Mt. Girraj Kunwar vs Irfan Ali And Anr. on 12 September, 1951

Equivalent citations: AIR1952ALL686, AIR 1952 ALLAHABAD 686

JUDGMENT

Malik, C.J.

1. These two appeals arise out of two suits for pre-emption which were connected in the trial Court and were disposed of by one judgment. Suit No. 507 of 1943 was filed by Waqif Mausoma Syed Bisharat Ali and Suit No. 15 of 1944 was filed by Syed Irfan Ali, son of Syed Bisharat Ali. Suit No. 507 of 1943 was to preempt the sale of a house, by Faiyaz Hussain to Mt. Girraj Kunwar, on 3-12-1942, for Rs. 1,325.

The other Suit No. 15 of 1944 was to pre-empt the sale of a house by Abdul Hamid to the same rendee Mt. Girraj Kunwar on 28 8-1943, for Rs. 600.

2. To the east of the house in dispute in Suit No. 507 of 1943 and contiguous to it is the house belonging to the plaintiff (wakif) and to the south of the property in dispute in Suit No. 15 of 1944 and contiguous to it is the house belonging to Syed Irfan Ali, the plaintiff to that suit.

3. The main question for decision in Suit No. 607 of 1943, out of which Second Appeal No. 609 of 1947 has arisen, is whether the wakif can file a suit for pre-emption. The learned Munsif held that the waqif had no right to pre-empt, while the lower appellate Court has disagreed with that finding.

4. Learned counsel for the respondents was not able to cite before us any authority in support of the proposition that under the Mahomedan law a waqif has a right to pre-empt. It has been argued by Sri Jagdish Swarup on behalf of the appellant that the right of pre-emption takes away the ordinary right of the owner of the property of transferring it to whomsoever he likes. It is, therefore, for a plaintiff, who claims the right of pre-emption in derogation of the general right of transfer to establish that there is a law giving him the right to pre-empt.

5. The case relied upon by the lower appellate Court--Wakif Banam Khudawand Karim v. Rajkali, 1937 ALL. L.J. 1337--was a case for pre-emption under the Agra Pre-emption Act, 1922, and that decision cannot, therefore, be treated as an authority for the proposition that under the Mahomedan law a waqif has a right to pre-empt. No doubt the learned Judges observed that they saw no defect or difficulty in considering a Mahomedan waqif to be a juristic person and thought that the mutwalli could claim pre-emption on behalf of the waqf, their attention does not appear to have been drawn to certain authorities which clearly laid down that mutwalli had no right to pre-empt.

6. The Punjab Chief Court in Jindu Ram v. Hussain Baksh, 24 Ind. Cas. 100 (Lah.) held that the mutwalli of a mosque was competent to claim pre-emption on behalf of and for the benefit of a

mosque. The case was, however, under the Punjab Pre-emption Act (II 2. of 1905) and is, therefore, not of much assistance. Various authorities were cited and discussed, but the learned Judges following certain previous decisions held that a mosque was a juristic person and the mutwalli of the mosque had a right to claim pre-emption,

7. The authorities are clear on the point that a waqif or a mutwalli or a beneficiary has no such right under the Mahomedan law:

8. In Baillie's Digest of Muhammadan Law, vol. I, at page 474, the following pissige oncurs:

> "When it is said that akar are proper objects of the right of pre-emption, it is by virtue of a right of milk, or ownership they are so. Hence, if a mansion were sold by the Bide of a waqf ,the appropriator would have no right of pre-emption; nor could the mutawalli or Superintendent take it under that right."

In The Durrul Mukhtar by B. M. Dayal, 1st Edn. at page 385 it is stated :

> "Bight of pre-emption does not arise in respect of endowed property nor in favour of endowed property--the nawazil; nor in properties adjoining it--the Sharh-i-Majma and the Khaniah as opposed to what is held in the Khulasa and the Bazzaziah.
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> Khairuddin Ramali thinks that by non-existence of the right of pre-emption in respect of properties adjoining a waqf property is meant that one cannot acquire it on the strength of the endowed property, and those who hold that the right of pre emption exists in properties adjoining endowed property mean that that endowed property can itself be acquired (by pre-emption) when it is sold. In the Faiz it is mentioned that the right of pre emption depends on the validity of the sale. What the Ramali has said is that in an endowed property which can never become private property there is no right of pre-emption, but if it can ever become private property there would arise the right of pre emption in respect thereof. When some property adjoining an endowed property is Bold or when some of the property sold is private and the rest endowed and the private part of it is sold, the endowment has no right of preemption."

Again, in Tyabji's Muhammadan Law, Edn. 3 at p. 711 the learned author has said :

> "Part of a land is waqf, and the other part belongs to S, who sells it to B. Neither the Mutwalli nor the beneficiary under the waqf, not even if he be a single individual' can pre-empt. If a mansion by the side of a waqf were sold, the wakif would have no claim to pre-emptor the mutwalli or superintendent. These two statements are from Shia and Sunni texts respectively. But under the Punjab Pre-emption Act II of 1905, the muttwalli could pre-empt."

In Fatwa Alamgiri, vol. VIII, p. 185, it is clearly provided that on the sale of the property contiguous to a waqf property there is no right of preemption in favour of the mutwalli or beneficiary. See also The Law of Pre-emption by Dr. M. L. Agarwala, 1942 Edn. p. 88 where some original texts have been quoted and discussed.

9. I am, therefore, of the opinion that, in accordance with the principles of Mahomedan law neither a mutwalli nor a waqif nor a beneficiary is entitled to claim pre-emption, and the cases mentioned above are distinguishable as they were not cases for pre-emption arising under the Mahomedan law.

10. The next question for consideration is whether a claim for pre-emption can be made on behalf of a waqf and suits filed for the benefit of the waqf in the name of the waqif or in the name of God Almighty in whom the waqf property is vested.

11. It is well settled that a suit for pre-emption can be filed by a person who is the owner of the adjoining building or a co-sharer in the house sold or the owner of a building with respect to which the right to share the immunities or appendages is claimed. It is not necessary to multiply authorities but I may usefully refer to the case of Sakina Bibi v. Amiran, 10 ALL. 472 where dealing with this point Mahmood J., said:

> " .... it is clear that what is intended to be conveyed by the author of the Hedaya was that, in what I may call the pre-emptive tenement, the pre emptor should have vested ownership and not a mere expectancy of inheritance or a reversionary right, or any other kind of contingent right, or any interest which falls short of full ownership."

Whatever might have been the view at one time and even though the property made a waqf of might have been deemed to be merely tied up the law is now well settled that the waqf property is deemed to be vested in God. The views of Abu Yusuf and Muhammad as against the views of Abu Hanifa have prevailed that waqf signifies the extinction of the appropriator's ownership in the thing dedicated and the detention of the thing in the implied ownership of God, in such a manner that its profits may revert to or be applied 'for the benefit of mankind.' It was urged by learned counsel that there is no bar against God claiming pre-emption with reference [to the waqf property which vests in him. The conception of God being impleaded as a party in a claim before a Qazi is so foreign to Muslim religion and Muslim jurisprudence that it may be on that account that Muslim jurists have nowhere discussed the question whether a suit for pre-emption can be filed on behalf of God Almighty, though they made it clear that the waqif, the mutwalli and the beneficiary will have no such right. In the Islamic system God alone has supreme legislative power and he promulgates His laws on this earth from time to time through His messengers (rasul) and prophets (anbiya). It is contrary to the principles of that system that God should figure as a party 1itigant, either as plaintiff or defendant.

12. The next question for Consideration is whether waqif as such can claim pre-emption. It is doubtful whether a Muslim waqif can be treated as a juristic person. In the absence of full arguments on the point, I would not like to express any definite opinion though as at present advised I am inclined to the view that it is not. The point was left open by their Lordships of the

Judicial Committee in the Shahid Ganj Mosque case. Moreover as stated by me above a suit for preemption can be filed only by a shafi, and shafi under the Mahomedan law must be the owner of the property on the basis of which he puts forward his claim for pre-emption. The waqif property not being vested in the waqif as such but in God, no claim for pre-emption can be made on behalf of the waqif even if it were to be treated as a juristic person, on which latter point I express no opinion. In Masjid Shahid Ganj v. Shiromani Gurudwara Parbandhak Committee, Amritsar, I.L.R. (1940) 21 Lah. 493, their Lordship expressed the opinion that "The right of suit by the mutwalli or other manager or by any person entitled to a benefit (whether individually or as a member of the public or merely in common with certain other persons) seems hitherto to have been found sufficient for the purpose of maintaining Mahomedan endowments. At best the institution is but a caput mortuum, and some human agency is always required to take delivery of property and to apply it to the intended purposes."

The Mahomedan law having provided that the 'human agency' the mutwalli is not competent to claim pre-emption, nor can suoh claim be made by the waqif or the beneficiary the result must be that a waqf cannot pre-empt.

13. The Muhammadan law of Pre-emption is very technical and has to be strictly applied. It is not possible to widen its scope. As I have already said, there seems to be no justification for holding that under the Muhammadan law a waqif has a right to file a suit for pre-emption. If anything, the views contained in the Durrul Mukhtar and in Baillie's Digest of Muhammadan Law are to the contrary. With great respect to the learned Judges who decided that case I am not prepared to accept the obiter dicta in Waqf Banam Khudawand Karim v. Rajkali, (1937 ALL. L. J. 1337) as laying down the correct law or as being binding on this Court.

14. On the finding that the waqif has no right to file a suit; for pre-emption, Second Appeal No. 609 of 1947 must be allowed and Suit No. 507 of 1943 dismissed with costs in all the Courts.

15. Suit No. 15 of 1944 was, as I have already said, filed by Syed Irfan Ali. The suit was dismissed by the trial Court on the ground that the talabs were not duly performed. The lower appellate Court has, however, set aside the finding of the trial Court on the point. There was a dispute as regards the amount spent by the vendee on improvements. The lower appellate Court found that the amount so spent was Rs. 50 and allowed pre eruption on payment of Es. 650. The result, however, of dismissing the suit filed on behalf of the waqif is that Mt. Girraj Kunwar becomes Shafi-e-jar of the property in suit on the date of the sale. It is not denied that Syed Irfan Ali is also a Shafi-e-jar. Suit No. 15 of 1944 will, therefore, have to be decreed to the extent of half, the sale being to a Shafi of an equal degree.

16. I would, therefore, allow Second Appeal No. 608 of 1947 in part and modify the decree of the lower appellate Court and decree the plaintiff's suit to the extent of half of the property in suit on payment of Rs. 325 within two months from this date. The plaintiff is to get half of his costs in all the Courts and the defendant appellant is entitled to get half of her costs in all the Courts. In case the plaintiff fails to deposit the sum of Rs. 325 within the time allowed, the suit shall stand dismissed with costs in all the Courts.

Wali Ullah, J.

17. I agree to the order proposed to be passed in the two appeals. I, however, desire to deal with the main question of law raised in these cases.

18. The main question of law which calls for decision in second Appeal No. 609 of 1947, which has arisen out of suit No. 507 of 1943, is whether, under Mohammedan Law, a waqf estate is entitled to claim pre-emption. In the course of arguments addressed to us, no decision of any Court bearing directly on the point has been brought to our notice, nor have we been able to lay our hands on any such decision. Certain decisions, including one of our own Court, have no doubt been cited before us, but they do not directly help us in the determination of the question raised. I shall, however, briefly refer to these cases after I have discussed some of the authoritative texts of Mohammedan law which seem to have a bearing on this question.

19. Learned counsel for the appellant has invited our attention to Baillie's Digest of Mohammedan Law, (Hanifeea) Part I, (1866) 1st Edn., pp. 473 and 474, and has contended on the strength of those passages that there is no such right of pre-emption recognized by Mohammedan law. At page 473, it is stated :

> "There must be milk or ownership of the Shufee, or pre-emptor, at the time of the purchase, in the mansion on account of which he claims the right of pre-emption. So that he has no right on account of a mansion of which he is merely the tenant for hire, or that he has sold before the purchase, or has converted into a Musjid, or place of worship."

20. This passage, to my mind, does not, in any way, help the contention of the learned counsel, for it is plain that here the author is only dealing with one of the essentials of the Mohammedan Law of Pre-emption viz. that the right of pre-emption accrues by reason of milk or ownership only. As soon as the owner e.g. of a mansion, converts it into a masjid, or a place of worship, the milk i.e. ownership passes out of him and becomes vested in God Almighty. Obviously, thereafter, the owner can claim no right of preemption in case a neighbouring mansion is sold by its owner.

21. The next passage is at page 474, where it is stated :

> "When it is said that akar are proper objects of the right of pre-emption, it is by virtue of a right of milk, or ownership, that they are so. Hence, if a mansion were sold by the side of a wakf, the appropriate would have no right of pre-emption; nor could the mootuwulee or superintendent, take it under that right. And though a mansion were appropriated for the benefit of a private individual, he could found no right of pre-emption on account of it."

22. Here again, to me it is obvious that what is being discussed and emphasized is the fact that it is milk i.e. ownership that provides the foundation for the exercise of a right of pre-emption. As soon as an appropriation e.g. of a mansion, has been made, the milk or ownership, goes out of the

appropriator. Thereafter he can no longer claim a right of pre-emption. Similarly, the mutawalli or superintendent cannot claim pre-emption for, as mutawalli, he does not hold the milk or ownership in the property, appropriated. For the same reason, the beneficiary of a waqf even though he be a private individual, cannot olaim pre-emption as the milk i.e. the ownership of the property, is not vested in him. It may be noted in passing that in the foot-note at p. 474, in Baillie's Digest, the reason why the appropriator has no right of pre-emption is given. It is because he is not the proprietor.

23. Again, in Baillie's Digest of Mohammedan Law, Part II, (Imameea) at pages 177 and 178, it is laid down :

> "If a mansion should be partly wakf, or appropriated to pious or charitable purposes, and partly free, and the latter portion of it is sold, the person entitled to the benefit of the appropriation has no right of pre-emption, not even if he be a single individual, because he is not the proprietor of the substance of the wakf and is entitled only to its usufruct."

24. None of the passages from Baillie's Digest referred to above, to my mind, throws any light on the crucial question which we have to decide in this case.

25. Next, I may refer to Tyabji's Muhammadan Law of Pre-emption, (1940) Edn. 3. Dealing with the question of the title of the pre-emptor, and in particular with the effect of partition affecting the community of interest of the pre-emptor, the learned author, at p. 711, gives certain illustrations. Illustration No. 3 runs thus :

> "Part of a land is wakf and the other part belongs to S. who sells it to B. Neither the mutawalli nor the beneficiary under the wakf' " not even if he be a single individual, can" pre-empt. If a mansion by the side of a wakf ware sold, the wakif would have no claim to preempt; nor the mutawalli or superintendent. These two statements are from Shia and Sunni texts respectively. But under the Punjab Pre-emption Act, II [2] of 1905 Section 13(1) (seventhly), the mutawalli could pre-empt."

26. From the references given by the learned author in the foot-note, it is clear that he has based this illustration entirely upon the extracts from Baillie's Digest, which I have quoted above. It follows, therefore, that no real help is to be derived from this quotation from Tyabji's book. No other passage from this book has been brought to our notice.

27. Next, I may refer to the Fatawa-i-Alam-giri (Kitab-al-Shuf'a) translated by Al-Haj Mam-medullah ibn S. Jung, chapter 1, dealing inter alia with the conditions on which the right of pre-emption is founded. It is stated at p. 46 :

> "At the time of the sale there must be milk i. e, ownership of the pre-emptor in some property by reason of which he claims the right of pre-emption, the pre-emptor has no right by reason of a mansion of which he is merely an occupier whether a tenant

> on hire or on ariat nor will he have a right of pre-emption if he had sold this property before this transaction, nor if he has converted it into a masjid."

28. Again, it is stated at p. 52 :

> "And it is according to Chapters of Adab-ul Qazi of Imam Khisaf'a Book of Pre-emption that right of preemption accrues by reason of milk i.e. ownership only; hence if a mansion was sold by the side of a waqf property, the waqif would have no right; nor could the mutawalli pre-empt the sale. This is according to the Fatewa-i-Kafiyah of Abul Lais. And according to the Muhit, if a mansion was made waqf for the benefit of a private individual then also he has no right of preemption by reason of the waqf property."

29. The extracts from Baillie's Digest, Part I, reproduced above appear to be based upon this passage from the Fatawa-i-Alamgiri. In any case, here, as there, it seems to me that the principle laid down is that the pre-emptor must have in him vested the milk i.e. the ownership of the property, by reason of which pre-emption is claimed.

30. Next, I refer to the Fatawa-i-Kazi Khan In the chapter dealing with the classes of pre-emptors, in para. 54, the learned author states :

> "There is no pre-emption in endowments, waqf neither the mutawalli nor the beneficiary ia entitled to the right of pre emption."

31. The expression "There is no pre-emption in endowments, waqf" might mean one of two things : (i) appropriation or endowment gives rise to no right of pre-emption and (ii) there is no right of pre-emption when the waqf property is sold. The original text i.e., la shafata phil waqf, however, would appear to mean that there is no right of pre-emption when some property is appropriated i. e. is endowed as a waqf. If the expression in question be taken in that sense alone, it seems to me that this passage of the Fatawa-i-Kazi Khan, otherwise known as "the khaneea," throws no more light on the crucial question than we get from the statements of the law as contained in the extracts from the Fatawa-i-Alamgiri or from Baillie's Digest referred to above. Obviously, there can be no right of pre-emption except in the case of a completed sale; and obviously there is no sale when an appropriation is made. If the other meaning be assigned to this expression then obviously the right of preemption can spring into existence only in the event of a valid sale of the waqf property. According to one view, a valid sale of certain kinds of waqf property was permissible at one time under the Muslim law. In a case of that character a valid sale of waqf property being permissible, the right of pre emption might be available, but in case the waqf property cannot be validly sold, there would be no right of pre-emption.

32. Next, I refer to the Durrul Mukhtar, the well known commentary on 'the Tanwirul Absar.' I may state in passing that this book was written in the year 1070 Hijri by Sheikh Mohommad Allauddin son of Sheikh Ali, Haskafi, who was Mufti at Damascus for a long time. The learned commentator has incorporated the Arabic text of the Tanwirul Absar in his commentary. In the translation of the

Durrul Mukhtar by Brij Mohan Dayal to which I am referring here, the Arabic text, taken from the Tanwirul Absar, and incorporated in the commentary, is printed within brackets in this edition and in the corresponding English translation it is printed in thick type in this book In the Durrul Mukhtar by Brij Mohan Dayal, at p. 385, the law is stated thus:

> "Bight of pre-emption does not arise in respect of endowed property, nor in favour of endowed property --the Nawazil; nor in properties adjoining it--the Sharh-i-majma and the Khaniah as opposed to what is held in the Khulasa and in the Bazzaziah,"
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> "Khairuddin Ramali thinks that by non-existence of the right of pre-emption in respect of properties adjoining a waqf property is meant that one cannot acquire it on the strength of the endowed property, and those who hold that the right of pre-emption exists in properties adjoining endowed property mean that that endowed property can itself be acquired (by pre-emption) when it is sold. In the Faiz, it is mentioned that the right of preemption depends on the validity of the sale. What the Ramali has said is that in endowed property which cart never become private property, there is no right of preemption, but if it can ever become private property there would arise the right of pre-emption in respect thereof. When some property adjoining an endowed property is sold, or when some of the property sold is private and the rest endowed and the private part of it is sold, the endowment has no right of pre-emption."

33. The expression: "Bight of pre-emption does not arise in respect of endowed property i.e. as regards the endowed property" has been bodily taken from the Tanwirul Absar and, by itself, it seems to me, it throws as little light on the crucial question which we have to decide, as a similar expression which occurs in the extract from the Fatawa i-Eazi Khan, reproduced in an earlier part of this judgment. But the expressions, "nor in favour of endowed property" and "nor in properties adjoining it," would clearly indicate that there is no right of pre-emption in favour of the endowment i.e., waqf estate, when an adjoining property is sold. I may note here that the English translation by Brij Mohan Dayal, quoted above, does not fully reproduce the much fuller discussion of these points in the original text of the Durrul Mukhtar.

34. A reference to the original text of the Durrul Mukhtar would make it clear that the apparent conflict between the texts of the Sharh-i-majma and the Khania on the one hand, and that of the Khulasa and the Bazzaziah on the other, was due to this fact: the Khulasa and the Bazzezlah were stating the law of pre- emption in regard to that variety of waqf, then recognized by the Muslim law, in which waqf property could be validly sold and was thus capable of again assuming the character of private property; while the view expressed in the Sharh-i-majma and the Khania proceeded on the footing that the waqf property could not be validly sold. The last sentence of the extract reproduced above would, however, clearly show that, according to the author of the Durrul Mukhtar, when some property adjoining a waqf property is sold, the waqf estate has no right of pre-emption. Lastly, it may be observed that it appears from the same extract that there is no right of pre-emption either in respect of, or for an endowed property, if the endowed property, i.e., the wakf estate, is such that it can never become private property. On the other hand, if it can ever become private

property e.g. by means of a valid sale permitted by the law, there would arise a right of pre-emption in respect of it.

35. Next, I refer to the Baddul Mukhtar, the well known commentary on the Durrul Mukhtar, by Sheikh Mohammad Amin known as Ibn Abdin Shami. This is a very well known and authoritative commentary written in the last quarter of the nineteenth century. In the words of Dr. Nicolas P. Aghnides of Columbia University--"this work may be said to be the last word in the authoritative interpretation of Hanifite law. It shows originality in attempting to determine the status of present practical situations, as a rule, shunned by others. Author shows a complete mastery of his subject. Very much used in Turkey, less in India:" vide p. 183, Mohammedan Theories of Finance with an introduction to Mohammedan Law and a Bibliography.

In the fifth volume of the Raddul Mukhtar, in Kitab-al Shuf'a i.e., the chapter dealing with pre-emption, at pages 194 and 195 there is a very full discussion of the tests of Durrul Mukhtar dealing with this question. The learned commentator has discussed in great detail the significance of each one of the expressions contained in the Arabic text of the Durrul Mukhtar. In the first place he has explained that the expression "right of pre-emption does not arise in respect of endowed property" really means the right of preemption does not arise when endowed property is sold. He has explained further that when a valid sale of endowed property be not possible under the law, there is no right of pre-emption in respect of it, nor is there any right of preemption if a property adjoining the waqf estate is sold. The learned commentator has critically examined the apparent conflict between the Khulasa and the Bazzaziah on the one hand and Sharh-i-majma and the Khania on the other and has shown that, in the first place, the texts of the Bazzaziah and the Khulasa, which stated that there was a right of pre-emption in property adjoining a waqf estate, were not quite accurate. In the second place, he has shown that, even if the current texts of the Khulasa and the Bazzaziah be considered to be correct, and it be held that, according to those authors, "there is a right of pre-emption in respect of an adjoining property," such a statement of the law must be strictly confined to the case of a waqf where the endowed property is capable of private ownership: in other words that it must be confined to the ease of a waqf in which sale of the waqf property is permissible according to law. It is in this way that the learned commentator has endeavoured to reconcile the two apparently conflicting views as mentioned in the Durrul Mukhtar.

36. On a consideration of the extract from the Durrul Mukhtar reproduced above as also of the discussion of the same topic in the Raddul Mukhtar, as indicated above, it is, in my view, clearly eatablished: (i) that a waqf estate has no right to claim pre-emption when an adjoining property e.g. an adjoining mansion, is sold, provided the waqf is of a kind in which the endowed property cannot be validly sold according to Mohammedan Law; (ii) in case a waqf estate be capable of a valid sale, such a sale will itself be subject to a right of pre-emption. Further such a waqf can claim a right of pre-emption in case a property adjacent to it is sold.

37. As explained in the extract from the Durrul Mukhtar, quoted above, it seems to me that the principle underlying this statement of the law is that there must be a reciprocity between the two estates before either of them can claim a right to pre-empt the sale of the other. In other words, it seems to me that the governing principle underlying this branch of the law as laid down by the

jurists is that a waqf property, normally speaking, being incapable of a valid sale, there can be no pre-emption by the owner of the adjacent property for the simple reason that the sale sought to be pre- empted is not valid in law. That being the position, on the sale of a property adjoining a waqf estate, the waqf estate is not permitted by the law to exercise the right of pre-emption for were it otherwise, the principle of reciprocity would be violated. If this principle be kept in mind, the apparent conflict between the view taken by the Sharh-i-majma and the Khania on the one hand and the contrary view taken by the Khulasa and the Bazzaziah on the other, would be fully explained.

38. In the Mohammedan Law of waqf which is enforced in this country, there is, ordinarily speaking, no question of a valid sale of endowed property. Only in exceptional circumstances, with the permission of the civil Court, a mutawalli may dispose of some portion of waqf property in order to carry out the objects of the waqf. Such being the position, a further reason for not allowing pre emption in favour of a waqf estate may be that the mutawalli i.e., the Superintendent of the waqf, is not authorised to apply the income of the waqf property for mere improvements e.g., for acquiring new property. He has to apply the income strictly for the purposes of the waqf including, of course, the maintenance and repairs of the property. Reference may be made to Hedaya p. 236, column 2, Baillie Part 1, p. 602, para 2 and Tyabji's Muhammadan Law, (1940) 3rd Edn. para. 469 at p. 570. If then pre-emption were allowed in favour of a waqf estate how would the mutawalli be in a position to pay for acquiring that property ?

39. For the reasons given above, I have reach ed the conclusion that, at the present day, a waqf estate is not competent, under the Mohammedan Law, to claim a right of pre-emption, in the case of a sale of an adjoining property.

40. Some arguments were addressed to us on the question whether a waqf estate i.e. an endowment, could be looked upon as a juristic person. In view of what has gone before, it is not necessary to decide this question. I may, however, briefly discuss this question with reference to the authorities cited before us. According to the settled law, the ownership in the waqf property vests in God Almighty. The question whether a mosque was a juristic person and thus capable of suing or being sued in a Court of law was discussed, but not decided -- rather left open by the Judicial Committee of the Privy Council in the well known case of Shahidganj Mosque, (I.L.R. (1940) Lah. 493). The question whether the idea of a juristic personality had occurred to Mohammedan jurists has been considered by Abdur Rahim in his "Mohammedan Jurisprudence." The learned author observes at p. 218:

> "It may be doubted whether the earlier jurists would recognize an artificial or juristic person. The State or community is regarded by them as holding and exercising the rights of God on His behalf through the Imam. Similarly, the deceased is spoken of as having rights and obligations and not his estate, for the law deals both with a man's spiritual and worldly rights and obligations and even the worldly rights and obligations of a person cannot be said to be altogether lost on his death, inasmuch as he is entitled to have his funeral expenses and his debts and other obligations discharged out of the estate. But later jurists seem inclined to recognize an artificial person, for instance, they would allow a gift to be made directly to a mosque, while

> the ancient doctors would require the intervention of a trustee."

41. It would thus appear that the idea of a juristic person was recognised, at any rate by the later jurists and that it is not foreign to Mohammedan Law. I may here refer to the case of Waqf Banam Khudawand Karim v. Bajkhali, 1937 ALL L.J. 1337. That was a case in which preemption was claimed on behalf of a waqf under the Agra Pre-emption Act. It was held by two learned Judges of this Court that waqf was a juristic person and was, therefore, competent to sue through the mutawalli. The learned Judges in that case have referred to a number of decisions of this Court with a view to show that mutawalli can sue on behalf of the waqf in various capacities. In that case, the learned Judges also referred to the extract from Baillie's Digest, Part 1, at p. 474 (reproduced above) and they observed that passage in Baillie's Digest had not considered at all the question whether the mutawalli could claim pre-emption on behalf of the deity. Further, the learned Judges approvingly referred to the decision of the Punjab Chief Court in Jindu Ram v. Hussain Baksh, 24 I. C. 100 (Lah.). It was held in that case that God Almighty could be considered to be a juristic person in the case of a Mohammedan waqf and that so far as the question of procedure was concerned, the mutawalli fully represented the waqf estate.

42. In Jindu Ram's case (24 Ind. cas. 100 Lah.) (ubi supra) the question was whether a mutawalli of a mosque was competent to claim pre-emption on behalf of and for the benefit of the mosque. That was a case governed by the Punjab Pre-emption Act (II [2] of 1905). The learned Judges, Johnstone and Shah Din JJ., appear to have considered the question at great length. They have referred to various authorities and, in particular to an earlier decision of their own Court, in Shankar Das v. Said Ahmad, 163 Pun. Re. 1884. They have expressed their approval of the view taken in the earlier decision in unmistakable terms.

43. Lastly, I may refer to the case of Shankar Das v. Said Ahmad (153 Pun. Be. 1884), (ubi supra) decided by Tremlett and Powell JJ. In that case a house adjoining a mosque was bought by the mutawalli of the mosque on behalf of and for the benefit of the mosque. Thereupon, the plaintiff, whose house also adjoined the house sold, brought a suit for pre-emption. In that case, it was contended on behalf of the plaintiff, that the mosque being waqf i.e. the property of the deity, and not of an earthly owner, no right of pre-emption could attach to it. It was held by the Bench that :

> "Such a contention could not prevail; that there was no rule or principle warranting a denial to the mosque (as an institution) of the same right of preventing strangers approaching its walls by the exercise of a right of pre-emption, as other householders possessed, and that the mosque, as an institution, had practically proprietary rights exercised through the guardians, one of those rights being to claim, on the ground of vicinage, a right of pre-emption in the case of sales of adjoining properties."

44. It may be observed, however, that the learned Judges have noted in their judgment that they had not found any direct precedent for their decision, nor have they referred to any authority on Mohammedan Law, as none, according to them, was available to them.

45. In view of these authorities, one might feel inclined to hold that there was no juristic reason for denying to a mosque, or other waqf estate, the right to claim pre-emption in case an adjoining estate e.g. a mansion, was sold. The mosque or other waqf estate, in such a case, would be deemed to be a juristic person. Further, it is settled law that the two Talabs which have to be made by a pre-emptor, in case pre-emption under the Mohammedan Law is to be enforced, can be made through agents. So, if a waqf estate, as a juristic person, were allowed to pre-empt, there would be no difficulty on the score of its being incapable of performing the two Talabs. It follows, therefore, that on general principles, a waqf estate, as a juristic person, may validly comply with the performance of the requisite Talabs and thereafter institute a proper suit for claiming pre-emption.

46. As seen above, the substantive Mohammedan Law, for reasons of its own, which I have endeavoured to indicate in an earlier part of this judgment has chosen to deny the right of pre-emption to a waqf estate. Whether the waqf estate be or be not recognized as a juristic person, no right of pre-emption, under the Mohammedan Law, can be claimed by it or, on its behalf, for the simple reason that Mohammedan Law appears to forbid such a claim. In this state of the matter, to my mind, it must be held that under Mohammedan Law, a waqf estate is not entitled to claim pre-emption.

47. Order by the Court--Second Appeal No. 609 of 1917 is allowed with costs in all the Courts. The decree of the lower appellate Court is set aside and the decree of the trial Court dismissing the suit is restored.

48. Second Appeal No. 608 of 1947 is allowed in part. The decree of the lower Court is modified to this extent that the plaintiff's suit for pre-emption is decreed for half of the property in suit on payment of Rs. 325 within two months from this date. The rest of the claim is dismissed. The plaintiff is to get half of his costs in all the Courts and the defendant-appellant is entitled to get half of her costs in all the Courts. In case the plaintiff fails to deposit the sum of Rs. 325 within the time allowed the suit shall stand dismissed with costs in all the Courts.