Hassan (DW-2).

7. The appellate court had also correctly overturned the finding of the trial court with regard to the sale price. Both the seller of the land (Shaiq Hasan, DW-2) and the purchaser (appellant, DW-1) had testified that the price respectively received and paid was Rs.190,000 and such price was also mentioned in the sale mutation, therefore, in the absence of any cogent evidence it was not correct to for the learned trial judge to conclude that the price for sale was Rs.150,000 simply on the basis of some minor contradictions in the testimony of the said witnesses. It is also noteworthy that the respondent in his examination-in-chief made no mention of the sale price whereas in his cross-examination simply stated that it was approximately Rs.150,000, but without providing the basis for his information. The informant of the sale, the said Faqir Muhammad however made no mention of the sale price. The plaintiff and his witness had to first testify that the sale price was other than the one that had been shown and then the basis thereof. It is often seen that a statement with regard to sale price is made by the pre-emptor without any basis whatsoever simply to

obtain an advantage. In this regard in the case of Subhanuddin v. Pir Ghulam (PLD 2015 Supreme Court 69) we had held that:

“Therefore, when an undue advantage is sought to be gained on the basis of a completely unsubstantiated statement it would disentitle a shafee to claim pre-emption. This was not a case where the plaintiff had been unable to establish the price that he contended was paid for the said land, but instead a case where a plea which had no basis in fact was taken to gain an advantage.” (at page 77J)

8. In the circumstances there was no occasion for the High Court to invoke its revisional jurisdiction under section 115 of the Code of Civil Procedure as there was no illegality or material irregularity or for that matter any other defect in the judgment of the appellate court requiring correction. We, therefore, allow this appeal and set-aside the impugned judgment of the High Court and restore the judgment of the appellate court. Consequently the pre-emption suit filed by the respondent is dismissed. In view of the facts of the case, the appellant will be entitled to costs throughout.

Judge

Judge

Announced in open court

On 18th November 2015

By Justice Qazi Faez Isa, J.

At Islamabad

APPROVED FOR REPORTING
(Zulfiqar)