

## Chapter Fifteen

### Pre-Emption (*Shuf'a*)

#### 1. Meaning and origin of Pre-emption or *Shuf'a*

This right of pre-emption or *Shuf'a* means the right possessed by one person to acquire an immovable property sold to another in preference to that other by paying a price equal to that settled, or paid by the latter. The law of pre-emption is based clearly on the texts of Islamic law and it is well-established doctrine. It was adopted in Islam to prevent the intrusion of a stranger among co-sharers and neighbours, because it may cause inconvenience and also injurious to that society.<sup>39</sup> The origin of pre-emption is found in a number of Hadith which are as follows.<sup>40</sup>

- (a) The right of *shuf'a* holds in a Partner who has not divided off and taken separately his share.
- (b) A neighbour has a right, superior to that of stranger, in the lands adjacent to his own.
- (c) The neighbour of a house and the neighbour of land has a superior right to those lands if he be absent, the seller must wait his return; provided, however, that they both participate in the same road.
- (d) It is morally objectionable, although not legally unlawful, to sell a property without offering it to the pre-emptor.

The law of preemption is essentially a part of Muslim law. It was introduced in India and given effect to by Muslim judges who were bound to administer Muslim law during Mughal period. During this period, it became the common law of the country and it was universally applied both to Muslims and Hindus.<sup>41</sup>

<sup>39</sup> Ameer Ali, *Muhammadan Law*, Vol. I, P. 712.

<sup>40</sup> Hedaya quoted these Hadith, P. 548.

<sup>41</sup> Asaf A.A. Fyzee, *Out lines of Muhammadan Law*, P. 334.

#### 2. Definition of Pre-emption

Pre-emption has been defined by different scholars differently. We cite a few of them.

(a) *Justice Mahmood defines*—“Pre-emption is a right which the owner of an immovable property possesses as such for the quiet enjoyment of that immovable property, to obtain, in substitution for the buyer, proprietary possession of certain other immovable property, nor his own, on such terms as those on which such latter immovable property is sold to another person.<sup>1</sup>

(b) *Shuf'a* or pre-emption, in the language of the law, signifies the becoming of proprietor of lands sold for the price at which the purchaser has bought them, although he be not consenting thereto.<sup>2</sup>

(c) The right of *shuf'a* or pre-emption is a right which the owner of an immovable property possesses to acquire by purchase another immovable property which had been sold to another person.<sup>3</sup>

(d) The literal meaning of pre-emption is conjunction. In law it is a right to take possession of a purchased parcel of land, for a similar (in kind and quality) of the price, that has been set on it to the purchaser.<sup>4</sup>

(e) The right of pre-emption is not a right to repurchase from the vendee, but it is a right of substitution, entitling the pre-emptor to stand in the shoes of the purchaser.

#### 3. Nature of right of pre-emption

Justice Mahmood in *Gobinda Dayal V. Inayetullah* case observes that Muslim law originates from the Quran and the Hadith of the Prophet and hence law and religion in Islam are intimately connected with each other. In this respect he cites the following Hadith—

“It is not lawful for any one to sell till he informs his coparcener (neighbour) who may take or leave it as he wishes, and if he has sold without such information, the coparcener has a preferential right to the

<sup>1</sup> Mahmood, J., in *Gobinda Dayal V. Inayetullah* case.

<sup>2</sup> Hedaya, P. 547.

<sup>3</sup> D.F. Mullah, *Principle of Muhammadan Law*, P. 255.

<sup>4</sup> Neil Baillie, *Digest of Moohammadan Law*, P. 475.

share." He further cites another Hadith relating to pre-emption, which is— "Pre-emption exists in all joint properties, whether land, or house, or grove. It is not proper for him (owner) to sell till he has offered it to his coparcener, who may take it or reject it; and if the vendor fails to do this, his coparcener has the preferential right to it until he is informed."

The law of pre-emption creates a legal servitude running with the land. Sale is not the actual cause of pre-emption, but it is the situation of the properties in question. The right to enforce the pre-emptor's right originates only after sale and not before. However, different High Courts of India differ from each other regarding the fact that whether this right is of personal nature of an incident of property. According to Calcutta and Bombay Highs Courts, it was a right to repurchase from the buyer, but Allahabad High Court held that it is an incident of property. The supreme Court of India accepted the latter opinion.<sup>5</sup>

#### 4. When the right of pre-emption arises

The right of pre-emption arises only when the contract transferring the right of property from the vendor to the vendee has become complete. So there shall be a complete sale in order to give rise to a right of pre-emption. A mere executory contract does not give rise to a right of pre-emption. Thus when a property is sold with a condition of option, no right of pre-emption arises. Similarly, the right does not take effect if a transfer is made under an invalid sale either before or after the vendee has obtained possession thereof.<sup>6</sup> The transaction amounting to a complete transfer will be determined on the principle of Muslim law and not on the Transfer of Property Act.

The right of pre-emption, therefore, arises in respect of property leased in perpetuity or mortgaged. The other condition is that the pre-emptor must possess immovable property. Further, there must be existence of relation between the pre-emptor and seller relating to land, i.e co-sharer.

<sup>5</sup> Syed Khalid Rashid, Muslim Law, P. 287.

<sup>6</sup> Ameer Ali, Muhammedan Law, Vol. I, P. 715.

#### 5. Relinquishment of the right of pre-emption or loss of the right of pre-emptor.

The right of pre-emptor may be lost due to the following three reasons:—

(i) *Acquiescence or waiver*- A person entitled to pre-empt loses his right if he expressly or impliedly relinquishes or waives it, or omits to assert immediately, and once relinquished, it cannot be asserted again.

(ii) *Death of pre-emptor*- The right of pre-emption is extinguished if the pre-emptor dies during the pendency of the suit, even if he made the two demands (*talabs*). This is the opinion of the *Hanafi* school. But *Shafei* and *Shia* schools are of opinion that the right to pre-empt devolves upon the pre-emptor's heirs proportionately.<sup>7</sup>

(iii) *Release*—The right of pre-emption is destroyed if there is a release for consideration to be paid to the pre-emptor. The right is not lost if there has been a refusal on the part of the pre-emptor to buy before the actual sale, nor by an unwillingness to make an offer to purchase the property after notice that the property was for sale.<sup>8</sup>

#### 6. Types of pre-emptors

According to Hanafi law, pre-emptors are of three types: (i) *Shafi-e-Sharik* (ii) *Shafi-e-Khalit* (iii) *Shafi-e-Jar*.

(i) *Shafi-e-Sharik* or co-sharer in property

A co-sharer is one who is an owner of an divided share in the property. Full ownership in the land pre-empted must be there. Thus when merely lease hold interest is sold, the right to pre-empt extinguishes. Faruque and Maruf, for example, are two sons of Faiz and as such are joint owners of a landed property by virtue of the law of inheritance after the death of their father. If Faruque sells his portion of the land to 'X', or Maruf to 'Y', Maruf or Faruque, respectively, have the right to pre-empt. But if only Faruque leases it to 'X', Maruf cannot claim any right of pre-emption.

<sup>7</sup> Asaf A.A. Fyze, Out lines of Muhammadan Law, P. 351.

<sup>8</sup> D.F. Mullah, Principles of Mahommedan Law, P. 220.

(ii) *Shafi-e-Khalit* (a participator in immunities and appendages

The terms *shafi-e-khalit* is meant a partner in the immunities and appendages of the property such as a right to water and roads. A person cannot claim as a *Shafi-e-Khalit* only when he has a right of easement over the property sold. The right extends only to the right of easement. Thus where a person has a right of way or flow of water over the property sold, he must be regarded as a partner in the appendages of the said property and to have the right of pre-emption in regard to it.<sup>9</sup> But where the two houses face the same public lane, there is no right of pre-emption. The right under *Khalit* or easement is limited to path or water only and therefore, it cannot be claimed on ground of easement of light or air. A person may be considered *Shafi-e-Khalit* in three ways<sup>10</sup> -

(a) he may be the owner of a dominant heritage, (b) he may be the owner of a servient heritage; (c) the property sold as also the property of the pre-emptor may be a dominant heritage in respect of a third person's property.

(iii) *Shafi-e-jar* or owner of an adjoining immovable property

Under this category, only the owner of a property can pre-empt, though he is not in possession. But a person in possession of a piece of land, not of his own or a tenant of an owner of land cannot exercise the right of pre-emption. Similarly, a *waqif* (dedicator) or *mutawalli* is not entitled to pre-empt on the ground that he is not the owner of *waqf* property.<sup>11</sup>

It is an established rule that the first class excludes the second, and the second excludes the third. Thus in case of competition between a co-sharer and a participator in immunities and appendages, the former will succeed and will entirely exclude the latter. Similarly, a sharer in appendages will be preferred to a neighbour.<sup>12</sup>

When two or more persons claim pre-emption as co-sharers or on the ground of participator in an appendage or an easement, for example, having a right of way through the property sold, all the pre-

<sup>9</sup> AIR 1946 Sind. 55.

<sup>10</sup> See Mullah, PP. 212-213, for detail.

<sup>11</sup> AIR 1952 All. 686.

<sup>12</sup> Asaf A.A. Fyzee, Outlines of Muhammedan Law, P. 343.

emptors have equal rights. The reason is this that Muslim law does not recognize degree of nearness in the same class of pre-emptors.<sup>13</sup>

### 7. Conflict of laws due to difference of religion or sect.

The law of pre-emption is applied differently due to difference in religion or sect among the vendor, vendee and pre-emptor. The following situation may arise:<sup>14</sup>

- (i) If all the parties are Muslims there is no problem and the law of pre-emption will be applicable.
- (ii) If all the parties are non-Muslims, the Muslim law does not apply.
- (iii) If the vendor (seller) and the vendee (buyer) are non-Muslims, but the pre-emptor is a Muslim, there is pre-emption.
- (iv) If the pre-emptor is a Hindu or non-Muslim, and the vendor and the vendee are non-Muslims pre-emption does not apply.
- (v) If the vendee is a Muslim, and the pre-emptor and the vendor are Hindus, there is no pre-emption.
- (vi) If the vendor is a Muslim, and the pre-emptor and the vendee are Hindus, no right of pre-emption arises.

The above rules are acceptable on the ground that Muslim law is a personal law and not the common law of the land and the rights and obligations, therefore, must be reciprocal.

But there is difference of judicial opinion if the pre-emptor and the vendor are Muslims and the vendee is a Hindu.

The Allahabad<sup>15</sup> and the Patna<sup>16</sup> High Courts held that the rights of the Muslim pre-emptor is not affected if the vendee is a non-Muslim (Hindu). But Calcutta High Court<sup>17</sup> held the view that if the vendee is a Hindu, a Muslim pre-emptor cannot enforce his right of pre-emption. It

<sup>13</sup> AIR 1946 Sind. 55.

<sup>14</sup> Asaf. A.A. Fyzee, Outlines of Muhammedan Law, PP. 337-338.

<sup>15</sup> Gobinda Dayal V. Inayetullah (1885)7 All. 775(F.B).

<sup>16</sup> AIR 1922 Pat. 601.

<sup>17</sup> Kudratullah V. Mohini Mohan (1869)4 Bengal LR 134.

was submitted that the first view was sound.<sup>18</sup> In *Bishan Singh V. Khazan Singh*<sup>19</sup> the Supreme Court of India adopted the view held by the Allahabad High Court, mentioned above, and the question is no longer open to doubt. In Bangladesh, the law of pre-emption is governed by the statutory laws.<sup>20</sup>

But in case of difference in sects, the following rule will be applicable:

- (a) If both the vendor and the pre-emptor belong to the same sect, *shiya* or *Sunni*, the right of the pre-emption is determined by the rules of that sect.
- (b) If the vendor is a *Sunni*, and the pre-emptor is a *Shia*, then *Shiya* law will apply according to Allahabad High Court.<sup>21</sup>
- (c) If the vendor is a *Shiya*, and the pre-emptor *Sunni*, then the *shiya* law shall apply according to Allahabad High Court,<sup>22</sup> but it is to be governed by the *shiya* law according to Calcutta High Court.<sup>23</sup>
- (d) The sect of the vendee (buyer) is not material in the above mentioned cases.<sup>24</sup>

### 8. Legal effects of pre-emption

- (i) On completion of the claim of pre-emption, the pre-emptor stands in the shoe of the buyer.
- (ii) If the sale has already been completed, the original buyer becomes the new vendor and the pre-emptor becomes the new one.
- (iii) The original buyer is entitled to receive or retain the rents and the profits of the land during the interval between the date of its sale to himself and the date of the transfer to the pre-emptor.

<sup>18</sup> Jog Deb V. Mahomed (1905) 32 Cal. 982.

<sup>19</sup> AIR (1958) S.C. 838, 840.

<sup>20</sup> The State Acquisition and Tenancy Act., 1950 and Non-Agricultural Tenancy Act, 1949.

<sup>21</sup> Pasha Begum V. Syed Sabber Haslen AIR (1956) Hyd. 676.

<sup>22</sup> Pin Khanna V. Faiyaz (1914) 36 All. 488.

<sup>23</sup> Jog Deb V. Mahomad (1905) 32 Cal. 982.

<sup>24</sup> Gobinda Dayat V. Inayetullah (Sup.)

- (iv) The pre-emptor is not liable to pay any contingent charges incurred by the buyer, such as brokerage or agency.
- (v) As the pre-emptor takes the property from the buyer and not from the seller, so the buyer must always be a party to the suit.
- (vi) The ownership in the property in question is transferred to the pre-emptor only when possession is given to him.
- (vii) The rights of the pre-emptor are not affected by any attempted disposition of the property by the buyer, nor by the death of the purchaser.
- (viii) The right of the pre-emptor is not affected in case of any change in terms of the sale after the completion of the contract of sale, for example, any improvement or deterioration of the land.

### 9. Formalities of demands (*Talabs*) for pre-emption

According to Hedaya, the right of pre-emption is but a feeble right, as it gives one the power of dis-seizing another of his property which he has acquired simply to prevent apprehended inconveniences.<sup>25</sup> The Muslim Law of pre-emption is a law of formalities and the existence of the right depends on the complete observance of formalities. If the formalities or ceremonies are incomplete or erroneous, the right of pre-emption becomes ineffective,<sup>26</sup> for the right to pre-empt involves the interference with one of the fundamental human rights like the right of freedom to make contract.

A person is not entitled to pre-empt unless he takes the proper steps at the proper time and observes the formalities necessary for conformation. These formalities are known as the three demands (*talabs*). The slightest delay to observe formalities will make the right frustrated.

<sup>25</sup> Hedaya, P.550.

<sup>26</sup> Asaf A.A. Fyzee, P.348.

The three demands or *talab* are the following:

**(i) The first demand (Talab-e-Muwasibat)**

A person who wants to exercise the right of pre-emption in respect of property which has been sold to another, must immediately, on receiving information of the sale, express in clear terms his intention to claim the property. He should rise and declare his intention then and there whether witnesses are present or not. This is called *Talab-e-muwasibat* or immediate demand.

The literal meaning of *muwasibat* is jumping. The idea is of a person who jumps from his seat being startled by a news of sale. No particular formula is necessary so long as the demand is asserted unequivocally. Thus if a man say, 'I have demanded or do demand pre-emption', it is lawful. In one case, a delay of 12 hours was considered too long. In another case, the right of pre-emption was denied to a man who, on hearing of a sale, entered his house, opened a chest and took money and then made the first demand.<sup>27</sup> This demand is based on the principle that the law requires extreme promptness and any calousness may defeat the claim of the pre-emptor. As to the degree of promptness, it has been said that when a pre-emptor receives information of a sale during the night, and is unable to go out and call upon witnesses to attest his demand, but does so as soon as it is morning, the demand is valid. So he should go out and make his demand in the morning as soon as people are stirring about their usual avocations.<sup>28</sup>

**(ii) The second demand (Talab-e-Ishad) or demand by invocation of witnesses.**

The pre-emptor must with the least practicable delay repeat before witnesses his demand, either (a) on the premises in dispute, or (b) in the presence of the vendor (if he is in possession) or (c) the vendee, calling on the two witnesses to bear the testimony. This demand is also known as *talab-e-taqrir*, the demand of confirmation.

There is no definite form for making this demand. The pre-emptor may say, "Such a person has bought such a house of which I am the

<sup>27</sup> Fyzee, P. 349.

<sup>28</sup> Wilson, Anglo-Muhammadan Law, P. 408.

pre-emptor (Shafi). I have already claimed my privilege of pre-emption (*shufa*) and now I again claim it: be you witnesses thereof."<sup>29</sup>

The pre-emptor may do it by means of a letter or a messenger or may depute an agent, if he is at a distance and cannot attend personally. If there are more than one buyer, the demand must be made to all of them, unless it is made on the premises, or in the presence of the vendor.

Sometimes the first two demands may be combined, provided the pre-emptor assembles two witnesses and makes the demands in presence of the vendor or vendee or on the premises.<sup>30</sup> It is not essential for the pre-emptor to enter into the house and make a demand. It is enough if he goes near the house and makes demand by touching the walls.

**(iii) The third demand (talab-e-tamlik)**

The third demand is practically legal action, which is only necessary when the first two demands are not conceded. The pre-emptor enforces his right by filing a suit. This action is known as *talab-e-tamlik* or *talab-e-Khusumat*. The suit must be filed within one year of the buyer taking possession of the property, if it is corporeal; or within one year of registration of the instrument of sale, if incorporeal.<sup>31</sup> The whole of property must be claimed in the suit. It is not sufficient to claim a part of the estate sold.

**10. Subject of pre-emption**

Generally only immovable property is considered as the subject of pre-emption. It is known from a Hadith which states that pre-emption is limited to only a mansion and a garden, thereafter the law expanded to houses and landed property. If the property in question consists of a share in a village or large estate, both co-sharer and neighbour can claim pre-emption.<sup>32</sup>

Under Hanafi law, pre-emption on indivisible property is not allowed. Some *Shia* authorities would allow pre-emption over movable property like apparel, utensils, animals, trees etc. pre-emption must be

<sup>29</sup> Hedaya, P. 551.

<sup>30</sup> AIR 1952 All. 167.

<sup>31</sup> Section 10, Limitation Act.

<sup>32</sup> Asaf A.A. Fyzee, P. 351.

claimed of the whole of the estate, because otherwise by breaking up the bargain, the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the buyer.<sup>33</sup> However, this rule is applicable only to those transactions which, while contained in one deed, cannot be broken up or separated. In case of sale of distinct properties by one contract, the pre-emptor may exercise his right in respect of any one leaving others. Similarly, if the pre-emptor is one of many, he may claim his rateable and tender the money. The right of a pre-emptor plaintiff is not affected if in a suit, to enforce his right, he joins with him a stranger.

### 11. Deposit of pre-emption money

A pre-emptor loses his right of pre-emption if he fails to deposit money within the time fixed by the court. But he would not be at fault if he deposited the money on the next day, provided he had been making genuine efforts to deposit it but failed due to some impediments placed by the court.<sup>34</sup> He is permitted to deposit it on the next day of the date fixed if the judge was absent on the last date. The application of the pre-emptor for extension of date may be dismissed by the court if he was given enough time to deposit the money.<sup>35</sup>

### 12. Period of limitation

A suit to enforce a right of pre-emption, whether the right is founded on law, or general usage, or special contract, must be instituted within one year from the time when the buyer takes physical possession of the whole of the property sold, or where the subject of sale does not admit of physical possession, when the instrument of sale is registered. This is in accordance with section 10 of Limitation Act, 1908. This Act, in fact, supersedes the Muslim law on the subject, which demands immediate response by the pre-emptor.

Where a suit for pre-emption was instituted on the very last day allowed by the limitation Act, but the plaint was subsequently amended in order to correct a mistake as to the quantity of land sold, it was held that the suit did thereby become time barred.<sup>36</sup>

<sup>33</sup> Sheobharas Rai V. Jiach (1886) 8 All. 462.

<sup>34</sup> PLD 1963 A.J.C.K. 15

<sup>35</sup> PLD 1967, B.J.I.

<sup>36</sup> Muhammad Sadiq, 33 All. 616(1911).

### 13. Evasion of law of pre-emption

Pre-emption is a predatory right. If the necessary conditions are fulfilled the courts give their approval to certain modes by which title can be modes by acquired, in case of difficulties in the way of the pre-emption.<sup>37</sup> Thus it follows that there is nothing illegal in a device to defeat the right of pre-emption. Pre-emption, therefore, can be defeated by legitimate devices like exchanges, gift.<sup>38</sup>

Mere concealment of sale does not constitute a fraud. There must be some evidence to establish affirmatively that the respondents had designed to prevent the discovery of the cause of action from the plaintiff. In pre-emption cases, intentional commission to notify the fact of sale to the pre-emptor is not amount to a fraud. But if the plaintiff raises an issue regarding the nature of transaction, its real nature, and after considering all circumstances, it may come to the conclusion that it is a real sale.

### 14. Statutory laws on pre-emption

In Indian sub-continent different enactments, regional and central, on pre-emption were passed to dispose of the suits relating to pre-emption. Some of these are as follows:

- (i) The Punjab pre-emption Act, 1913.
- (ii) North-West Frontier Province Pre-emption Act, 1950.
- (iii) The Oudh Laws (pre-emption) Act, 1876.
- (iv) The Partition Act, 1887.
- (v) The E.B. State Acquisition and Tenancy Act, 1950 (Section, 96)
- (vi) The Non-Agricultural Tenancy Act, 1949 (Section, 24)
- (vii) The Land Reforms Ordinance, 1984.

<sup>37</sup> 19 DLR SC. 136.

<sup>38</sup> PLD 1971 Pesh. 150(DB).