Pre-emption

The right of pre-emption is in the nature of an easement, and is annexed to the land under Muslim law.

The right comes into existence on the sale of the adjacent property. The right to pre-emption is not a right to a re-purchase, either from the vendor or from the vendee, but is simply a right of substitution, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of the rights and obligations arising from the sale.

It is rather anomalous that the right of pre-emption is not recognised in Madras. The reason given by the **Madras High Court** for refusing to recognise the right of pre-emption amongst Muslims is that it places a restriction on the liberty of a person to transfer property, and is, therefore, opposed to justice, equity and good conscience. (Ibrahim v. Muni Mir Uddin, (1870) 6 M.H.C. 26)

Object of Pre-Emption:

The object of the rule of pre-emption is to prevent the inconvenience which may result to families and communities from the introduction of a disagreeable stranger as a coparcener or near neighbour.

Pre-Emption by Contract:

The right of pre-emption may also be created by contract. In construing the terms of such a contract, the Court will give effect to the intention of the parties as expressed therein. In the absence of a contract to the contrary, it will be presumed that a contract for preemption will be governed by the Hanafi law, and all the formalities are to be observed before a valid claim for pre-emption can be made. Where a right of pre-emption is based on a contract, a Muslim cosharer is entitled to pre-emption even against a Hindu purchaser. [Sitaram v. Jiaul Hasan, (1921) 48 I.A. 475]

To whom Applied:

The doctrine of pre-emption is applicable to all Muslims in general. Applicability to Hindus.

The law of pre-emption is applied to Hindus also (i) by legislation, as in the Punjab and Oudh, where there are general territorial enactments; or (ii) by custom, as in Bihar and certain parts of Gujarat; or (iii) when there is a contract between the parties that the law should apply.

In the Mofussil of Bombay, under regulation IV of 1827, (which does not mention pre-emption or any other topic of Muslim law as expressly applicable to the Muslims), the law of pre-emption can be applicable on the principles of justice, equity and good conscience, or on the ground of custom.

But it has been held in Mahomed Beg Amni Beg. & Anr. v. Narayan Meghaji Patil & Ors., (1916) I.L.R. 40 Bom. 358, that pre-emption is opposed to justice, equity and good conscience. So, it can apply only on the ground of custom.

Who can Claim Pre-Emption?

According to the Muhammadan law, the right of pre-emption appertains to the following persons:

1. A Shafii-i-sharik, i.e., co-sharer or partner in the property sold.

2. A Shafii-i-khalit, i.e., a partner in the amenities and appendages of the property (such as the right to water and roads, or common access). These are persons connected with the property sold either as holders of dominant or servient heritages, or as sharing a common right.

3. A Shafi-i-jar, i.e., an owner of neighbouring immovable property. This right of pre-emption on the ground of vicinage does not extend to estates of large magnitude such as villages and zamindaris, but is confined to houses, gardens and small parcels of land.

Problems:

1. A, who owns a piece of land, grants a building lease of the land to B. B builds a house on the land and sells it to C. Can A claim pre-emption?

Ans:

No. A is not entitled to pre-emption of the house; though the land on which it is built belongs to him, he is neither a co-sharer, nor participator in the appendages of the house, nor an owner of adjoining property. (Pershadi Lai vs. Irshad Ali, (1870) 2 N. W. P 100)

2. A owns a house which he sells to B. M owns a house towards the north of A's house and is entitled to a right of way through that house. N owns a house towards the south of A's house, separated from A's house by a party wall and having a right of support from that house. Both M and N claim pre-emption of the house sold to B. Who is entitled to a preferential claim of pre-emption?

Ans:

M, the owner of the dominant tenement, has, in respect of the sale of the servient tenement a right of pre-emption as a Shafii-i-Khalit, which is superior to the right of N, who is merely a neighbour as regards the property sold. (Karim vs. Priyo LaI Bose, (1906) I. L. R. 28 All. 127)

As regards priority among different classes of pre-emptors, it may be noted that the first class excludes the second, and the second excludes the third, if there are two or more pre-emptors belonging to the property in respect of which the right is claimed. Thus, a Shafii-i- khalit has priority over a Shafi-i-jar, as in Problem No. 2, above.

Shia Law:

By Shia law, the only persons entitled to the right of pre-emption are co-sharers and that too, if the number of co-sharers does not exceed two.

Sect of Either Party how Far Material:

If both the vendor and the pre-emptor belong to the same school, being either Sunnis or Shias, the law of that school applies, the law of the vendee being always immaterial. According to the Allahabad High Court, when one of them is a Shia, the Shia law will apply. According to the Calcutta High Court, the law of the pre-emptor prevails, in case the vendor and the pre-emptor do not belong to the same school of Muslim law.

Thus, if the vendor is a Sunni and the pre-emptor is a Shia, then according to the Allahabad High Court, the right of pre-emption is to be determined by the Shia law. If the vendor is a Shia and the pre- emptor is a Sunni, then also, according to the Allahabad High Court, the point is to be decided according to the Shia law, but according to the High Court of Calcutta, in such cases, the rights are to be determined by the Sunni law. The personal law of the purchaser is immaterial in such cases.

It would not, therefore, be quite correct to say that the law of preemption in force in india is the pure Sunni law of pre-emption.

Constitutional Validity of Pre-Emption:

It has been held by the High Courts of Rajasthan, Madhya Bharat and Hyderabad that pre-emption on the ground of vicinage (see 3 above) is void after 26th January, 1950, as it imposes an unreasonable restriction on the fundamental right guaranteed under Artical 19(1) (f) of the Constitution. However, pre-emption as between co-sharers (see 1 above) and owners of dominant and servient heritages (see 2 above) is saved by Article 19(5) of the Constitution.

The Bombay, Allahabad and Patna High Courts have, however, taken a different view and upheld the constitutional validity of preemption by all the three classes of persons mentioned above. However, the Supreme Court has now approved the view taken by the Rajasthan High Court (above).

The Supreme Court has observed that “the right of pre-emption is an incident of property and attaches to the land itself. (Audh Singh v. Gajadhar Jaipuria, AIR 1954 S. C., 417)

In the above case, the Supreme Court held that where the right of pre-emption rests upon custom, it becomes the lex loci or the law of the place, and the right of pre-emption attaches to the properties situated in that place.

The Allahabad High Court has also observed in Jagmohan Prasad v. B. B. Singh,

“Where we have the existence of a right of pre-emption without specifying how that right is to be enforced or exercised, or without laying down the full particulars of that custom, the presumption is that the right of pre-emption is in accordance with the rights allowed by Muhammadan Law. This view has been laid down in a number of cases. These cases have also been followed in subsequent cases.”

A Division Bench of the Bombay High Court has also observed that the law of pre-emption continued to be valid law even after the enactment of the Constitution, and that it had not been

rendered void by Art. 13 read with Art. 19(1) (f) of the Constitution of India. (Bhimrao Eknath v. P. Ramkrishan, AIR 1960 Bom. 552)

Formalities (Three Demands):

In order that a claim for pre-emption should be held to be valid, no particular formula is necessary, provided the claim is unequivocally asserted. But, under the Sunni law, certain formalities are strictly to be observed. No person is entitled to a right of pre-emption, unless he or his manager, or any other person previously authorised by him in his behalf, has made the following three demands, viz.

1. Talab-i-mowasibat, i.e., immediate demand (or demand of jumping), which is not effective unless it is followed by a formal claim by talab-i-ishhad (-below-). Talab-i-mowasibat is an announcement by one entitled to pre-empt, of his intention of making the claim. This announcement is to be made immediately on his receiving information of the sale, but after (and not before) the sale is completed.

2. Talab-i-ishhad, i.e., demand with invocation of witnesses. The talab-i-mowasibat (demand of jumping) is of no effect, unless it is followed by a formal claim, which is called talab-i-ishhad (demand with invocation of witnesses), in which the pre-emptor must (1) affirm his intention to assert his right of pre-emption, referring expressly to his having made the 'demand of jumping' and (2) make a formal demand — (i) either in the presence of the buyer or the seller, or on the premises which are the subject of sale, and (ii) in the presence of at least two witnesses, specially called to bear witness to this demand. Any unreasonable delay in making this second demand will defeat the pre-emptor's right.

The Muhammadan law relating to demand before filing a suit for pre-emption is of a highly technical nature. Thus, talab-i-mowasibat is the first demand and talab-i-ishhad is the second demand. The third formality consists of the institution of the suit for pre-emption. Both the talabs are conditions precedem to the exercise of the right of pre-emption. The talab-i-mowasibat (or first demand) should be made as soon as the fact of the sale is known to the claimant. Any unreasonable or unnecessary delay will be construed as an election not to pre-empt. (Shaikh Mohammad Rafiq v. Khalilur Rahman and anr. (1972) 11 S.C. W.R. 102)

Tender of Price not Essential:

It is not necessary to the validity of a claim of pre-emption that the pre-emptor should tender the price at the time of talab-i-ishhad.