LAW OF PRE-EMPTION (SHUFA'A)

By Justice (R) Shabbir Ahmed

Definition

The right of pre-emption or Shufa'a means the right posses by one person to acquire a property sold to another in preference to that other by paying a price equal to that settled, or paid by the latter. The original meaning of Shufa or pre-emption is conjunction. In the language of the 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 out on it to the purchaser (Bailie 1.475).

Nature of Right

The definition clarifies that the right of pre-emption being a feeble right, accrues only after the completion of a valid sale with a bonafide transaction. There must be three conditions present in order to give a valid claim of the right.

The first is that the pre-emptor must himself own property,

Secondly, there must be a sale of certain property, and

Thirdly, there must be certain relationship between the pre-emptor and the vendor in relation to the sold property. (Fayzee, 289).

The law of pre-emption was to be treated as a real law that is a law affecting and attaching to the property itself. The

liability to the claim of pre-emption is a quality impressed upon and inherent in the property which is subjected to it, or in other words an incident of that property. (Per Norman and Macpherson JJ in Sheikh Kudratullah V. Mahani Mohan 4 Beng LR 134). It is a right, which the owner of certain immovable property possesses as such, for the quiet enjoyment of that immovable property, to obtain, in the substitution for the buyer, 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, and being a personal right remains neither transferable nor inheritable. The right of pre-emption is one of repurchase from the vendee. It is a right inherent in the property and hence could be followed in the hands of the purchaser whoever might be.

The right under Muhammadan law partakes strongly of the nature of an easement right, the "dominant tenement" and the "servient tenement" of the law of easement being analogous to the "pre-emptive tenement" and "Pre-emptional tenement". In other words the right is a sort of a legal servitude running with the land. The right exists in the owner of the pre--emptive tenement for the time being which entitles him to have an offer of sale made to him. Whenever the owner of the "pre-emptional" property desires to sell it. But this right could not be a right of repurchase either from the vendor or vendee involving new contract of sale. "It is simply a right of

substitution entitling the pre-emptor, by reasons of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the right and obligations arising from the sale under which he has derived his title. It is in effect, as if in a sale deed the vendee's name was rubbed out and the pre-emptor's name was substituted in its place." (Per Mehmood J in Govind Dayal V Inayatullah; 7 ALL 775)

According to Hanifi Law the right of pre-emption is a personal right and does not survive to the pre-emptor's heirs. The right or pre-emption is rendered void by operation of law when the pre-emptor dies after making necessary demands, but before he has taken over the property which forms the subject matter of the dispute, or before he has obtained a decree therefore from the court. But it is not rendered void by the death of purchaser and the pre-emptor can therefore, asserts his rights and take the property from his heirs.

According to Shafei's and the Shia, the right of pre-emption is a inheritable right and devolves upon the heirs of the pre-emptor.

When the person claiming the right of pre-emption sells previous to the decree of the court, the property upon which his right is founded, that right becomes extinguished.

In the Muhammadan system owes its origin to motives of expediency and to desire to prevent the introduction of a stranger among co-shares and neighberours likely to cause inconvenience or vexations. Such right is to prevent any "harm" that may be caused to the co-owner or neighbourer by entry of an outsider into the property. As many things are shared in common by co-owners as well as neighbourers, like the right of way and water, they have been given first right to buy the property if it is sold. It is said that the object of pre-emption in Islam is to remove "zarar" or damage, where the exigencies of the state so require and "Harm" to the interest of the public may be minimized only by not caring for the "Harm" to the interest of individuals, preference will be given to the elimination of "Public Harm" on the following rule laid down in the Mejelle Page 6.

Purpose and object

"26- to repel a public damage (Zarar) a private damage is preferred. The prohibition of an unskillful doctor is a branch from this rule"

The majority of the jurists agreed that pre-emption as a customary right, was vague in Arab tribes before the advent of Islam. It was only maintained by the Prophet (P.B.U.H). The right of pre-empt, therefore, cannot be said to be a creation of Islam. The right of pre-emption was prevalent in pre-Islamic Arab

Origin

against sale of house and agricultural lands (Sahih Muslim Vol 5 Page 570). "When owner being desirous to sell his property to another person then third person used to visit him and asked to convey the property to him, instead to the purchaser. The seller used to accept the offer, treating him having preferential right than the purchaser. Such deal was called "SHUFFA,"

In Aqreb-ul-Mawarid against the word 'Shufa' it is stated on the authority of Utbi that if any person intended to sell his house during *Jahhliyat* he would make an offer to him for (exercising of) his right of pre-emption. According to commentary Mowatta by Imam Malik, he would offer it to the neighbourer or the co-sharer.

The law of pre-emption is not only "Peculiar" in Islamic system, it was also recognized in the Roman law and other system. In the Roman law, it sanctioned a compulsory relation between the vendor and a person determined, binding the vendor to sell to that person if he offered as good condition as the intended vendee. It arose from the agreement and from the sanction of written law, but was protected solely by a personal action and gave no right of action against the vendee to whom the property has been passed. German law also recognized the right of pre-emption as a form of obligation attached by written or customary law to a particular status which binds the

purchaser from the obliged to hand over the subject matter to the other party to the obligation on receiving the price paid with his expenses,. The action was exercisable the moment at which the property was handed over to the purchaser. The law was called Restractrechi *(JUS RESTRACTUS)* and the right is ex-jure-vicinitatis in the German law. The right was based upon a notion that natural justice required a preference to certain persons who had specified relations of person or property of vendor.

The Islamic provision was a bit closer to the German law on the point of its exercise, period required and the devices used for its defeat.

Position in Hindu Law

Though in commentary on Islamic Jurisprudence by A.A Kadri published by Tripathi Ltd (Pages 250 and 251) has a reference that Hindu system of the ancient India recognized the law of pre-emption and permitted to be exercised upon the sale of land in favour of full brothers, Sapindas, Sanamodkas, sagotras, neighbourers, creditors and one's co-villager in a respective order. The Hindu system vested the right among the member of one village in a text which declares the assent of *town's men, of kins men etc, as* a requisite of transfer of the landed property.

But this view has not been approved by Supreme Court of India, it adopted with approval, in Audh Behari

V. Gajadhar AIR 1954 S.C 417, the view expressed by Privy Council in Jadullal V Janki Koer 39 IA, 101 (P.C) and Digambar Singh V Ahmed Saeed Khan AIR 1914 PC 11" it is stated;

"There is no indication of such concept in Hindu law and the subject has not been noticed or discussed either in the writings of smriti writers or in those of later commentators. Sir William Macnaghten in his principles and precedent of Muhammadan law vide page 14 has referred to a passage in "the Mahanirvana Tantra", which according to learned author, implies that pre-emption was recognized as a legal provision according to the notions of the Hindus. But this treatise itself is one of Mythology, not of law and is admittedly recent production. No value can be attached to an astray passage of this character. The authenticity of which is not beyond doubt."

Concept of pre-emption in Islam

The right of "Shaffa", holds in a partners, is founded in a precept of the Prophet (P.B.U.H) who has said, "the right of "Shaffa" holds in a partner who has not divided off and taken separately his share" The establishment of it in a neighbourer is also founded on a saying of the Prophet. The Neighbourer of a house has a superior right to that house, and the neighbourer of the lands has a superior right of those lands and if he be

absent the seller must wait his return, provided, however, that both participate in the same road and also " A neighbourer has a right superior to that of a stranger in the land adjacent to his own. Shaffe'i is of the opinion that the neighbourer is not a Shaffee because the Prophet (P.B.U.H) has said shaffa relates to a thing in joint property, and which has not been divided off. All school of thoughts, except the Hanifi agree that the right of pre-emption vests only in partner in the property. They rely on the Precept of the Holy Prophet (P.B.U.H). "The Prophet (P.B.U.H) has ordered pre-emption in case of every property that has not been divided but where the property is divided and boundaries marked out, there is no pre-emption." (Hedaya, Hamilton).

There is no mention, express or implied of a right of pre-emption Islamic or customary in Qur'an. The law of pre-emption be it customary or Islamic concerns exclusively and wholly the *"Maamlat"* that is social dealing of individuals orderly arrangement of their affairs, and for such matter the rationale, the purpose, the mischief or wrong sought to be avoid and the remedy or advantage sought to be advanced is readily ascertainable. Another outstanding feature of Islamic law of pre-emption is that unlike the Islamic law of Inheritance, marriages etc it is equally applicable to *Muslims* and *Non-Muslims (zimnis).* A right

of pre-emption whether it is as co-sharer; as neighbourers or as a participator of immunities or appendages, it is not further qualified or controlled by the faith of the vendor or vendee, or the preemptor. This would point the one hand to its purely mundane character and on the other to its universality. Finally the injunction regarding right of pre-emption were not decreed or declared at one point of time encompassing the entire field as regards the properties which one pre-emptable right of pre-emption or the qualification of Pre-emptor. It came piece meal it was demonstratively situational. As and when a question arose, a controversy developed, a right was asserted, it was decided by recognizing a right. (per Shafi-ur-Rehman J, Minority view in Govt. of NWFP V Said Kamal shah PLD 1986 S.C. 360 P 446).

Ahadis

As there is nothing in *Qur'an* itself on the question of pre-emption, the jurists had relied on certain sayings of the Prophet (P.B.U.H) in this regard. The relevant Ahadis are:

(i) On the authority of Jabir, son of Abdullah, said he, "Prophet has ordered for pre-emption in case of other such property has not been divided. But when the boundaries and passages have been marked out then there is no pre-emption" *(Saheh of Al-Bukhari).*

On the authority of Jabir, said he, Prophet said when

the boundaries have been laid down and roads marked out then there is no pre-emption" *(Jamai ofTirmizi).*

On the authority of *Ibn Abbas,* said he, "Prophet of Allah said, the co-sharers has right of pre-emption and pre-emption lies in every thing" *(Jamai ofTirmizi)*

(ii) On the authority of Amr son of Al-Sharid, said he, I was standing by Sa'ad son of Abu Waqas when there came Al-Misawar son of Makhrama, and placed his hand on one of my shoulders. Then there came Abu Rafi, the Servant of the prophet and said, "O' Sa'd! Purchase from me the two houses that are next to your house" Sa'd said, "By Allah I will not purchase them. Al-Misawar said "By Allah you shall have to purchase them. Sa'd said " By Allah I will give you for 4000 Dirhams and even that by installments" Abu Rafi said" I am already being paid 500 Dinars for them and if I had not heard the prophet saying that the neighbours has greatest right on account of his being nearer proximity, I would not have given you these houses for 4000 Dirhams. Particularly when I am certain of getting 500 Dinars from them. Then Abu Rafi gave those houses to Sa'd. *(Sahih of Al-Bukhari).*

(iii) On the authority of Abud Imran, said he, " I heard Talha son of Abdullah quoting Ayesha he said, " O' Prophet of God! I have two neighbourers to which I shall sell the share first? The Prophet said, "To the one whose door is

nearer to yours" *(Sahih Al-Bukhari).*

On the authority of Samarah, said he, "The Prophet of Allah (PBUH) said, "The neighbor of the house has a greatest right to pre-empt the house" *(Jamai ofTirmizi)*

Introduction of pre-emption law in Indo-Pak Sub-continent

During the period of Mughal Emperors, the law of pre-emption was administered as a rule of common law of the land in those part of the country which came under the domination of the *Muhammadan* rulers and it was applied alike to *Muhammadan* and Ziminies. (Within which Christian and Hindu were included) No distinction being made in this regard between the persons of different races and creeds, Hamilton's Hidaya Vol III P 592. In course of time the Hindus came to adopt pre-emption as a custom for reasons of convenience and custom is largely to be found in provinces like *Behar, Gujrat* and *Punjab* which had once integral part of *Muhammadan* Empire. The opinion differ as to whether the custom of pre-emption amongst villages community in Punjab and other parts of India was borrowed from the *Muhammadan* or arose independently from *Muhammadan* law having its origin or doctrine of "limited right" which has always been characteristic features of village communities. (Dil Sukhan Ram V. Natho Singh 98 PunjRep 1894).

Where the Muhammadan law was borrowed, it was

not always borrowed in its entirety. The observations of the Judicial Committee in Degambar Singh V. Ahmed Saeed Khan AIR 1940 P.C 11 is instructive:- " In some cases the sharers in a village adopted or followed of Muhammadan Law of Pre-emption and in such cases the custom of village follows the rule of Muhammadan Law. In other cases where a custom of pre-emption exists each village community, has a custom of pre-emption which varies from the Muhammadan Law of pre-emption and is peculiar to the village in its provisions and its incidents. A custom of pre-emption was doubtless in all cases, the result of agreement amongst the share holders of the particular village and may have been adopted in modern times and in villages which were first constituted in modern times.

Punjab land administration manual has traced the history of the statutory provisions about pre-emption one has to refer paragraph 16 and 18 about the source of those law in Punjab.

"(16) the origin of pre-emption is clearly explained in tribal law of the Punjab, It has been usual to regard this as a village not as a tribal custom and as originating in the Muhammad law. I think that this is quite an erroneous view and the pre-emption is merely a corollary it is a general principle regarding succession to, and the power of disposal of the land. In these matters the holders of estate for the time

being is subject, generally speaking to the control of group of agnates who would naturally succeed him. They can, as a general rule, altogether prevent alienation by adoption or gift or by sale for the holder's benefit :- it would be only in natural rule that when a proprietor was compelled by necessity to sell, these agnates would be offered the opportunity of advancing the money required and thus savings what is really there own property (Tribal law in Punjab - Roen Rettingan 82,83).

"(18) The customs governing pre-emption were also recorded in village administration paper drawn up at the settlement made before the passing of Punjab land Act. (IV of 1872)

In nearly all the old Wajib-ul-Arz we find a provisions securing this right either to the next heirs, or to the agnates generally and after then to all members of the village community to the exclusion of a stranger. (Tribal law of the Punjab Ibid P 88)

Pre-emption in Indo-Pak Sub-continent is thus partly Islamic and partly customary which means that it emanates partly from Arab custom and partly from local customs. The same position was obtaining in the Punjab. Section 16 of Punjab Pre-emption Act 1913 now repealed deals with the right of pre-emption in Urban Immovable Property is based on the Islamic law of pre-emption while

section 15 dealt with that right in agricultural land and immovable village property was founded to agnatic theory on village customs, till repeal.

The affinity between the Islamic and the Punjab customary law can not be lost sight of. The institution of pre-emption in both the laws is the growth of tribal custom. Prophet (P.B.U.H) maintained the right of co-sharer in the property and the neighbourers thereof as prevalent in Arabian society during the period of Ignorance (Jahiliya). The tribal custom of giving preference to the next heir or to the agnate even though they do not own any land was introduced in section 15 of the Pre-emption Act 1913 (now repealed).

Position during British Rule

Since the establishment of British rule in Sub-continent, Muhammadan law ceased to be the general law of the land and as such the pre-emption law is applicable only between the *Muhammadans* as a part of their personal law provided that the judge of the place where the property situates, does not consider the said law to be opposed to the principle of justice, equity and good conscience. The Madras High Court has held that the law of pre-emption by reasons of its placing restriction upon the liberty of transfer of property, could not be regarded to be in consonance with the principles of justice, equity and good

conscience. (Kirshna Mangan Vs. Keshna vol 20 Madras 205). Hence the right of pre-emption is not recognized in the Madras Presidency (Now Channai) at all even amongst Muhammadans except on the footing of a custom.

Sources of pre-emption - personal law, Customary and territorial law.

The law of pre-emption was being administered as a rule of common law of the land in those part of the subcontinent which came under the reign of Mohammadan rulers and were applied alike to Mohammadan and Zimminies. Since the establishment of British rule in India, the Mohammadan law cease to be the general law of the land. The pre-emption became one of the matters respecting which Mohammadan law is expressly declared to be rule for decision where the parties to the suit were Mohammadan and was being administered entirely on the ground of justice equity and good conscious as a general law. The right of pre-emption in some provinces like Punjab and NWFP is statuary law passed by the respective legislatures and has been thus codified, it un-doubtly became the territorial law of that provinces, applicable to all persons by reasons of their property being situated therein.

In the course of the time the inhabitants came to adopt pre-

emption as custom for reasons of convenience and such custom is to be found in provinces like Behar and Gujrat which has once being integral part Muhammadan empire. Therefore, the pre-emption can be claimed on the basis of (a) personal law, (b) custom (c) Agreement (d) statuary law. In Province of Sindh and Baluchistan, the rights of pre-emption is enforceable on the basis of personal law. On the basis of customs, the persons of a particular locality/area may claim such right amongst the inhabitants of that area irrespective of their religious belief. One can enforce such right, where there is an agreement between the inhabitants of a particular area. Lastly on the basis of statuary law, such right is enforceable by or against the persons residing in that province. The Punjab Pre-emption Act and NWFP Pre-emption Act are in the field, such right can be claimed as territorial law.

Accrual of pre-emptive right

The right of pre-emption arises only when the contract transferring the right of the property from the vendor to the vendee has become complete. The right of Pre-emption takes effect with regard to the property conveyed by other by virtue of the compromise claim. It takes effects also in respect of the property conveyed by Hiba-bil-Shartul-Evaz, when the settled consideration has been paid by the transferee for a Hiba-bil-Shartul-Evaz. The right of pre-

emption accrues only when a complete transfer of right, title, or interest has taken place and no where there is a mere agreement to sell or where transfer is only fictitious or the sale is invalid. The question whether alienation is a 'complete transfer' will be determined on the basis of Muhammadan law and not on the basis of Transfer of the Property Act. No right of pre-emption arises in respect of the property leased or mortgaged even though by a conditional sale until foreclosure or equity of redemption. Where the transferee has been delivered the possession of the property and paid the consideration although no sale deed has been executed, it has been held that in a suit for pre-emption, the Muhammadan law would apply. It does not take effect with regard to property which has devolved by right of inheritance or which has been received in gift without any consideration or a legacy. It does not arise in respect of the property bailed to other or given in lieu of services rendered or to be rendered or by way of reward or as a compensation for khulla or as a dower to a wife. Similarly if a man were to marry without settling on the wife any dower and after the marriage were to settle on or convey to her a property in lieu of dower, there would be no right of pre-emption. When a property is conveyed to a wife in discharge of the dower-debts, there is also no right of pre-emption but when a house is sold to a third person in order to enable the husband to satisfy with the proceeds thereof the dower of his

wife, the right of pre-emption comes into operation. The ordinary law of pre-emption is not applicable to compulsory sale in execution of the decree but where the sale is effected by the collector under the orders of the Civil court by private contract, the pre-emptive rights of the persons entitled thereto were not oust.

Persons entitled to pre-empt

The jurists' opinion is that a preemptor must be owner of the property in order to claim right of pre-emption. The principle does originate from the tradition, and is unexceptionable to the extent that the tradition of Prophet (P.B.U.H). The right of pre-emption, the milkiyat or the proprietor's interest in the property on which he based his right must be in him till the decree by a Qazi. But it is not necessary that he should be in actual possession of it. A mortgagee or a mere Benamidar is not entitled to a pre-emption on any of the ground the claim is founded, the pre-emptor cannot pre-empt until he has proved his title. It is according to the views of Imam Abu Hanifa and Imam Muhammad and one of the two reports of Abu Yousif also mention the same view. Basing on the above it was held as early as September 24th 1867 in Gooman singh v. Tripoole Singh .and others W.R 437. "The Muhammadan law nowhere recognizes the right of pre-emption in favour of mere tenant upon the land." It was likewise held on 8th April 1868 in Beharee Ram v. Mst: Shoobhudra (9 WR 455) "Mere possession gives no Haq

Shuffa". "Haq Shuffa" according to Muhammadan Law there must be ownership "Milkyet" in the contiguous land.

Classes of pre-emptor

According to Hanifi law three classes of persons are entitled to claim the right of pre-emption, not simultaneously, but in succession to each other. And the right may be claimed by one or more persons equally entitled to it. It appertains (1) to the co-sharers in the property, called 'Shafi-e-Sharik' (2) to the co-sharers in the rights and appurtenances, classed "shafi-e-Khilat" a pre-emptor by virtue of a right of easement over the property sold and (3) to a person whose property is contiguous to the subject to the sale technically called "Shafi-e-jar", pre-emptor by right of vicinage.

The question came for consideration, whether a person whose land is being irrigated from the government watercourse has a preemptive right over the land of the neighbours whose lands are also being irrigated from the same watercourse, on the ground of *Shafi-e-Khalit,* before the then Chief Court of Sindh in Imambakhsh Shah & others V. Mir Muhammadali & others AIR 1946 Sindh 55) and the question was replied in negative in the following words:

> "The right of *Shafi-e-Khalit* extends no further than the right of easement. 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. But because a person owns a land which draws water from a Government watercourse, the bed of the watercourse being the property of Government, he can not in any way claim the right to pre-emption as a sharer in an appendage (*Shafi-e-Khalit*) with the land of the neighbours who draw water for their lands from the same Government watercourse and over whose lands he does not in any way, exercise the rights of a dominants tenement, nor is he even the owner of the servient tenement."

According to Shia law there is only one category of pre-emptor i.e. co-sharers called, Shafi-e-Sharik.

Whether pre-emptive right based on Shafi-e-Sharif (co-sharer) and Shafi-e-Jar offend the fundamental rights.

The right of pre-emption by Shafi-e-Sharif (co-sharer) and shafi-e-jar (right on vicinage) came for consideration in Bhau Ram Vs. B. Baijnath Singh (AIR 1962 SC 1476), if such right on these grounds violate the fundamental rights as guaranteed by the constitution. The right of pre-emption of co-sharer was found to be a reasonable restrictions, the comments are in the following words;

We feel no doubt that a law giving such a right imposes a reasonable restriction on the right conferred by

Art. 19(1)(f). If an outsider is introduced as a co-sharer in a property, that is likely to make common management inconvenient and thereby destroy the benefits of ownership of the property to a large extent. Property cannot be managed profitably unless one policy is followed. If there are more than one owner of a property, it is essential for the profitable enjoyment of it that they should be able to work in union. Therefore if by the operation of the law of pre-emption based on co-ownership the property eventually comes to be vested in a single hand that would be a great advantage to the owner. Such a law being for the benefit of all owners would surely be in the interests of the general public.

While commenting on the right of pre-emption on the ground of vicinage, it was observed

> "a society where certain classes were privileged and preferred to live in groups and there were discriminations, on grounds of religion, race and caste. There may have been some utility in allowing persons to prevent a stranger from acquiring property in an area which had been populated by a particular fraternity of class of people and in those times a right of pre-emption which would oust a stranger from the neighbourhood may have been tolerable or reasonable. But 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, 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. The Rewa State Pre-emption Act, 1946 was under consideration which conferred the right of pre-emption on the ground, inter alia, of vicinage."

In Sant Ram & others V. Labh Singh & others (AIR 1965 SC 166) case, same 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."

New class of pre-emption

One more class of pre-emptor was created by enacting Law Reforms Regulation 1972 (MLR 115) whereby a sitting tenant was given right to claim pre-emption over the land in his tenancy based on possession by virtue of para 25 clause 3 sub-clause (d) of ibid, the Shari' at Appellate Bench of Supreme Court struck down that provisions of para 25 clause 3 sub-clause (d), being repugnant to the injunctions of Islam in government of NWFP V Said Kamal Shah (PLD 1986 SC 360).

Essential formalities to claim pre-emption

There are two essential formalities, the performance of these is a condition precedent to enable the preemptor to claim the right of pre-emption.

1. A person who intends to advance a claim based on the right of pre-emption in respect of the property

which has been sold out to another, must, immediately on receiving information of sale, express in explicit terms his intention to claim the property. The intention must be formulated in the shape of a demand. No express formula is necessary so long as the assertion of the right or what is caused a demand is expressed in unequivocal language. This is called as ***Talab-e-Muwasabat*** (Jumping demand). This demand must be made immediately upon the receipt of the information any delay in making this demand on hearing the sale defeats the right of pre-emption. It is not necessary, however, that it should be made in presence of witnesses. It is not material in what words the claim is preferred so long as they imply a claim, they are sufficient. Thus says the Hedaya, if a person were to say "I have claim my Shuffa" or "I shall claim my shuffa" or I do claim my shuffa" all these are good, for sound it is the meaning and not style of mode expression which is here considered.

> "Similarly if he said I have demanded" or "I take the mansion by pre-emption" or "do demand pre-emption: it would be lawful. But if he were to say to the purchaser 1 am the Shafi or preemptor', it would be void. The reasons of these distinction is evident, as a mere statement of the fact does not evinced any desire

on his part to avail himself of his right.

Presence of witnesses is not necessary at the formulation of this demand, the evidence regarding the performance of this preliminary formality generally rests on the evidence of the pre-emptor. But the demand must be made after the sale has been completed if made while negotiations one going on between the vendor and vendee, it is of no avail.

2. The second condition is that the pre-emptor should with least practicable delay as is possible in the circumstances, repeat before witnesses his demand, (a) either on the premises in dispute or (b) in the presence of the vendor or (c) of the vendee, calling on the witnesses to bear the testimony to the fact. This formality is called ***Talab-e-Ishhad*** or demand by invocation of the witnesses.

As the right of pre-emption is strictissimi juris, failure to perform the "demands" in accordance with the requirement of law would defeat the claim.

In order to entitle the pre-emptor to perform the second demand in presence of the vendee it is not necessary that he should be in possession of the property in respect of which the right is claimed. For the performance of the demand of Talab-e-Ishhad the pre-emptor must take some witnesses with him to the vendor if

the property sold to be still in possession or to the vendee or to the property which is subject matter of the claim and there in presence of the witnesses he must say to the following effect; “such a person brought such a property, of which I am the Shafi: I have already claimed my right of Shuffa and now again claim it be therefore witness thereof”. The courts have held that at the time of making the second demand the pre-emptor should distinguishly state that he has already made the Talab-e-Muwasabat.

These formalities may be observed by the pre-emptor in person or by proxy. It has also been held that the performance of the Talab-e-Ishhad depends on the pre-emptor ability to perform it. He may do it by means of letter or a message, or may depute an agent, if he is at a distance and can not attend personally. Talab-e-Ishhad may be combined with 'Talab-e-Muwasabat' e.g. if at the time the Talab-e-Muwasabat the pre-emptor had an opportunity of invoking witnesses in the presence of the seller or the purchaser or on the premises to attest immediate demand, it would suffice for both demands, and there would be no necessity for the second demand.

The lastly, the pre-emptor should prefer his claim called talab-e-khusumat or talab-e-tamik in court within the period of limitation under Article 10 of the schedule of Limitation Act.

There is no instance discoverable from the Sunnah of the Holy Prophet PBUH where a right of pre-emption may have been conceded in properties like shop, Sarai, Katra, Dharm Shala, Mosque or other similar buildings.

Subject of Pre-emption

It has been held that the right of pre-emption extends to agricultural estates, and is not confined merely to urban properties or small plots of lands (Karim Bukhsh v. Kumuruddin Ahmed, 6 N.W., 377). The right founded on the basis of vicinage has been limited by the court to parcels of land and houses, such a right founded upon actual coparcener has been held to apply to villages or large estates (Govind Dayal v. Inayatullah, ILR. (1885), 7 All. 775.

Under the Punjab Pre-emption Act of 1991, "immoveable property" is subject to the right of pre-emption in terms clause "C" of Section 2 of the Act, clause "A" thereof defines "immoveable property" means property situated in any area other than urban area or within cantonment area. Therefore, properties falling in urban and cantonment area are not subject to the right of pre-emption on its sale. The agriculture land, garden and houses etc. in rural area are subject to the right of pre-emption on sale. Whereas under the NWFP Pre-emption Act "immoveable

property" is also subject to the right of pre-emption in terms of clause "C" of the at of 1987, clause "A" thereof defines "immoveable property", which includes land, buildings, houses, shops water tank and well. The right of pre-emption in NWFP is not confine to any specific area. Both enactment exempt waqf or such property used for charitable, religious or public purposes, (b) property of the Federal and Provincial Government or a local authority or the property acquired by such Government are not pre-emptable.

NWFP Pre-emption Act also exempt property used for factory or industrial undertakings, such properties are not pre-emptable.

Muhammad Hussain v. Mohsin Ali (1870) 6 B.L.R., 41, the Calcutta High Court distinctly laid down that though a neighbor could not, under the Mahommandan Law, claim a right of pre-emption in respect of a share in villages or large estates, a co-sharer undoubtedly could, and that a neighbor's right extends only to houses, gardens and small plots of land.

Where the claim to pre-emption is not based either on custom or special agreement the British Indian courts have held that in order to assert the right, the vendor and claimant must both be subject to Mohammedan Law (Dwarka Das v. Hussain Bukhsh (1878) ILR 1 All. 564)

When the property, which forms the subject-matter of dispute, deteriorates in the hands of the purchaser, the claimant is entitled to a proportionate reduction in the price, unless the deterioration has not been caused by the purchaser, in which case the pre-emptor must either pay the whole price or resign his claim. When any portion of a house or garden is destroyed by accident or natural causes, the pre-emptor has the option of either resigning the whole or taking it, by payment of the full price. If the buildings are burnt down or swept away by an inundation so as the leave nothing in the hands of the purchaser, the pre-emptor must take the site at the full price. In other words, the purchaser is not damnified by loss occasioned by what in English Law would be called "an act of God".

Deterioration

The right of pre-emption may be relinquished either expressly or impliedly. The pre-emptor may expressly forego the right of pre-emption, with or without any compensation. Implied relinquishment depends upon inferences deducible from his conduct. If he omits without any sufficient cause to perform the demands after learning of the sale, the inference is that he has abandoned his right; and the law, therefore, holds that such omission avoids the right. Acquiescence in the sale either by offering to purchase from the buyer the property sold, or by asking him if he would give it up to him, or by

Relinquishment

taking it from him on lease, amounts in law to a relinquishment (Habib-un-Nissa v. Barkat Ali (1886) IL, 7 AIL, 275). But these acts have that result only when they are done with the knowledge of the sale.

Evasion

The law allows certain devices for the evasion of the right of pre-emption, e.g., where a man sells the whole of his house excepting only the breadth of one yard extending alongside the house of the pre-emptor, the latter is not in this case entitled to claim the right of pre-emption, because he is no more a neighbor. Similarly if the vendor were to grant the intervening part of his house as a free gift to the purchaser and put him in possession.

The right of pre-emption can be enforced on the basis of (1) Territorial Law. (2) Custom and (3) By contract in respect of sale by Muslim as well as non Muslim. In absence of Territorial Law, customs and contract, the Mohammedan Law of pre-emption is being applied to Muslims only by the court of sub-continent. The question came for decision, whether right of pre-emption can be enforced against Hindu vendee in respect of sale by Muslim vendor, before Full bench of Calcutta High Court and Allahabad High Court in Shaikh Qudratullah v. Mohni Mohan (4 BLR 134) and Govind Dayal v. Inayatullah (7-ILR (Allahabad 775)

respectively. Conflicting view was expressed. Full Bench of Calcutta High Court gave the decision in negative, whereas, Full bench of Allahabad High Court expressed contrary view.

The full bench of Calcutta High Court held that a right of pre-emption is nothing more than a mere right of repurchase, not from the vendor but from the vendee who is treated, for all intends and purposes as the full legal owner of the property which is subject matter of that right.

Basis for the contrary view of Full bench of Allahabad High Court was that "right of pre-emption was not a right of repurchase from the vendee. It was a right inherent in the property and hence could be followed in the hands of the purchaser whoever he might be". It is in effect as if in a sale deed the vendee's name was rubbed out and the pre-emptor's name was substituted in its place". The cases of Shaikh Qudratullah & Govind Dayal were considered by Supreme Court of India in Audh Behari v. Inayatullah (Supra) and the view taken by Full bench of Allahabad High Court was approved. The view taken by full bench of Allahabad High Court in Govind Dayal was followed by Justice Saeeduzzman Siddiqui in Sindari Bai v. Ghulam Hussain 1982 CLC 2441.

The question whether a muslim can maintain the suit for pre-emption in respect of sale by Hindu Vendor in favour of Muslim Vendee came for consideration in Abdul Rahim

v. Asif Ali (2002 SBLR Sindh 1990). The view expressed was that the right of pre-emption can be enforced on sale by vendor who is subject to Muslim Personal Law. Hindu Vendor can not be subject to Muslim Personal Law in absence of Territorial or customary law and the property owned by Hindu can not be said to be having inherent right of pre-emption. Similar view was expressed by Full bench of Allahabad High Court in Dwarka Das vs. Hussain (1878) ILR (1) Allahabad 564.

"Katra"

The word "Katra" is not defined in the (Punjab Pre-emption Act, 1913); but it appears that the primary meaning of the word "Katra" is enclosure and the secondary meaning is market; (Karim Ahmad v. Rahmat Elahi A.I.R. 1946 Lah. 432). Generally, therefore, a "Katra" would be a business locality though there might be purely residential "Katras". However, even purely residential "Katras" would consist of a large number of houses to which a large number of people will resort. In the circumstances, the premises exempted under section 5 are practically of one class, (shops, serai, "Katra", dharamsala, mosque and other similar buildings) namely, those to which the public has to resort and it is this class which is distinct from the rest of residential property meant for private residence of individuals which has been exempted.

What a "Katra" is, in not defined. But it would appear that

the primary meaning of “katra” is an enclosure and the secondary meaning is market: Karim Ahmed v. Rehmat Alahi. It would therefore be safe to proceed on the basis that a “katra” is principally a business promises with in an enclosure though no doubt it also contains residential accommodation.