RIGHT OF PRE-EMPTION IN MODERN SOCIAL CONDITIONS

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I. Pre-emption introduced in India

THE CONCEPT of pre-emption was, it appears, unknown to ancient Hindu law. The Hindu society, probably because of the strict legal rules of alienation and partition of ancestral property, did not need the help of pre-emption to preserve the unity of such properties. With the advent of the Muslim rule in India, pre-emption was introduced in this country, mainly in Northern India. It is generally accepted that the law and custom of pre-emption in British India had their origin in the Muslim law and that it was unknown here before the time of the Moghul rulers.[1] With the growth of Muslim influence in the country the custom of pre-emption became prevalent among the natives in several parts of India. Such customs, unless proved otherwise, were in agreement with the Muslim law of pre-emption.[2]

On the annexation of different regions of India, the English regime gave a guarantee to the people that in respect of personal and family matters they would be governed by their own laws. Act XII of 1887[3] provided:

> 1. Where in any suit or other proceedings, it is necessary for a civil court to decide any question regarding succession, inheritance, marriage, caste or any religious usage or institution, the Muhammadan law in cases where the parties are Muhammadans and the Hindu law in cases where the parties are Hindus shall from the rule of decision except in so far as such law has, by legislative enactment, been altered or abolished.[3]

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1. See the observation of Sir John Edge in *Digamber Singh* v. *Ahmed Syed Khan*, 37 All. 129, 140-41.
2. *Sonabashi Kuer* v. *Chaudhry Ramdeo*, A.I.R. 1951 Pat. 521.
3. S. 37.

2. In cases not provided for by sub-section 1 or by any other law for the time being in force, the court shall act according to justice, equity and good conscience.

This and the similar legal provisions provided authority for the recognition of personal laws and established customs and usages. Pre-emption was not specifically mentioned in Act XII of 1887 or, for that matter, in any of the earlier regulations and Acts making similar provisions. As the time passed, in some provinces and princely states the rules of pre-emption were put into the form of legislative enactments.[4] Rights of pre-emption were also stipulated by contract between sharers in certain villages. Thus, there are four grounds on one of which a claim to pre-emption may be founded :

(*a*) Muslim personal law,
(*b*) statute,
(*c*) custom, and
(*d*) private contract.

The Muslim law of pre-emption has been applied by the Indian courts on the ground of justice, equity and good conscience.[5] It is rather curious that on the same ground of equity, justice and good conscience, the Madras High Court refused to apply the law of pre-emption to Muslims, holding that it imposed unwarranted restrictions upon the liberty to transfer property.[6] In Bombay too, Batchelor, J. agreed with the view that pre-emption was opposed to justice, equity and good conscience and that rules of pre-emption placed a clog or fetter upon the freedom of sale, under the Transfer of Property Act and the Indian Contract Act.[7]

In those parts of India where there are statutory enactments providing for the right of pre-emption, the local citizens are, irrespective of their caste, creed or religion, governed by the provisions of the statutes. These provisions are, in certain respects different from those of the Muslim law of pre-emption.

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4. See Oudh Laws Act 1876; Punjab Pre-emption Act 1913; Agra Pre-emption Act 1922; Mewar Pre-emption Act 1922; Bhopal Pre-emption Act 1934; Gwalior Pre-emption Act 1922; J.&K. Right of Prior Purchase Act 1993 *F.* Alwar State Pre-emption Act 1946; Rewa State Pre-emption Act 1946, *etc.*
5. See Mahmood, J. in *Gobind Dayal* v. *Inayat Ullah* 7 All. 775 (F.B.) where an attempt was made to treat the rules of pre-emption as part of religious usage or institutions, the rules being based on the tradition of the Prophet's sayings and actions. But Patheram, C.J. and Oldfield, J., dissenting, held that the courts were not bound to administer Muslim law in claims of pre-emption and that they did so only on grounds of equity.
6. *Ibrahim Saib* v. *Muni Mir-ud-din*, 6 M.H.C.R. 26.
7. *Mahmood Beg* v. *Narayan* (1915) 40 Bom. 358.

The above brief history of the application of the law of pre-emption in India shows that:

(*i*) unlike the Muslim law of marriage and inheritance, *etc.*, the rules of Muslim law of pre-emption are nowhere expressly directed to be applied to Muslims;
(*ii*) in some parts of India, Muslim law of pre-emption is applicable on the grounds of justice, equity and good conscience; and
(*iii*) an appreciable number of Muslims in India are governed by the local statutory law of pre-emption and not by the Muslim law of pre-emption.

Though the textual Hindu law did not provide any rule of pre-emption, under section 22(1) of the Hindu Succession Act 1956 when two or more heirs specified in class I under the Schedule inherit an immovable property together, and any one of such heirs proposes to transfer his or her interest in the property, the other heirs shall have preferential right to acquire that interest. It seems the use of the expression 'transfer of his or her interest' may include transfers other than sales also. If more than one co-heir is willing to buy the interest transferred, it is provided that that heir who offers the highest consideration for the transfer shall be preferred.

II. Pre-emption in Muslim law

Justice Mahmood has defined pre-emption as a right which the owner of certain immovable property possesses as such, for the quiet enjoyment of immovable property, to obtain in substitution for the buyer's proprietary possession of certain other immovable property not his own, on such terms as those on which such latter immovable property is sold to another person.[8]

There are a number of Traditions relating to the right of pre-emption[9] All the schools of Muslim law accepted in principle the right of pre-emption but, following the different Traditions, came to different conclusions as

8. *Gobind Dayal* v. *Inayatullah* (1885) 7 All. 775, 799.
9. Some of these are :
   (1) A partner in the thing itself has a superior right to one who is only a partner in its appendages; and a partner in appendages of the property precedes a neighbour (The *Hidāya*, 548).
   (2) *Shuf'a* relates to a thing held in joint property, and which has not been divided off (*id.* at 548).
   (3) The right of *shuf'a* holds in a partner who has not divided off and taken separately his share (*ibid*).
   (4) A neighbour has a right, superior to that of a stranger, in the lands adjacent to his own (*ibid*).

regards the scope of the right. Therefore, the categories of persons having the right of pre-emption are not uniform under the various schools.

The *Hanafī* law, which is predominant amongst the Muslims of India, recognizes three categories of persons having right of pre-emption. They are, in order of priority : (*i*) a co-sharer in the property which is the subject of sale;[10] (*ii*) a participator in the amenities and appendages of the property;[11] and (*iii*) a neighbour owning an adjoining immovable property.[12] Under the *Shī'a* law, the right of pre-emption is of every narrow application and is restricted to co-owners in the undivided property and that also when their number is two; the right does not arise if there are more co-sharers than two[13]. It does not recognize the right on the ground of vicinage[14] or on the ground of participation in appendages. Under the *Shāfi'ī* law, the right of pre-emption is applicable only to the co-sharers; the other two classes of pre-emptors are not recognized.[15]

Pre-emption involves three parties—vendor, vendee and pre-emptor. No difficulty arises if all the three parties belong to the same school of Muslim law. The problematic situation is where the three parties involved in a claim of pre-emption belong to different schools of Muslim law. There is a difference of judicial opinion regarding claims of such a nature. If the vendor is not governed by the law under which pre-emption is claimed, the right cannot be allowed.[16] According to Allahabad[17] and Patna decisions,[18] the religion of the vendee is immaterial as regards the enforcement of the right of pre-emption, but the High Courts of Calcutta[19] and Bombay[20] have expressed contrary opinion. Where the vendor was a *Sunnī* and the pre-emptor a *Sh'īa*[21], or *vice versa*,[22] the Allahabad High Court, on principle of reciprocity, held that the right of pre-emption would be governed by the *Shī'a* law. The tendency of the Calcutta High Court is to apply *Sunnī* law on the ground that it is the *Hanafī* law of pre-emption which is in force in India, except when both the parties are *Shī'a*.[23] Under

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10. *Syed Ibrahim* v. *Syed Khan*, 95 I.C. 83.
11. *Karim* v. *Priyo Lal*, 28 All. 127.
12. *Aziz Ahmed* v. *Nazir Ahmed*, 50 All. 257.
13. *Hussain Buksh* v. *Mahfuzul Haq*, 47 All. 944.
14. *Gurhan* v. *Chote*, 22 All. 102.
15. The *Hidāya*, 548.
16. *Pir Khan* v. *Faiyaz Hussain*, (1914) 36 All. 488.
17. *Supra* note 8.
18. *Achutanand* v. *Biki Bibi*, 1922 Pat. 601.
19. *Kudratullah* v. *Mahini Mohan*, 13 W.R. 21 (F.B.).
20. *Sitaram* v. *Syed Sirajul Khan*, 41 Bom. 636.
21. *Supra* note 14.
22. *Supra* note 16.
23. *Jog Deb Singh* v. *Mahomed*, 32 Cal. 982.

the *Shī'a* law, pre-emption cannot be claimed by a non-Muslim where the vendee is a Muslim.[24]

In a multi-racial society like ours, governed by different personal laws, uncertainty as to the law applicable in disputes relating to the right of pre-emption is bound to lead to increased litigation. It is, therefore, desirable to have a uniform law.

The right of pre-emption under Muslim law is based on certain aims. It is said that since the rules of inheritance in Muslim law tend to disintegrate the family property, pre-emption is a necessary safeguard. It reduces the chances of litigation,[25] consolidates property and tends to increase production of wealth.[26] Another object of the rule is to prevent inconvenience which may result to families and communities from the introduction of a disagreeable stranger as a coparcener or neighbour.[27]

The right of pre-emption applies only to the transfer of immovable property by sale; it does not apply if the property is transferred under a gift, bequest[28], lease (even if a perpetual)[29] or mortgage (even if by way of conditional sale and with possession).[30]

The parties to a sale-transaction may lawfully resort to devices, which are not fraudulent or forbidden by law, to defeat the right of pre-emption or diminish the desire of the pre-emptor to avail himself of it.[31]

III. Need for a reconsideration

It is not doubted that the rules of pre-emption, so far as they provide means to save the family property from disintegration through the introduction of disagreeable strangers, has something good in it. But in the present-day society, especially in the urban areas, a disagreeable stranger may be introduced as the next-door neighbour or as a tenant; and there is no way to stop it.

Considering the transfers of property that are exempted from the provisions of the law of pre-emption and the devices that a seller may resort to, the privilege of pre-emption is set at naught. The inconveniences which are sought be avoided under pre-emptive right have become unavoidable in our times.

The law of pre-emption, specially the right of pre-emption arising from vicinage, has been disfavoured by the courts in modern India. In *Moti*

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24. Baille, 2 *Digest of Mohummudan Law*, 179, 180 (1887).
25. *Abdul Hakim* v. *Jan Mohd.*, A.I.R. 1951 All. 247, 248.
26. *Id.* at 249.
27. Garth, C.J. in *Lalla Naubat Lal* v. *Lall Jewan Lal*, 4 Cal. 831' 834 (F.B.).
28. *Jind Ram* v. *Hussain Baksu*, 49 P.R. 1914.
29. *Munni Lal* v. *Bishwanath*, A.I.R. 1968 S.C. 450.
30. *Dewantullah* v. *Kazeem Molla*, 15 Cal. 184.
31. For instances of such devices see Baillie, I *Digest of Moohammedan Law*, 512-14 (1875).

Bai v. *Kaudakari*,[32] an opinion was expressed that the Muslim law of pre-emption, which was the law of the state of Hyderabad before the commencement of the Constitution, was repugnant to the provisions of article 19(1)(*f*). The Supreme Court of India in more than one case has held that the claim of pre-emption on the ground of vicinage, whether under a custom (derived from the *Hanafi* law)[33] or under statute,[34] is void as it imposes unreasonable restriction on the rights guaranteed in article 19(1)(*f*) of the Constitution. It was pointed out that it placed restrictions both on the vendor and the vendee, and that there was no advantage to the general public; the only reason given in support of it being that it prevents persons belonging to different religions, races or castes from acquiring property in any area occupied by persons of other religions, races or castes, which could not be considered reasonable in view of article 15 of the Constitution.[35] Though in neither of the Supreme Court cases, the Muslim law of pre-emption applicable was directly involved, yet there is not an iota of doubt that the decision would be different if the parties were Muslims and the law applicable was the *Hanafī* law.

The judicial opinion in India is opposed to the rule of pre-emption, particularly in respect of urban immovable property, as is clear from the following observations:

(*i*) Pre-emption is an exceedingly feeble right and is not favoured by law.[36]

(*ii*) The right of pre-emption is a very weak right. It interferes with the freedom of contract and is opposed to progressive state of society.[37]

(*iii*) The right of pre-emption is a very special right. It displaces ordinary rights and places restrictions upon normal rights of property.[38]

(*iv*) It is a right of an extremely feeble nature solely and exclusively based upon the considerations of apprehended inconvenience to the pre-emptor. The result of the exercise of the right of *shuf'a* is generally adverse to public interest.[39]

(*v*) The state of society which necessitated the introduction of a right of pre-emption as a part of law was thus archaic. The society no longer exists in our cities, towns or urban areas. The isolated

32. A I.R. 1954 Hyd. 161, 163.
33. *Sant Ram* v. *Labh Singh*, A.I R. 1965 S.C. 314.
34. *Bhau Ram* v. *Baij Nath*, A.I R. 1962 S.C. 1476.
35. *Id.* at 1481.
36. *Abdul Rashid* v. *Mohd. Adris*, A.I R. 1946 Cal. 135.
37. *Dinga Singh* v. *Girwar Dutt*, A.I R. 1938 All. 191; *Badri Dutt* v. *Shri Krishan*, A.I.R. 1945 All. 94.
38. *Keshav* v. *Krishna*, A.I.R. 1939 Nag. 107.
39. Phear J. in *Nushrut Raza* v. *Umbulkhyer* 8 W.R. 309.

and the politically, economically, and socially independent village community has disappeared from our villages.[40]

A graphic description of the trial and tribulation of a vendor whose property is subject to a claim of pre-emption was given in the following words in *Raja Ram* v. *Bansi*:[41]

> Except under the pressure of necessity, land-owners, rarely part with their landed property. It is therefore, of the utmost moment to to them to obtain its fair value and without unreasonable delay. Now, in a village held by a number of co-sharers, it is almost impossible to obtain within reasonable time from every co-sharer an explicit refusal of an offer of sale or such evidence of the refusal as will thereby be incontrovertible. Not frequently when a co-sharer desires to sell his share and in fulfilment of the stipulation offers it to his co-sharer, some one or more of them will neither explicity accept nor decline the offer, but haggle to obtain it at a price far below its value. When the patience of the seller is exhausted or the urgency of his need no longer permits delay, he is driven to effect a sale with a stranger which is followed after the longest delay allowed by law by the institution of one or more suits to enforce the right of pre-emption. The stranger, aware of the risk to which his purchase is exposed either at once takes account of it by offering less than the property ought to fetch if it could be so free from the risk or retains a portion of the purchase money until it be seen whether the sale is contested, or if contested, the result be known. Fictitious considerations are entered in sale deed, fictitious payments made before the registering officers, fictitious receipts executed, and wholesale perjury committed on the one side or the other when the courts come to enquire into the prices actually paid.

During the last 25 years or so, great changes have taken place in the country. Independence and partition of India led to massive transfer of population in certain areas of the sub-continent, greatly affecting the 'blocks' of particular religions in the urban and rural areas. The Constitution of India has given to the people the freedom to acquire, hold and dispose of property.[42] Industrialization and consequential urbanization are fast arriving. The complexion of life has changed enormously, joint living is disappearing at a great speed from the present-day society; and people are feeling the need for change in the outmoded laws, enabling them to bring

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40. *Babu Lal* v. *Goverdhan Das*, A.I.R. 1956 M.B. 1,6.
41. 1 All. 207.
42. Art. 19(1)(*f*).

these in conformity with their changed outlook. Modernity is triumphing over mediaevalism. There is, in these circumstances, a great need for a re-thinking in respect of the Muslim law, especially the *Hanafī* law, of pre-emption. In a society where certain classes were privileged and preferred to live in groups and there was discrimination, on grounds of religion, race and caste, there might have been some utility in allowing persons to prevent a stranger from acquiring property in an area which had been populated by a particular fraternity or class of people. This has no place in the existing social conditions of India.

In the wake of changes in social and economic structure of the Indian society, some of the enactments recognizing right of pre-emption have been already mended. For instance in Punjab under the Punjab Pre-emption (Amendment) Act 1960, the right of pre-emption in respect of agricultural and village immovable property now vests in the heirs and co-sharers only.[43] A revolutionary change has been made regarding right of pre-emption in respect of urban immovable property. The amended section has done away with all the categories of persons having the right of pre-emption and instead now provides a right of pre-emption only to the tenant who holds under the tenancy of the vendor of the property sold or part thereof.[44] By a notification issued under section 8(2) of the Punjab Pre-emption Act 1913, no right of pre-emption is to exist with respect to urban and village immovable property or agricultural land when purchased by any member of the scheduled castes mentioned in Part X of the Schedule to the Constitution (Scheduled Castes) Order 1950.[45]

Thus the trends in judicial and legislative thinking are rightly leaning towards restricting the scope of the right of pre-emption, whether under Muslim law or under any custom or statute.

Almost all the states in India have passed legislation imposing ceilings on land-holdings and there is every prospect of legislation being passed in the very near-future putting restrictions on holding of urban immovable property. This legislation would further make the existing laws of pre-emption, including the Muslim law of pre-emption, less effective in practice.

In the context of changes in the Muslim law, the notion of the *Sharī'a* as a rigid and immutable system has been completely dispelled by legal developments in the Muslim world over the past few decades. In West Asia, Muslim family law, as applied by courts, has been successfully adapted to the needs and the temper of the modern society. If modifications in the field of family law can be accepted, it is still easier to modify the Muslim law of pre-emption which is applied in India only on grounds of justice,

43. S. 15.
44. S. 16.
45. The Punjab Gazette, Part I, Feb. 16, 1962.

equity and good conscience and not under the mandate of any statute. As such any legislative change brought about in this law should not hurt religious feelings and sentiments of any section of the Muslim community. Though this author does not see any reason for hesitation in adopting a uniform progressive policy applicable to all citizens of India irrespective of religion, caste or creed, yet if the society is not yet ready to take such a radical step, a beginning may be made by narrowing the gap in the law relating to pre-emption under different systems of law in India, namely, local statutes, customs, and the Muslim law, by separate measures. As regards Muslim law of pre-emption, as early as 1965 a Muslim lawyer had argued, with convincing points, that the modern judicial trends about pre-emption could be reconciled with Muslim law without violating its sanctity.[46] He made a plea for the abandonment of the *Hanafī* law of pre-emption and enforcement of the more liberal *Shāfi'ī* or *Shī'ī* law for all Muslims of India.[47] His suggestion deserves consideration.

To conclude, it is submitted that an attempt should be made to narrow down the scope of the various laws of pre-emption—customary, statutory and personal—so as to permit the right of pre-emption only to the co-sharer and the co-tenants of the immovable property, village or urban including agricultural land.

46. See Tahir Mahmood, 'Supreme Court Decisions on Pre-emption : Reconciliation with Muslim Law', I *S.C.J.* 94-97 (1965).
47. *Id.* at 96.