

PRE-EMPTION MEANING, NATURE, SCOPE UNDER MUSLIM LAW (SHUFA) AND WHO CAN CLAIM THE RIGHT

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INTRODUCTION

Origin

MEANING - In the words of Mulla, “The right of shufaa or pre-emption is a right which the owner of an immovable property possesses to acquire by purchase another immovable property which has been sold to another person”. The foundation of the right of pre-emption is the human desire to avoid the inconvenience and disturbance which is likely to be caused by the introduction of a stranger into the land.¹

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.²

The law of pre-emption under muslim religion is to be looked at in the light of the Muslim law of succession. Under Muslim law, death of a person results in the division of his property into fractions. If an heir is allowed to dispose of his share without offering it to other co-heirs, then it is likely to lead to the introduction of strangers into a part of the estate with resultant difficulties and inconveniences.

Sources of Pre-emption

¹ Article by Anshi Bhatnagar, <http://www.shareyouressays.com/knowledge/what-is-meant-by-pre-emption-and-when-it-arises-muslim-law/117418>

² *Gobind Dayal v. Inayatuliali* (1885) 7 All. 775, 799

1. Pre-emption is a part of Muslim Personal Law: In some parts of India, the pre-emption existed among some Muslims as part of their Personal law. Where the law of pre-emption is neither territorial, nor customary, it is applicable as between Muslims as part of their personal law. In *Audh Behari Singh v. Gajadhar Jaipuria*, the Supreme Court observed:

The law of pre-emption was introduced in India by the Muslims. There is no indication of any such conception in the Hindu law. During the period of Moghal Emperors the law of pre-emption was administered as a rule of common law of the land in those parts of the country which came under the domination of the Muslims and Zimmies (non-Muslims) no distinction being made in this respect between persons of different races and creeds. In course of time Hindus came to adopt pre-emption as a custom for reasons of convenience and the custom as largely to be found in provinces like Bihar and Gujarat which had once been integral parts of the Muslim Empire.”³

2. Pre-emption by Custom:

“Subject to any law which is in force for the time being, pre-emption may be claimed on the basis of a custom. In some parts of India, the law of pre-emption was based on custom. Though the custom has been confined, in some cases, to a particular locality, but the right, when based on custom becomes law for the place and all lands belonging thereto are subjected to the law irrespective of religion, nationality or domicile of owners. But this right is limited to the persons who are residing or are domicile in such places, and not to those who simply own the property in that place. When the custom is proved to exist in a certain place, it could not be extended to other places.”⁴

3. Pre-emption by Statutes:

“In some parts of India, the right of pre-emption existed under statutes. For example, in Oudh under the Oudh Laws Act, 1876, in Punjab under the Punjab Pre-emption Act, 1915, Agra Pre-emption Act, 1922, etc. In such areas, the law of pre-emption based on these statutes applies to both Muslims and non-Muslim. In such areas the Muslim law of pre-emption does not apply even to Muslims.”⁵

³ <https://www.scribd.com/doc/126718494/Pre-Emption-Muslim-Law>

⁴ Supra Note 5

⁵ Ibid

Nature of preemption under Muslim law

Personal Right:

“The Calcutta and Bombay High Courts have held that right of pre-emption is a personal right of the pre-emptor. These High Courts have held that it is merely a right of repurchase from the vendee who is treated as the full owner for all practical purposes till the right of pre-emption is exercised. The right comes into existence only when ownership of the adjacent property has completely passed on to the vendee i.e., when the sale is complete. Therefore, it is a personal right against the owner of another property. Similarly, the Bombay High Court had also held that the right was not an incident relating to property but an option which is exercised by a Muslim owner after the completion of a sale by owner of another property.”⁶

Pre-emption is Weak Right:

“The right of pre-emption is a weak right. Claim of pre-emption operates against the concept of ownership. In effect, the claim of pre-emption hints directly against the absolute right of a person to own and possess a property. In presence of this right, a bona fide purchaser has to give up his ownership compulsorily in favour of the pre-emptor. It may be stated, therefore, that pre-emption imposes a limitation or disability upon the ownership of a property merely on the ground of future possible inconvenience of the pre-emptor. As such, the right of pre-emption is feeble (weak) as well as defective right. This means that the right is transitory in nature. The right may be lost in the event of any slightest delay in its enforcement. Moreover, the right is defective in the sense that it may be defeated by all lawful means e.g. by showing that there was a gift or exchange and not a sale to the vendee.”⁷

Evolution

“The Muslim law of pre-emption has been applied by the Indian courts on the ground of justice, equity and good consciences. It is rather curious that on the same ground of equity, justice and good conscience⁸, 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. In

⁶ <http://www.shareyouressays.com/knowledge/what-is-the-nature-of-the-right-of-pre-emption/117469>

⁷ Ibid

⁸ *Gobind Dayal v. Inayat U/lah* 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

Bombay too, Batchelor, J. agreed with the view that pre-emption was opposed to justice, equity and good conscience and that rules of pre-emption⁹ placed a clog or fetter upon the freedom of sale, under the Transfer of Property Act and the Indian Contract Act”

Contemporary position

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 Bai v. Kaudakarir*¹⁰ 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 Hanafllawpa or under statute.¹¹

“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. 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.”¹²

“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

⁹ *Mahmood Beg v. NarayDI*(1915) 40 Bom, 358.

¹⁰ A I.R. 1954 Hyd. 161,163

¹¹ *Bhau Ram v. Daij Nallr*, A.I.R. 196::! S.C. 1476

¹² Baldev Kohli, RIGHT OF PRE.EMPTION IN MODERN SOCIAL CONDITIONS, Pg.

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.”¹³

When does the right arise?

The right of pre-emption arises only in case of sale and only when such sale is complete. It does not arise in cases of transfer of immovable property without consideration, such as by way of gift. But the transfer of property in lieu of mahr is treated as one for consideration and hence subject to pre-emption. So we take the two separately, as follows:—

(1) **Right arises only in case of sale.**—“The right of claiming pre-emption arises only when the property which is the subject of pre-emption has been subjected to a valid sale. An intention to sell can never be a ground for claiming the right. Such sale must be bona fide, Sale also includes exchange. However, it does not include gift, Sadaqa waqf, inheritance, bequest of a lease in perpetuity, i.e., in these cases a right cannot be claimed.”¹⁴

(2) **Right arises only when sale is complete.**—The right of making a claim of pre-emption arises when the sale is complete. Now the question arises as to when the sale is to be considered as complete. According to the Muslim Law, a sale is complete when the price is paid by the purchaser to the vendor and possession of the property is delivered by the vendor to the purchaser. The execution of an instrument of sale is not necessary According to the Transfer of Property Act, 1882, Section 54, a sale of property of the value of Rs. 100 and upwards is not complete unless made by a registered instrument. Formerly, there was controversy on the point when a sale would be regarded as complete. The view of the Allahabad High Court was that if a complete sale effected under Muslim Law as where the price is paid and possession is delivered, the right of pre-emption will arise, though the sale may not be complete under the Transfer of Property Act. On the other hand, the view of Calcutta and Patna High Courts was that the right of pre-emption does not arise until after registration as required by the Transfer of Property Act.

EVOLUTION OF PREEMPTION UNDER MUSLIM LAW

¹³ Tahir Mahmood, 'Supreme Court Decisions On Pre-emption: Reconciliation with Muslim Law', I S.C.I. 94-97 (1965)

¹⁴ Arun shookan ,Pre Emption Muslim Law

Analysis in Jurisprudential Context

The two primary sources of Islamic Law are the Quran and the Sunna. These two revealed legal sources have contained certain definitive legal rulings, which require no legal reasoning from the part of the jurist, rather need to be applied as they are. The Quran and the Sunna have also comprised legal contents, the implementation of which demands legal reasoning from the side of the jurist. This legal reasoning points to the maximum effort exerted by the jurist to interpret and apply the rules pertaining to the origins of jurisprudence.¹⁵

Islamic jurisprudence presents a strong connection between the ‘real’ and the ‘right’ where exercising personal reasoning ‘ijtihad’ in understanding Sharia often leads to the real legal ruling in God’s creation. Based on the foregoing, He claims that if the law is prescribed by Sharia, not only is the legal ruling derived from primary legal sources, but the right shall also be justified by way of a verdict clarifying the fact that has given rise to the law to be implemented in the given instance. Therefore, abduction, the contributor asserts, can offer an account for the nature of Islamic jurisprudence, its ramifications and its function of the tradition as being important factors of the logic of the legal system of Islam.

ANALYSIS ON INDIAN LEGAL PROVISION WITH JUDICIAL PRONOUNCEMENT

Study in light of Present Legal framework

“The Constitution now prohibits discrimination against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them under Art. 15 and guarantees a right to every citizen to acquire, hold and dispose of property, subject only to restrictions which may be reasonable and in the interests of the general public. Therefore, the law, of pre-emption based on vicinage was really meant to prevent strangers i.e. people belonging to different religion, race or caste, from acquiring property. Such division of society now into groups and exclusion of strangers from any locality cannot be considered reasonable, and the main reason therefore which sustained the law of pre-emption based on vicinage in previous times can have no force now and the law must be held to impose an unreasonable restriction on the right to acquire,

¹⁵ Rafat Y. Alwazna, *Islamic Law: Its Sources, Interpretation and the Translation of It into Laws Written in English*

hold and dispose of property as now guaranteed under Art. 19(1)(f), for, it is impossible to see such restrictions as reasonable and in the interests of the general public in the state of society in the present day.”¹⁶

To overcome or solve the problems occurring in our everyday life

“In Sant Ram & others V. Labh Singh & others (AIR 1965 SC 166) case, view was adopted and applied with regard to the claim on the ground of vicinage based on custom. It was held; “It is hardly necessary to go into ancient law to discover the sources of the law of pre-emption whether customary or the result of contract or statute. The statute law is concerned Bhau Ram’s case decides that a law of pre-emption based on vicinage is void. The reasons given by this court to hold statute law void apply equally to a custom.”¹⁷

Role of Judiciary

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:

1. Pre-emption is an exceedingly feeble right and is not favoured by law.¹⁸
2. 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.¹⁹
3. The right of pre-emption is a very special right. It displaces ordinary rights and places restrictions upon normal rights of property.²⁰
4. 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.²¹
5. 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.

COMPARATIVE & CRITICAL ANALYSIS OF PERSONAL LAW

¹⁶ Law of Pre-Emption (Justice (R) Shabbir Ahmed) pg. 22 and 23

¹⁷ (AIR 1965 SC 166)

¹⁸ Abdul Rashid v. Mohd. Adris, A.I.R. 1946 Cal. 135.

¹⁹ *Dlga Singh v. Girwar DULL*, A.I.R. 1938 All. 191; *Badri DULL v. Shri Krishan*, A.I.R. 1945 All. 94

²⁰ *Keshav v. Krishna*, A.I.R. 1939 Nag. 107

²¹ Phear J. in *Nushrut Raza v. Umbulkhyer* 8 W.R. 309.

Comparison between any two religion

UNDER HINDU LAW

“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.”²²

“Though the textual Hindu law did not provide any rule of preemption, 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 anyone 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.”²³

Comparison between India and other Countries

PREEMPTION IN BANGLADESH

In Bangladesh, the application of pre-emption was very familiar. With the change of time, the importance of pre-emption is somewhat reduced in present society due to mobiling lives. The provisions of present statutory laws, in a sense, discourage people to apply the right of pre-emption due to the rigid provisions introduced in 2006. It reduces the numbers of application for pre-emption in civil courts comparatively.”²⁴

“In Bangladesh there are three approaches as regards ‘Pre-emption’- one under the Muslim Law and another two under two existing laws- section 24 of the Non-agricultural Tenancy Act, 1949 (herein referred to as the NATA Act, 1949) and section 96 of the State Acquisition and

²² observation of Sir John Edge in *Dlgamber Singh v. Ahmed Syed Khan*, 37 All. 129, 140-41

²³ Supra Note 7

²⁴ The State Acquisition and Tenancy (Amendment) Act, 2006, (Act No. XXXIV of 2006)

Tenancy Act, 1950 (herein referred to as the SAT Act, 1950). Pre-emption of non-agricultural land is dealt under sec.24 while sec. 96 is for agricultural land. These legal approaches and present actual position of pre-emption will be focused in this paper. This article also shows the comparison between the statutory laws and Muslim law; clarifies changes introduced into the statutory laws and purposes behind the changes; determines the importance of the pre-emption in present mobilized society and gives some recommendation to implement the existing laws properly.”²⁵

Critical analysis of preemption under Muslim law

“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 to 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 Bai v. Kaudakarir*²⁶ 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 or under statute, is void as it imposes unreasonable restriction on the rights guaranteed in article 19(1)(f) of the Constitution.”²⁷

Who can claim pre-emption?

“The person who claims pre-emption is known as pre-emptor. A pre-emption may arise from the following categories of persons. Following three persons may be pre-emptor;

1. Co-sharer by Inheritance: A co-sharer is one who is an owner of an undivided share in the immovable property which was inherited previously from deceased person. In Arabic term this is known as *Shafi-i-Sharik*. A co-sharer by inheritance is entitled to claim for the right of pre-emption.

²⁵ Md. Milan Hossain, Pre-emption: Bangladesh Approach

²⁶ A.I.R. 1954 Hyd. 161,163.

²⁷ *Bhau Ram v. Daij Nallr*, A.I.R. 196::! S.C. 1476.

2. Participator in Immunities & Appendages: Participator in immunities & appendages means a person who is entitled to have a right of way over the disputed land or property. In Arabic term this is known as Shafi-i-Khalit. A participator in immunities and appendages is entitled to claim for the right of pre-emption.

There are three ways in which a person is entitled to have a right of pre-emption as Shafi-i-Khalit;

- i. He may be the owner of a dominant heritage,
- ii. He may be the owner of a servant's heritage,
- iii. The property sold as also the property of the pre-emptor may be dominant heritage in respect of a third person's property.

3. Owner of Adjoining Property: A person, who is neither co-sharer nor participator in immunities & appendages, is also entitled to have a right of pre-emption by being a owner of adjoining property. An owner of adjoining property may be by the way of purchase nearer to the disputed land or property. In Arabic term this is known as Shafi-i-Jar. An owner of adjoining property is also entitled to claim for the right of pre-emption.”²⁸

CONCLUSION

Shuf'ah means to combine, increase, or fortify and refers to the right of first refusal on the purchase of a jointly owned immovable property or neighboring property according to the Hanafi School. The pre-emptor combines what he owns by virtue of this right to his own property, thus increasing and fortifying it. 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.

SUGGESSTIONS/RECOMMENDATION

²⁸ <https://legalblogge.blogspot.com/2016/07/who-can-claim-pre-emption.html>

“Pre-emption is a right of co-sharer tenant of a holding. It was very familiar to the Indian sub-continent, the application of pre-emption is now very limited. In the present society, the significance of pre-emption has been reduced rapidly. Now the people are so much busy with their lives and their jobs; they have no enough time who come to the adjacent property. Some people still uses the opportunity of making an application for pre-emption, particular in agricultural land when necessity arises; they have to face some legal complexity and the party purchased the land and improved the land also. Under these circumstances, the following steps should be taken:

1. A seven days’ notice should be hanged over the land which will be proposed to sell.
2. A notice should be served after registration by the registered office with cost of purchaser. By this he can avoid subsequent complexity and he can improve his purchased land smoothly.
3. The maximum time limitation of application for pre-emption should be six months (present it three years).
4. Under amended sec. 96, a co-sharer tenant of holding by inheritance can only apply but such provision creates discrimination to the co-sharer tenant of holding by purchase (the problem has been explained in the point no. 2.2.8. of this paper). Such bar should be removed.
5. ADR should be introduced as compulsory to pre-emption process i.e. in order to bring a suit or an application for pre-emption one should first face ADR and then, in case of failure, ordinary process can apply.”²⁹

²⁹ Supra Note 19

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