Constitutionality of Pre-emption

Before Forty-Fourth Amendment

Before the Forty-Forth Constitutional Amendment in 1978, there was Article 19 (1) (f) in the Indian Constitution. Article 19 (1) (f) provided that all citizens had a fundamental right to acquire, hold and dispose of property. Clause (5) of this Article provided that reasonable restrictions may be imposed on this right in the interest of the general public. The High Courts of Rajasthan, Madhya Bharat, and Hyderabad had held that pre-emption on the ground of vicinage (ownership of adjoining immovable property) was void after the advent of the Constitution, being an unreasonable restriction on the right to acquire and dispose of property under Article 19 (1) (f), but pre-emption as between co-sharers (*shafi-i-shareek)* or owners of dominant and servient tenements (*shafi-i-khalit)* was saved by the reasonable restrictions of Clause (5) of the Article. But in 1962, in the case of Bhau Ram v. Baij Nath (AIR (1962) SC 1476), 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-sharers or participators in some immunities, the right cannot be protected. Accordingly, claim of pre-emption on ground of being co-share or participator in common privilege, was constitutional but pre-emption only on ground of neighborhood was unconstitutional. The Supreme Court reaffirmed this view in Sant Ram v. Labh Singh.

After Forty-Fourth Amendment

By the Constitution (Forty-fourth Amendment) Act, 1978, the fundamental right to property enshrined in Article 19 (1) (f), as well Article 31 has been taken away from Part III of the Constitution. The result is that now there is no fundamental right of acquiring, holding, and disposing off a property. Moreover, this right has not been included anywhere in the Constitution of India. Thus, right to acquire, hold and dispose off, is neither a fundamental right nor a mere a constitutional right. Therefore, it may be said that constitutionality of the right of pre-emption under Article 19 (1) (f) is now not any relevant topic for discussion.

However, pre-emption still continues to be a legal right. It is therefore, 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* [(1986) 2 SCC 249, 257)], the Supreme Court held that claim of pre-emption on ground of consanguinity i.e. on the that ground pre-emptor is co-sharer of the vendor, is *ultra vires* the Constitution. While examining the constitutionality of Section 15 (1) (a) *Thirdly,* of the Punjab Pre-emption Act 1923 (as amended in 1960) which provided pre-emption to the co-sharers or kinsfolk of a vendor, the Supreme Court held that the claim of pre-emption on the ground of consanguinity is the relic of feudal past and is totally inconsistent with the

constitutional scheme. 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 payment had superior right being father's brother's son of the owner cannot be sustained. Accordingly, Clause (1) (a) *Thirdly* of Section 15 of the Act was held to be unconstitutional by the Supreme Court because there was no 'reasonable classification' of the co-sharers entitled to claim pre-emption.

After *Atma Prakash*, the next case before the Supreme Court was *Krishna v. State of Haryana* (A.I.R. (1994) S.C 2536. See also Bhikha Ram v. Ram Sarup A.I.R. (1992) S.C. 207), in which constitutionality of the right of pre-emption was again raised under above-mentioned enactment namely, the Punjab Pre-emption Act 1923. While interpreting Section 15 (1) (b) *Fourthly*, of the above Act, the Supreme Court held that the right of pre-emption to co-sharers (under this clause) is valid and is not violative of Articles 14, 15, and 16 of the Constitution. The Apex Court observed further that the decision in *Atma Prakash* need not be reconsidered [In Mohd. Noor v. Mohd. Ibrahim (1994) 5 S.C.C 562, the Supreme Court held that a co-sharer can claim the right of pre-emption only if it is sale of ownership; it is not available in the transfer of tenancy (Rajasthan Pre-emption Act 1966)].