JUDICIAL REFORM OF THE LAW OF PRE-EMPTION IN INDIA : IMPACT ON MUSLIM PERSONAL LAW[1]

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I. Law of pre-emption : modern trends

THE *HIDĀYA*, an authoritative treatise on Islamic law, reports :

> Imām Shāfi'ī held pre-emption to be repugnant to analogy (*qiyās*), as it involves taking possession of another's property contrary to his inclination; whence it must be confined solely to those to whom it is particularly granted by law.[2]

The judicial trends in modern India in regard to the enforcement of pre-emptive rights seem to be in complete agreement with the views expressed by Shāfi'ī several hundred years ago.

In Independent India the law of pre-emption in respect of immovable property, in vogue in certain parts of the country under local custom or statutes, has been one of the subjects of significant judicial reform. Within the first decade after the enforcement of the Constitution some state High Courts, *e.g.*, Hyderabad and Madhya Bharat,[3] had pointed out discrepancies between certain aspects of the law of pre-emption and some constitutional provisions. It was, however, as late as 1962 that the Supreme Court had an opportunity to pronounce a verdict on the constitutional validity of certain aspects of the law of pre-emption. In the case of *Bhau Ram* v. *Baijnath Singh*[4], the Supreme Court struck down the statutory provisions of certain state enactments applicable in Rewa[5], Berar[6] and the Punjab[7], recog-

1. This article represents a revision of the author's note, 'Supreme Court Decisions on Pre-emption: Reconciliation with Muslim Law', I *Supreme Court Journal*, 94-96 (1965).
2. The *Hidāya*, 550 as cited in Tyabji's, *Muslim Law*, 632 (4th ed. 1968).
3. See *Moti Bai* v. *Kandakari*, A.I.R. 1954 Hyd.; *Babu Lal* v. *Goverdhan Das*, A.I.R. 1956 M.B. 6.
4. A.I.R. 1962 S.C. 1476.
5. Rewa State Pre-emption Act 1946, s. 10.
6. Berar Land Revenue Code 1928, Ch. XIV.
7. The Punjab Pre-emption Act 1913, s. 16.

nizing the right of pre-emption on the basis of vicinage. Later, in 1965, the Supreme Court adopted an identical attitude in regard to the customary law of pre-emption. Accordingly, in *Sant Ram* v. *Labh Singh*[8], a local custom decreeing right of pre-emption on the ground of vicinage was declared *ultra vires* as, according to the court, it conflicted with the provisions of article 19(i)(*f*) of the Constitution.

None of the aforesaid decisions was directly concerned with the Muslim law of pre-emption, which is the parent-law of the aforesaid statutory and customary provisions.[9] Yet they point out to the constitutional invalidity of the provision of the Muslim personal law under which a follower of that law can claim pre-emptive right in respect of certain immovable properties situate in his neighbourhood. Therefore, the judicial attitude to pre-emptive rights in respect of immovable property, represented by these decisions, has been criticised in some legal circles for its possible effect of 'uprooting' an age-long institution of Islamic jurisprudence. In the opinion of the present author this criticism is rather misplaced. An objective analysis of the modern judicial trends in regard to pre-emption in the light of the relevant Islamic legal principles would enable the Muslims of India to accept the same, without violating the sanctity of their personal law.

II. Supreme Court decisions considered

The two aforementioned decisions of the Supreme Court, having a bearing on the subject under review, may be briefly analysed here.

Statute law

In the erstwhile Rewa state a local enactment recognized the right of pre-emption on the ground, *inter alia*, of vicinage.[10] Similarly, in Berar the holder of an interest in a 'survey number' had a statutory right of pre-emption when another person having a land in that 'survey number' sold it to a stranger.[11] And in the Punjab a local Act conferred the right of pre-emption on the "owners of common stair-cases", "owners of common entrance from a street", and "owners of contiguous property".[12] These statutory provisions were challenged, in different cases, on the ground that they imposed unreasonable restrictions on the fundamental right to acquire, hold and dispose of property, guaranteed in article 19(1)(*f*) of the Constitution. These cases were dealt with together by the Supreme Court in

8. A.I.R. 1965 S.C. 314.
9. See *Digamber Singh* v. *Ahmad Said Khan*, A.I.R. 1914 P.C. 11, in which it was laid downthat the law of pre-emption was introduced in India by the Muslims. *Cf. Avadh Behari* v. *Gajadhar*, A.I.R. 1954 S.C. 417.
10. *Supra* note 5.
11. *Supra* note 6.
12. *Supra* note 7.

Bhau Ram v. *Baijnath Singh*.[13] It was contended on behalf of the respondents that the provisions in question were saved by article 19(5) of the Constitution, which allows reasonable restrictions on the said right in the interest of general public. Wanchoo, J. (as he then was), delivering the majority judgement, rejected the contention and held that the impugned provisions did impose unreasonable restrictions on the fundamental right guaranteed in article 19(1)(*f*). In the opinion of the court these provisions unnecessarily restricted the vendor's right to sell his property to a puchaser of his choice. Accordingly, it held that the real reason behind the right of pre-emption on the basis of vicinage was:

> (To) prevent strangers, *i.e.*, people belonging to different religions, castes or races, from acquiring property in a particular fraternity or class of people.

The court concluded that such a purpose could not be considered valid or reasonable in view of the prohibition, under article 15 of the Constitution, of discrimination on grounds of religion, race or caste, *etc.*

Customary law

In *Sant Ram* v. *Labh Singh*,[14] Hidayatullah, J. (as he then was) held, with reference to the earlier decision of the Supreme Court referred to above, that for the reasons explained by the court in that case, a local custom allowing pre-emption on the basis of vicinage would be as much opposed to the provisions of article 19(1)(*f*) of the Constitution as the statutory provisions questioned in that case were. The decision was based on the reasoning that custom and usage having the force of law must be held to be contemplated by the expression "All laws in force", which were declared in article 13(1) to be void in so far as they were inconsistent with the provisions of Part III of Constitution dealing with fundamental rights.

Scope of recent decisions

It may be noted that in both the decisions of the Supreme Court briefed above the court struck down the right of pre-emption, statutory as well as customary, on the ground of vicinage only. Co-ownesrhip of property as a basis of pre-emptive right was not affected by these decisions. On the contrary, in an earlier case the Supreme Court had specifically upheld the constitutional validity of the right of pre-emption based on co-ownership in an undivided property.[15] So, neither legislative[16] nor judicial

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13. *Supra* note 4.
14. *Supra* note 8. In this case pre-emption was claimed on the basis of vicinage, the claim being based on a custom obtaining in tahsil Milak of district Rampur in U.P.
15. *Avadh Behari* v. *Gajadhar*, A.I.R. 1954 S.C. 417.
16. It may be noted here that the Hindu Succession Act 1956 has introduced the right of pre-emption in favour of co-heirs in the property of a Hindu dying intestate (s. 22).

trends in modern India are opposed to the law of pre-emption operating within the limited field of co-ownership of property.

III. Vicinage in Islamic law of pre-emption[17]

It has been said that the decisions of the Supreme Court in the cases discussed above will adversely affect the Muslim law of pre-emption (*shuf'a*)[18] and that they take away an important legal right which has, by long usage, become a part of the *lex loci*.[19] To examine the truth in these observations, the position of pre-emption on the basis of vicinage (*jiwār*) in Islamic legal system may be discussed in detail.

The schools of Muslim law differ from one another on the question of the circumstances in which the right of pre-emption can be claimed. Principles of the various schools are given below.

(i) *Hanafī law* : The *Hanafī* school of Islamic law recognizes three circumstances in which a person can claim pre-emption. These are: co-ownership of property (*shirka*), participation in appendages (*khilt*) and vicinage (*jiwār*). Accordingly, the following three classes of persons can exercise the right of pre-emption :[20]

(*i*) a co-sharer in the property (*shafī' sharīk*);
(*ii*) a participator in appendages (*shafī' khalīt*); and
(*iii*) the owner of an adjoining property (*shafī' jār*).

The right of the last class does not, however, extend to large estates such as villages or zamindaris.

(ii) *Shāfi'ī law* : Under the *Shāfi'ī* school the right of pre-emption is very much limited; it arises only in favour of co-sharers in an undivided property.[21] The *Hanafī* grounds of participation in appendages and vicinage have not been recognized by the *Shāfi'ī* lawyers. The latter held that even "common ownership of outlet" would not confer the right of pre-emption on the owners of adjacent properties.[22]

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17. A brilliant statement of the Islamic law of pre-emption in a detailed codified form will be found in D.W. Kathalay, *The Law of Pre-emption in British India*, 31-168 (1928).
18. See Fyzee, *Outlines of Muhammadan Law*, 331-333 (3rd ed., 1964). Discussing the decisions in *Bhimrao* v. *Patiban*, A.I.R. 1960. Bom. 552; *Babulal* v. *Gowardhandas*, A.I.R. 1956 M.B. 1; *Ragunath* v. *Baburao*, A.I.R. 1956 Hyd. 120; and *Muhammad Ulmar* v. *Amir Mohammad*, A.I.R. 1958 M.P. 423, Fyzee seems to have favoured the view that the right of pre-emption cannot be regarded as unconstitutional.
19. See V.N. Saxena,'Bhau Ram v. Baijnath : A Comment', I *Aligarh Law Journal*, 151-156 (1964).
20. Fyzee, *op. cit.* note 18 at 333-334.
21. Tyabji, *Muslim Law*, 632 (4th ed. 1968), referring to the *Hidāya*, 548.
22. *Cf.* the Punjab Pre-emption Act 1913, s. 16, which specifically recognized this ground as a basis for pre-emption. That legislative provision was considered void by the Supreme Court in *Bhau Ram's* case. See *supra* note 4.

(iii) *Ithnā 'Asharī law*: The *Shī'a Ithnā 'Asharī* school rejects the ground of vicinage as well as that of participation in amenities. By defining pre-emption as "the legal title of one partner in joint property to the share of another partner in consequences of its transfer or sale,[23] the *Sharāi' al-Islām* recognized the right of pre-emption only in favour of co-sharers in an undivided property. Accordingly, under the *Ithnā 'Asharī Shī'a* law the right of pre-emption does not arise in favour of any person other than a co-sharer; nor when there are more co-sharers than two.[24]

(iv) *Ismāī'ilī law* : The *Ismā'īlī* school of Islamic law also specifically rejects vicinage as a basis of the right of pre-emption. Among the Muslims adhering to the law of this school, a neighbour's right to pre-emption is, therefore, unknown.[25]

Thus, it is only the *Hanafī* school which recognizes vicinage as one of the grounds for the right of pre-emption. To all other schools of Islamic law a *shafī' jār* is not acceptable. In recognizing a neighbour's right of pre-emption the *Hanafī* lawyers had the same considerations in mind on which the Supreme Court regarded the right of pre-emption on the basis of vicinage to have been based (in *Bhau Ram's* case), *viz.* to prevent strangers from entering into a particular fraternity. The *Hidāya* refers to pre-emption as "disseising another of his property merely in order to prevent apprehended inconveniences."[26] Also the fact that the right of pre-emption in the *Hanafī* law does not extend to large estates like villages shows that the rationale behind the rule was nothing but to avoid newcomers in a particular locality inhabited by people belonging to a particular group.

IV. Effect of modern trends on the Islamic law

Islam does not have a monolithic legal system; it has in its fold a number of schools and sub-schools of legal thought—all equally valid and respectable. And, if a legal principle of a certain school of Islamic law does not suit the conditions obtaining in a country where that school is followed in general, Islamic jurisprudence allows substitution of the corresponding rule of any other school.[27] There is, therefore, no reason why Muslims of India should insist on ahdering to the *Hanafī* law of pre-emption, shutting their eyes to the more progressive legal principles of the other schools of Islamic law. They must benefit by the freedom they have to replace the *Hanafī* law by the corresponding provisions of any other system of law within the framework of Islam. The principle of an exclusive application

23. Tyabji, *op. cit.* note 21 at 630.
24. Baillie, II *Digest of Moohammadan Law*, 175-179 (1875).
25. Fyzee, *op. cit.* note 18, referring to Qādī Nu'mān, II *Da'āim al-Islām*, 267.
26. Tyabji, *op. cit.* note 21 at 632, referring to *Hidāya*, 550, 558.
27. This is permissible under the legislative principle of *takhayyur*, which represents an ecclectic choice of legal principles from amongst those of the various schools of Islamic law.

of the *Hanafī* school to Indian Muslims, which creates hardship in several spheres of life, cannot last long. There is, in India, indeed a valuable precedent in this regard, namely, the Dissolution of Muslim Marriages Act 1939, under which the *Mālikī* law relating to married women's right to seek divorce in a court of law was adopted[28] and made applicable to all Muslims of India in replacement of the corresponding provisions of the various locally prevalent schools—both *Sunnī* as well as *Shī'a*.

In its decisions reviewed above the Supreme Court has suggested, in effect, that the rule of the *Hanafī* school which recognizes the right of pre-emption on the basis of a particular ground, *i.e.*, vicinage, does not agree with the social conditions now prevailing in India. Moreover, in striking down the right of pre-emption on the basis of vicinage the Supreme Court has given an indirect recognition to another rule of Islamic law itself, found in its schools other than that of the *Hanafīs* (more particularly the *Shāfi'ī* and *Shī'a* schools), under which the neighbour's right to claim pre-emption merely on the basis of vicinage is expressly or impliedly rejected.

It is well-known that four different schools of Islamic law, namely, *Hanafī*, *Shāfi'ī*, *Ithnā 'Asharī* and *Ismā'īlī*, prevail among the Muslims of India. The followers of the last three are not in the least affected by the judicial reform of the law of pre-emption under review, since the laws of these schools are themselves in agreement with the attitude now adopted by the courts in India. This atitude affects only the *Hanafī* Muslims—who, of course, constitute an overwhelming majority among the Muslims of this country.

V. Conclusion

The present author is of the opinion that the judicial reform of the law of pre-emption, recently introduced in India, is based on a realistic appraisal of the modern socio-economic conditions prevailing in this country. The *Hanafī* Muslims should, therefore, make an objective approach to the reasons and objects underlying this reform. Happily, the reasoning of the Indian judiciary in rejecting the right of pre-emption on the basis of vicinage is not altogether unknown to the law of Islam. It does find considerable support within the fabric of Islamic jurisprudence.

It is submitted that the *Hanafī* principle recognizing a neighbour's right to pre-emption may be lawfully abandoned in India and replaced by the *Shāfi'ī-Shī'ī* doctrine, which considerably restricts the right of pre-emption and never allows it on the ground of vicinage.[29]

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28. See Statement of Objects and Reasons issued with the Bill, V *Gazette of India*, 6 (1938).
29. *Supra* notes 21, 24.