

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Qazi Faez Isa
Mr. Justice Yahya Afridi

**Civil Petition Nos. 2836 and 2837/2020 and
CMA Nos. 7704 and 7705/2020**

(On appeal against the orders 29.09.2020
passed by the Lahore High Court, Multan Bench,
in F. A. O. Nos. 7 and 8/2019)

Sheikh Ishtiaq Ahmad, etc. (in CP 2836/20)

Ishtiaq Ahmad, etc. (in CP 2837/20) *Petitioners*

Versus

Muhammad Usman Ali Sheikh and another (in both) *Respondents*

For the Petitioners (in both): Malik Muhammad Rafiq Rajwana, ASC
Ch. Habibullah Nehang, ASC
Mr. Arshad Ali Chaudhry, AOR

For Respondent No. 1 (in both): Qari Abdul Rasheed, ASC
Syed Rifaqat Hussain Shah, AOR

For Respondent No. 2 (in both): Mr. Ahmad Hassan Khan, ASC
Mr. Umair Azam, Assistant Director, MDA

Date of Hearing: 4 June 2021

ORDER

Qazi Faez Isa, J. Respondent No. 1 filed two pre-emption suits claiming a superior right to the two plots purchased by the petitioner alleging that he was a *Shafi Jar* under the Punjab Pre-Emption Act, 1991 (**'the two plots'** and **'the Act'**) as he resided in the immovable property which lay adjacent to the two plots. In our order dated 30 March 2021 we had noted the contention raised by the learned Malik Muhammad Rafiq Rajwana with regard to the non-applicability of the Act to plots situated within the area of the Officers Colony of the Multan Development Authority (**'MDA'**). However, the learned counsel has raised another and a more fundamental point, which is that in the suits filed by the respondent No. 1 he did not assert that he was the owner of the immovable property on the

basis of which he sought to pre-empt the adjacent two plots. It is further submitted that the respondent No. 1 also did not attach with his plaint a copy of any document to show his ownership of the immovable property which lay adjacent to the two plots nor filed the same with his *list of documents*.

2. The learned Mr. Rajwana also points out that the petitioners had filed applications under rule 11, Order VII of the Code of Civil Procedure, 1908 (**'the Code'**) in both the suits filed by the respondent No. 1. However, in his replies to the same, respondent No. 1 did not disclose the ownership of property on the basis of which he claimed the rights of a *Shafi Jar* nor attached therewith any documents as proof thereof.

3. The learned Qari Abdul Rasheed, representing respondent No. 1 in both petitions, referred to the plaints, which we read with his assistance. However, the plaints do not state that the respondent No. 1 owns the immovable property, on the basis whereof the respondent No. 1 claimed rights of *Shafi Jar* to the two plots, and the same is the position with regard to his replies to the application under rule 11, Order VII of the Code. There is also no document on record which discloses the respondent No. 1's ownership to the said immovable property on the basis of which he claimed the right of a *Shafi Jar* in terms of Explanation (III) of subsection (1) to section 6 of the Act.

4. The respondent No. 1 in his plaints states that he resides in the property which lay adjacent to the two plots in respect whereof he asserted rights of *Shafi Jar* but did not assert that he was the owner thereof nor did he file any document therewith to show the same. Section 33 of the Act stipulates that the provisions of the Code apply to the proceedings under the Act. Rule 2, Order VI of the Code requires that *material facts* must be mentioned in the pleadings. Since the very foundation of the respondent No. 1's claim was his ownership of the adjacent immovable property on the basis whereof he asserted superior pre-emptive rights of a *Shafi Jar*, it was necessary for him to assert his ownership, which was not only a *material fact* but an essential one. '*It is well established rule that if a plea of fact is not pleaded no case can be founded on it*', as held by a four-member Bench of this Court in the case of

Government of West Pakistan v Haji Muhammad (PLD 1976 Supreme Court 469, 473A). The learned Mr. Rajwana is also correct in stating that in the *list of documents* (see, rules 9, 14 and 18 of Order VII and rule 1 of Order XIII of the Code) no document was brought on record or referred to which showed the respondent No. 1 to be the owner of the immovable property which lay adjacent to the plots. *'It is also a well-settled principle that no evidence can be led or looked into in support of a plea which has not been taken in the pleading'*, as held in the case of *Binyameen v Hakim* (1996 SCMR 336, 340B), which is a judgment by a three-member Bench of this Court.

5. The suits did not mention that the respondent No. 1 (the plaintiff in the suits) was the owner of the property adjacent to the two plots, which were sought to be pre-empted. Therefore, the complaints merited rejection because they did not *disclose a cause of action* as per clause (a) of rule 11, Order VII of the Code. The suits were premised on a right recognized under the Act, that of *Shafi Jar*, which is a right vested in the owner of the adjacent immovable property to those sought to be pre-empted, but the complaints did not state that the plaintiff owned the adjacent property. Since the basic ingredient of pre-emption, that is, *Shafi Jar*, was missing, the suits were also *barred* under the Act and as such would also attract clause (d) of rule 11, Order VII of the Code and the complaints merited rejection on this ground too.

6. The learned Civil Judge *vide* order dated 6 February 2017 allowed the petitioners' applications under rule 11, Order VII of the Code and rejected the complaints under the said provision read with section 23(b) of the Act. The appeals filed by respondent No. 1 were allowed, by setting aside the learned Civil Judge's orders, dismissing the said applications and directing the learned Civil Judge to proceed with the suits. However, the learned Single Judge of the High Court partially allowed the appeals by holding that, *'the provision of Order VII, Rule 11, C.P.C. cannot be invoked rather the proper course for the court in such cases is to frame issue on such question and decide the same on merits in light of evidence'*, which proposition does not accord with the law. Since, as noted above, the complaints did not state that the plaintiff (respondent No. 1) was the owner of

the adjacent property, therefore, the plaintiff should not be permitted to lead evidence to assert and then to establish his ownership of the adjacent immovable property.

7. The plaintiffs also did not attach any document to show that the plaintiff (respondent No. 1) was the owner of the adjacent property nor was any document of title mentioned in the *list of documents* or in the replies to the petitioners' applications under rule 11, Order VII of the Code. Therefore, the plaintiffs in the pre-emption suits, filed by respondent No. 1, merited rejection. However, although we have not considered whether or not MDA plots can be pre-empted the plaintiffs in both suits are rejected, under rule 11, Order VII of the Code, for the reasons mentioned hereinabove. And, the question whether MDA plots can be pre-empted has not been determined herein.

8. For the reasons mentioned above, these petitions are converted into appeals and allowed by setting aside the orders of the High Court and the judgments of the Appellate Court and restoring the orders dated 6 February 2017 passed by the learned Judge of the Trial Court, accepting the application under rule 11, Order VII of the Code, but for the reasons mentioned above. However, there shall be no order as to costs.

Judge

Judge

Bench-IV
Islamabad
04.06.2021
(Farrukh)

Approved for Reporting