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Dear Students

Now we are going to cover Unit IV. As you are aware that Unit IV are divided into two sub-chapters. First are law of pre-emption and other law of Inheritance. Law of pre-emption is one of the simplest chapters in compare to Law of inheritance. Now let's move to law of Pre-emption.

Law of Pre-emption

It is the right of an owner of immovable property to acquire by purchase another immovable property which has been sold to another person. In other words, under this right owner of an immovable property is entitled to repurchase an adjacent property which has been sold to someone else.

Definition of pre-emption is also given by Mohmood, J., in Gobind Dayal case in which he observation as, 'Pre-emption is a right which the owner of 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, not his own, on such terms as those on which such latter immovable property is sold to another person.'[1]

We can understand pre-emption with this illustration: A and B is owners of their houses which are adjacent to each other. B sells his house to C, who may be a stranger for A. Under this pre-emption right, A who is a pre-emptor can legally repurchase that house from C at the same price at which B sold it to C. In this manner, the right of pre-emption would enable A to avoid C from being his permanent neighbour. As a matter of fact, an apprehended inconvenience which may be caused by a stranger has been the very basis of this right.

The law of pre-emption was not a part of the personal law of Muslim. Before the advent of Moghul Rule in India, there was nothing akin to the law of pre-emption.[2] It was only during the Moghul rule, that the law of pre-emption was introduced and made applicable as rule of general law of the land for all communities. According to the Hedaya :

> A Muslim and Zimmee (non-Muslim) being equally affected by principles on which Pre-emption is established, and equally concerned in its operation, are, therefore, on an equal footing in all cases regarding the principle of pre-emption.[3] With the result pre-emption was adopted by Hindus as a custom.

Object of the right of Pre-emption :

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[1] Govind Dayal v. Inayatullah, (1885) 7 All 779
[2] Digambar Singh v. Ahmad, AIR 1914 PC 14
[3] The Hedaya, II, 592

The law is based on the principle of convenience. According to the Hedaya, 'Besides, according to our tenets the grand principle of Pre-emption is the conjunction of property, and its object is..... to prevent the vexation arising from a disagreeable neighbour.....'[4]

The right of Pre-emption and Its Constitutional Validity :

As far as constitutional validity of right of pre-emption is concerned, it can look into the Pre-emption after dividing two stages, (i) before 44th Constitutional Amendment, and (ii) after 44th Constitutional Amendment.

(i) Before 44th Constitutional Amendment, 1978 : Article 19(1) (f) of the Indian Constitution provides all citizens had a fundamental right to acquire, hold and dispose off property. Article 19 (5) provided that reasonable restrictions may be imposed on this right of a person to acquire, hold and dispose off a property yet it was protected under Clause (5) of Article 19. With the help of power exercise under this Clause, this right on the ground of vicinage or on ground of consanguinity or on ground of participation of some immunity was held Constitutional. Further, the right held Constitutional whether it was exercised under some enactment or under Muslim personal law. But in 1962, in the case of Bhau Ram v. Baij Nath,[5] the Supreme Court overruled this view and held that Pre-emption only on the ground of vicinage was unconstitutional and cannot be enforced. The court held that unless the Pre-emptor and the vendor are co-sharer or participators in some immunity, the right cannot be protected. Accordingly, claim of Pre-emption on ground of being co-sharer or participator in immunity was constitutional but Pre-emption only on ground of vicinity was unconstitutional. The Supreme Court reaffirmed this view in Sant Ram v. Labh Singh.[6]

(ii) After 44th Constitutional Amendment : Article 19(1) (f) has now been repealed by the 44th Amendment Act, 1978. The result is that now there is no fundamental right of acquiring, holding and disposing off a property. Thus, right to acquire, hold and dispose off, is neither a fundamental right nor a mere constitutional right. However, Pre-emption still continues to be a legal right. It is therefore, submitted that the reasonableness of the right of pre-emption can still be examined under Article 14 and 15 of the Constitution. In Atma Prakash v. State of Haryana,[7]the Supreme Court held that claim of Pre-emption on ground of consanguinity is *ultra vires*. The court observed that the reasons which justified Pre-emption in the past namely, the preservation of the integrity of rural society, the unity of family life and the agnatic theory of succession, are totally irrelevant. The court held that the claim for possession by way of Pre-emption only on ground that claimant had superior rights being father's brother's son of the owner, cannot be sustained. Accordingly, Section 15 of Punjab Pre-emption Act, 1923 (which provided Pre-emption to co-sharer for kinsfolk of a vendor) was held to be unconstitutional by the Supreme Court because there was no reasonable classification of the co-sharer entitled to claim Pre-emption.

CLASSIFICATION OF PRE-EMPTORS OR WHO MAY PRE-EMPT

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[4] The Hedaya, 591
[5] AIR 1962 SC 1476
[6] AIR 1965 SC 314
[7] (1986) 2 SCC 249

Only three classes of persons may claim the exercise of the right under Muslim law. Under Muslim law, pre-emptor are classified into three categories :

i. The Co-sharers or Shafi-i-Sharik
ii. The Participators in Immunities or Shafi-i-Khalit, and
iii. The Owners of Adjacent Properties or Shafi-i-Jar

i. The Co-sharers or Shafi-i-Sharik

The persons who are entitled to inherit the properties of a common ancestor are called co-sharers. The co-sharers have the preferential right of pre-emption against any other class of pre-emptors. For example, brothers or two sisters are the co-sharers. If one of them sells his/her house, the other is entitled to claim pre-emption. Co-sharers are given preference against other categories of pre-emptors because they are common blood-relations

ii. The Participators in Immunities or Shafi-i-Khalit

In the absence of a co-sharer, Shafi-i-Khalit is entitled to pre-empt in the following cases :

In Bhau Ram v. Baij Nath,[8] the Supreme Court has held that pre-emption on the basis of participation exists only in the easements of way and water on private land. It does not extend to any other easement such as easements of air and light.[9] It may be noted here that for claiming the right of pre-emption on the basis of being a Shafi-i-Khalit, is that the right to way and right to discharge water must be a private right. The right to use common thoroughfare such as common village roads will not give rise to the right of pre-emption.
A person cannot said to be the Shafi-i-Khalit and would not be entitled to the right of pre-emption in the following cases :

a. The right of pre-emption cannot be claimed on the basis of easement of light or air.
b. The mere fact that the owners of land have the right to draw water from a Government water course does not give them any right of pre-emption.[10]
c. On the basis that the branches of his tree project over the land of a neighbour, the owner of the tree cannot claim the right of pre-emption as Shafi-i-Khalit on the sale of that land.[11]
d. The right to use common thoroughfares, such as village roads, big canals, etc. does not give rise to the right of pre-emption.

iii. **Owners of Adjacent Properties or Shafi-i-Jar** :

Shafi-i-Jar is the owner of an adjoining property or in other words it is mere neighbour who can be a pre-emptor i.e., there is vicinage if two properties are adjacent to each other, but only in the absence of Shafi-i-Sharik and Shafi-i-Khalit. The right on the basis of neighborhood arises only in favour of the owner of the adjoining immovable property. So, the right does not belong to a tenant or to a person who is in possession of property but does not have any ownership in it.

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[8] AIR 1962 SC 1476
[9] Ladu Ram v. Kalyan Sahai, AIR 1963 Raj 195
[10] Imam Baksh v. Mohd. Ali, AIR 1945 Ker 374
[11] Aziz Ahmad v. Nazir Ahmed, AIR 1927 All 505

However, as discussed earlier, after the Bhau Ram's case n 1962, the claim of pre-emption only on the ground of vicinage has now been declared to be unconstitutional.

There are some differences between Sunni and Shia law on pre-emption

These are of the following :

i. Shia law recognises co-sharers as the only class of pre-emptors. The other two categories, namely, the Participators in Immunities and Owners of Adjacent Properties cannot become pre-emptors.
ii. Under Shia law, the co-sharers too are entitled to pre-empt only where their number does not exceed two. If there are more than two co-sharers, the right is not available to any one of them.[12]
iii. Under the Shia law, if there are two co-sharers, they are entitled to pre-empt only in proportion of their respective shares. Their right of pre-emption is simultaneous but not equal in magnitude. For example, A and B are the two Shia co-sharers having 2/3 and 1/3 shares respectively. Upon the sale of pre-empted property, A is entitled to repurchase 2/3 of the property whereas B is entitled to re-purchase only 1/3 of it.

FORMALITIES FOR PRE-EMPTION

The formality for the claim of this right consists of three demands. The demand must be made by pre-emptor step by step and at proper time.

1. The First Demand (Talab-i-Mowasibat) : The Arabic expression 'Talab-i-Mowasibat' means 'Demand of Jumping' which shows that it must be made immediately. It is essential that the first demand must be made immediately on the hearing of the completion of sale. Every class of pre-emptor must demand immediately, meaning thereby that pre-emptor belonging to inferior class should not wait till a pre-emptor belonging to superior class waives his right for exercise of his right.

The Second Demand (Talab-i-Ishhad) : The expression, Talab-i-ishhad means a demand with the invocation of witnesses. After making the first demand, it is the second demand. The second demand is repetition of the first demand, therefore, it is also called as the confirmatory demand. The pre-emptor must, as soon as he can, affirm the intention of asserting his right by making the second demand in which he refers to the fact that he had already made the first demand. It is must and indispensable. No particular forms are prescribed. For the validity of the second demand, the following requirements must be fulfilled :

i. The Second demand must be made in the presence of at least two witnesses expressly called to bear witness to the second demand,
ii. The Second demand is effective only when the first demand was lawfully made at an earlier date.
iii. The pre-emptor must mention that he has already placed his first demand and now he is asserting the claim for the second time.

[12] Abbas Ali v. Maya Ram, (1888) 12 All 229; Hussain Baksh v. Mahfuzul Haq, AIR 1925 All 559

The Third Demand (Talab-i-Tamlik)

If the pre-emptor fails to get the desire result after making first two demands, he may take legal action. Therefore, if the purchaser sells the property to him, then no further formality is required and the pre-emptor is substituted in place of vendee. But, if after the first two demands, the pre-emptor fails to re-purchase the property, then he has to take legal action. In other words, the third and the last step are to maintain an action in a court of law. Filing of a suit for the claim of pre-emption is known as the Third Demand. This is also termed as 'demand of possession'.

First and Second Demands may be Clubbed: The pre-emptor may combine both the demands. If at the time of the first demand, the pre-emptor invokes the witnesses in the presence of the Vendor or the Vendee or on[13] the property it will suffice for both the demands. If once both the demands have been combined and made, there would be no need to make the second demand subsequently, and if made it would be superfluous.[14]

Shia Law :

As far as all the demands are concerned, the law is the same as Hanafi law. Under Shia law while Talab-i-Ishhad (second demand) is made, reference to first demand is absolutely necessary. If this reference is not made the second demand would become defective.[15]

RIGHT OF PRE-EMPTION WHEN LOST :

The right of pre-emption may be lost in the following cases :

1. By acquiescence or estoppel or waiver or forfeiture: When the pre-emptor fails to observe necessary formalities prescribes i.e., making three demand. There may be other circumstances also from which acquiescence on the part of pre-emptor may be observed:

i. A pre-emptor may waive his right by acquiescence i.e., by not asserting his claim. Upon the sale of the pre-empted property, a pre-emptor may either assert his right by making demands or may willingly forego his claim by not making any demand.[16]
ii. The right of pre-empt is lost when the pre-emptor enters into a compromise with the vendee, not to claim the right of pre-emption.
iii. The right is lost when the pre-emptor permits a sale to be made to another person.

However, in the following circumstances acquiescence or estoppel or waiver will not be inferred:

[13] Rajjub Ali v. Chundi Chaman, (1990) 17 Cal 534; Abdul Gaffor Khan v. Abdul Jikar, AIR 1954 Nag 113
[14] Abdul Majid v. Qamaruddin, AIR 1945 All 375
[15] Ummulnisa v. Fatima Begum, AIR 1947 All 89
[16] Indira Bai v. Nand Kishore, AIR 1991 SC 1055

i. A mere offer by a pre-emptor to purchase from the vendee the property at the sale price with a view to avoiding litigation, does not amount to acquiescence.[17]
ii. When the pre-emptor had previous notice of the sale or of the fact that negotiations for the sale were going on and did not offer to buy the property, then also no acquiescence will be inferred.[18]

2. By death of the pre-emptor : When the pre-emptor dies after making the two demands but before the filing of the suit[19] i.e., third demand then also the right of pre-emption is lost, his legal representatives have no right to file the suit. However, under the Shia and Shafi law, if a pre-emptor dies during pendency of the suit, the right is not lost.[20]

3. By misjoinder of plaintifs : When the pre-emptor joins himself as a co-plaintiff with a person who is not entitled to claim the right of pre-emption then also the right to pre-empt is lost. But if he joins with himself as co-plaintiff a person who could have filed a suit for pre-emption, but for the reason that he did not make the two demands the right to pre-empt will not be lost.[21]

4. By release : The pre-emptor would lose his right if there is a release for consideration to be paid to the pre-emptor.

5. Loss of right before final decree: If the pre-emptor loses his right before the final decree is passed, he would lose his right. Therefore, his right must exist till the date when final decree is passed by trial court.

6. By statutory disability: The right of pre-emption may be forfeited if there is any statutory disability on the part of pre-emptor to repurchase the pre-empted property. In such a circumstance a pre-emptor who may otherwise be competent to enforce the right, is unable to claim the right because of statutory disability.

[17] Mohd. Uunus v. Mohd. Yusuf, (1897) 19 All 334
[18] Askari v. Rahmat Ullah, AIR 1926 All 548
[19] Tyabji, 596
[20] Hedaya 561; Baillie I, 505
[21] Dwarka Singh v. Sheo Shankar, AIR 1927 All 168