THE RAJASTHAN PRE-EMPTION ACT, 1966

(Act No.1 of 1966)

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[*Received the assent of the President. on the 1st day of February,1963: Assent. published in the Rajasthan Gazette. Part IV-A. Extraordinary, dated 10th February. 1966}*

An Act to consolidate and amend the law relating to pre- emption in the State of Rajasthan

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1. Statement of objects and Reasons. On the subject of preemption different laws prevail in different part of the State. In some parts no law exists at all but cases relating to pre-emption in those parts are dealt with on the basis of custom. Thus much difficulty is experienced in administering different laws in parts and as a step towards the unification of the laws in the State it is considered necessary to provide by law a self sufficing and uniform set of rules governing the right of pre-emption, thereby superseding the customary law on the subject. Hence the Bill.

The provisions contained in the Bill follow the lines of the provisions of the Rewa State Pre-emption Act, 1946 with modifications on the lines of the Agra Pre-emption Act, the Punjab Pre-emption Act, and the Oudh Laws Act suited to local conditions. While abolishing all rights of pre-emption being enforced so far.

The Bill lays down that the right of pre-emption will accrue to specified persons in the specified order upon the completion of a sale or upon the passing of a final decree for fore closure subject to specified exemptions. A complete procedure has been provided to govern and regulate the enforcement of the right. (Bill No. 22 of 1962)

[Pub. in Raj Gaz. Part III-A, Extraordinary, dated 1-10-1962]

2. History and back ground

[1] *History and background of the law of pre-emption*- The concept of the right of pre-emption is foreign to the soil of India. Indians came in touch with this branch of law with the influx of muslim settlers in" India. As the Muslims were to be governed by their personal law so also the customary rights of pre-emption prevail among them. The Hindus oncoming into contact with them adopted and applied the customary law of pre-emption.

Their Lordships of the Supreme Court of India in Audh Bihari vs.Gajadhar traced out the origin and development of this branch of law asunder:-

> "That the law of pre-emption was introduced in this country by the Mohammadans. There is no indication of any such conception in the Hindu Law and the subject has not been noticed or discussed either in the writing of the Smriti Writers or in those of letter commentators. During the period of the Mughal emperors the law of pre-emption was Administered as a rule of common law of the land in those parts of the country which came under the domination of the Mohammadans rulers, and it was applied alike to Mohammadans and Zimmees (within which Christians & Hindus were included), no distinction being made in this respect between persons of different races and creeds. In course of time the Hindus came to adopt pre-emption as a custom for reasons of convenience and the custom is largely to be found in provinces like Bihar and Gujarat which had

once been integral parts of the Mohammadan empire. Opinions differ as to whether the custom of pre-emption amongst village communities in Punjab and other parts of India was borrowed from the Mohammadans or arose, independently of the Mohammadans Law, having its origin in the doctrine of 'limited right' which has always been the characteristic feature of village communities...Since the establishment of British rule in India, the Mohammadans Law ceased to be the general of the land and as pre-emption is not one of the matters respecting which Mohammadans Law is expressly declared to be the rule of decision where the parties to a suitare Mohammadans, the courts in British India administered the Mohammadans law of pre-emption as between Mohammadan entirely on grounds of justice, equity and good conscience. Here again there was no uniformity of views expressed by the different High Courts in India and the High Court of Madras definitely held that the law of pre-emption, by reason of its placing restrictions upon the liberty of transfer of property, could not be regarded to be in consonance with the principles of justice, equity and good conscience. Hence the right of pre-emptions not recognised in the Madras Presidency at all even amongst Mohammadan except on the footing of a custom Rights of pre-emption have in some province like Punjab, Agra and Oudh, been embodied in statutes passed by the India Legislature and where the law has been thus codified, it undoubtedly becomes the territorial law of the place and is applicable to persons other than Mohammadans by reason of their property being situated therein..... In other parts of India, its operation depends upon customs and when the law is customary the right is enforceable irrespective of the religious persuasion of the parties concerned. Where the law is neither territorial nor customary, it is applicable only between Mohammadans as part of their personal law provided the judiciary of the place where the property is situated does not considers such law to be opposed to the principles of justice, equity and good conscience.... Apart from those a right of Pre-emption can be created by contract and such contracts are usually found amongst sharers in a village"- *Audh Bihari Vs. Gajadhar*, **AIR 1954SC 417 = 1954 SCJ 590** See also *Digambarsing vs. Ahmed Said Khan*,**(1915) 37 All. 129 = 42 IA 10 = 28 IC 34.**

Hon'ble Mr. D.F. Mulla in his book "Principles of Mohammadan Law"(15th edition at page 204) states as under :-

"Under the Mohammedan Law, non- Mohammadan are as much entitled to exercise the right of pre-emption as Mohammedans: Barillie, 477. Therefore during the Mohammadan rule in India, claims for pre-emption was entertained by the courts of the country the law of pre-emption as applied to Hindus... Was the Hanif law, the Mohammadan sovereigns of India being Sunni of Hanif sec and the same law is now applied to them in case of pre-emption. "The right of pre-emption is recognised by custom among Hindus and it is governed by the rules

of Mohammedan law of pre-emption except in so far as such rules are modified by such custom.- *Jagannath. vs. Inderpal*, **AIR 1935 All.236**

[2] After the establishment of the British rule in India this branch of law as part of the Mohammedan law ceased to be the general law of the Land. Thus where both the parties were the Muslims, law of pre-emption was to be enforced lest, the plaintiff has to allege the customary right of pre-emption and has to prove such right as is recognised by the custom.

3. Sources of law.

The sources of law of pre-emption - (1) Mohammedan law (2) Village Custom in India, and (3) An enacted law.- *Jallabegum vs. GulamZohra*, **AIR 1959 J & K 32.**

The province of Punjab had its own laws on pre-emption. Few native States in India also had the special enactments dealing with the subject viz. :

1. The Bikaner State Pre-emption act 1919.
2. The Marwar Law of Pre-emption, 1922
3. The Bharatpur State Pre-emption Law, 1922
4. The Banswara State Law of Pre-emption, 1924
5. The Dungarpur State Law of Pre-emption, 1939
6. The Alwar State Pre-emption Act, 1946
7. The Ajmer Laws Regulation, 1887 (Second chapter)

The law had the statutory force in the respective areas. These laws, had been declared ultra vires by the Constitution of India, 1930.

The Code of the Civil Procedure, 1908, have provided the general procedure as to the suits for pre-emption under Orders 6, 7 & 8 and also provides for the guidance of the courts the form and manner of the decree in such suits under Order 20, Rule 14 under the same Code.

Section 20 of the Hindu Succession Act, 1956 provides a right of pre-emption to a property inherited by two or more heirs of the same character. When any heir desires to transfer his share of interest in the property to be inherited under the Hindu Succession Act, 1956, that section of the said Act gives a right of pre-emption to the other heir. Correctly speaking what is conferred under section 22 of the Hindu Succession Act, 1956 is a preferential right to acquire and not exactly the preferential right to purchase.

4. Customary law before the Act.

Pre-emption-Customary law- Death of sole pre-emptor – Legal Representatives not entitled to continue suit.

It is an admitted fact that in the former State of Jaipur, there was custom is pre-emption which was founded on the Mohammedan Law but it stood modified only with regard to making of Talab by the notification dated 7-4-1927. The law of pre-emption was introduced in this country by the Mohammedans. There is no indication of any such

concept in the Hindu Law & the subject has not been noticed or discussed either in the writings of the Smriti writers or later entreaters. During the period of Mughal right of pre-emption does not survive to the heirs. Bharat Singh vs. Emperors, the law of pre-emption was administered as a rule of common law of the land, and was applied alike to the Mohammedans and the Hindus, and in course of time the law of pre- emption was adopted as a custom. Right of pre-emption runs with the land and can be enforced by or against the owner of the land for the time being, although the right of the pre-emptor does not amount to interest in the land itself. Initially, it is not personal but it assumes personal as pact for the purpose of enforceability in a Court of law. Right of pre-emption is a very weak right and can be defeated by a defendant by all lawful means. In order to claim a right of pre-emption, it is necessary for the pre-emptor plaintiffs to allege and prove that they are the owners of the property on the basis of which they are claiming the right of pre-emption so long as decree is not passed by the court in his favour. If he losses his right before that event happens, he cannot claim himself to be entitled to a decree. The full bench decision of Allahabad-High Court in Mohd Ismail's case (supra) was followed by this court in Pyare Mohan's case (supra) and it was held that in case of the death of a pre-emptor before passing of the decree the right of, pre-emption does not survive to the heirs. *Bharat Singh vs. Kala Singh***(1966) Current Law Journal (Punjab) 124,** also took the view that the right of pre-emption is purely a personal right and it comes to an end on the death of the pre-emptor and it was held that the legal representatives cannot continue suit for pre-emption & relying on these authorities, another Single Judge, Justice G.M. Lodha, has also taken the same view in Gopi Chand's case (supra) and has held that the appeal abates as after the death of sole plaintiff Gopichand, the legal heirs could not continue the suit and the appeal was dismissed solely on this ground. Justice N.M.Kasliwal, while deciding Civil Revision petition Kewal Chand (supra), has of course observed that in view of section 18 of the Rajasthan Pre-emption Act, if the plaintiff dies at any time before the decree has become final, the suit was not abated for the cause of action subsists and in that case, he had observed the cases of Avadh Behari Singh, Hazarivs Neki and Gurdev Kaur (supra). In the later full bench decision of Punjab & Haryana High Court in Chandra Roop Singh vs. Data Ram **AIR 1983 P & H 1** the earlier decision of the Punjab High Court in Gurdev Kaur (supra) has been over-ruled and since Justice N.M. Kasliwal in Dewal Chand (supra) was considering a case which was instituted after the coming into force of the Rajasthan Pre-emption Act, the observations made there in are of no help to decide the present case. I am also in agreement with the view expressed by Justice N.M. Kasliwal in Pyare Mohan (supra) and that of Justice G.M Lodha in Gopi Chand's case (supra) and I hold that the right to sue for pre-emption does not survive to the heirs. Since the plaintiff pre-emptor had died, his legal representatives could not have continued the proceedings whether in suit or in appeal and they are not entitled to a decree for pre-emption.- *Kailas Chandra vs. Smt. Gyarsi Devi*, **1987(1) WLN 10.**

Suit under customary law before the Act- Sole Plaintiff expired -Right does not survive to legal heirs. AIR 1956 All 1 (FB) Rel., AIR 1968SC 1205, AIR 1980 Raj. 116 = 1979 RLW 176 and 1966 CLJ ((FB)) 124Ref. Nani Devi vs. Komal Chrmd, **1987 (1) RLR 774.**

5. Customary law before the Act how far modified in Jaipur State.

Pre-emption - Customary law - Whether modified in Jaipur by a notification dated 7th April, 1927, published in Jaipur Gaz dated 15thApril 1927 and made the formalities of making 'Talabs' as unnecessary -Rights before the coming into force of the Rajasthan Act - Effect of.

The only question which calls for adjudication is, whether the making of Talabs is necessary or has become 'unnecessary' in Jaipur and what is the effect of notification dated the 15th April, 1927, which runs as under.

"No. 2155/J-I-148, Jaipur Dated 7th April, 1927

Whereas it is expedient to give all possible claimants format notice of a sale, with a view to facilitate their ascertain of pre-emptive right without recourse to litigation, the following rules have been passed by the Council of State, and they shall come immediately into force:

1. When any person proposes to sell any property in respect of which any persons have a right of pre-emption, he shall give notice to the persons concerned of:

(a) The property; and

(b) The price at which he is willing to sell it.

Such notice shall be given through the Court within the local limits of whose jurisdiction the property or any part thereof is situate.

2. Any person having a right of pre-emption in respect of any property proposed to be sold shall lose such right unless within 3 months from the date of service of such notice he or his agent pays or tenders through the court the price aforesaid to the person so proposing to sell.

3. Any person entitled to a right of pre-emption may bring a suit to enforce such right on any of the following grounds; (namely):

(a) that no due notice was given as required by rule 1;

(b) that tender was made under rule 2 and refused.

(c) that the price stand in the notice was not fixed in good faith.

S.N. Modi J. while making reference to this court in the present case, observed that the provisions of the notification are neither inconsistent nor they such that they cannot stand to

JP. Jain J. in Prabhu Narain Patwa vs. Suraj Narain (S.B. Civ. Second Appl. No. 261/71 decided on April 28, 1972) held that in notification of 1927 made the "Talabs' by a pre-emptor unnecessary, in case of a sale governed by customary law of pre- emption

applicable to the area comprised in the former Estate of Jaipur. .

Similarly, M.B. Sharma, J., in *Gopal vs. Haridutt Sharma* [1981 RLW 525] on July 24, 1981 held that the customary law of pre-emption founded on Mohammedan Law stood modified in Jaipur State by notification of 1927.

The Council of State of Jaipur described the requirement of compliance of this notification as the 'rules' and, preamble or the object clause contained in the preamble mentioned that this being done with the object of giving all possible claimants formal notice of sale with a View of facilitate their assertion of their claims, without recourse to litigation.

Clause (1) of the notification requires that a person proposes to sell any property in respect of which any persons have a right of pre-emption; he will have to give notice to the persons concerned through the court mentioning the property and the price at which he is willing to sell it.

Once this requirement is fulfilled by the Vendor, the responsibility shifted to the claimant to pay or tender through the court the price proposed within three months of receipt of the notice, to the persons proposing to sell. Cl.3 of Rule3 of this notification is very important because it prescribes three conditions, any of which may become a ground for filing a suit to enforce such right. First condition being that no due service as required by giving a notice as required by C1. I. Second condition which is an alternative is that the tender was made under cl. 2 and was refused. Third one which is again in the alternative is that the price stated in the notice was not fixed in good faith.

Obviously, even if we discuss this law, in terms, of procedure or substantive law these conditions would not fall within the branch of procedural law because they give a substantive right to file a suit to a pre-emptor and absence of it would take away the right of pre-emptor.

It is to be noticed that the Council of the State of Jaipur have introduced the entire law of pre-emption by notice through the court, payment or tender through the court, and filing a suit in the court on fulfilment of either of three conditions mentioned in Rule 3.

We are of the opinion that this notification is a complete Code in respect of right of pre-emption except that the concept of pre-emption has been left to be deducted from the customary law of the parties and has not been mentioned in it. In other words, the right of pre-emption, as per the customary law is to be found in the customary law but once the right of pre-emption exists either on account of vicinity or otherwise then that right can be enforced only according to the requirement and conditions laid down in this notification of 1927.this reference that the requirement of 'Talabs' was necessary under thecustomary Mohammedan Law before this notification was issued and if there is any doubt on that point, that is amply answered by the two judgments of the Supreme Court in *Smt. Rajeshwari Devi vs. Mukesh Chandra* (supra) and *Bhagirath Singh Shekhawat vs. Ramniwas Barit* (ibid) later being related to the Jaipur State, itself.

We certainly feel that reliance cannot be placed on the decisions in Mst. Mathura vs.

Ramzano after the decision of Rajasthan High Court in Jagannath vs. Radhey Shyam (supra) and of the Supreme Court in Bhagirath Sing vs. Ramniwas (supra).

The learned Single Judge (S.N. Modi J.) was of the opinion that this notification and the provisions contained therein are neither inconsistent no they are such that they cannot stand together side by side with the, customary right of pre emotion founded on the Mohammedan law & according to which making of Talabs is essential. We on a thoughtful consideration of the various pros and cons different facets of the requirement of "Talabs' in Mohammedan Law, and the conditions prescribed in this notification, feel that the above statement of law made by S.N. Modi J., is too wide to be sustained and confirmed.

As is obvious from the customary law prevalent in former Jaipur State was recognised by the decision of Chief Court and was generally noticed, the stage of 'Talabs' comes only when sale becomes complete and as per the present law, the registration of the sale deed is done.

Now, let us dissect the notification of 1927 with an illustration. 'A' proposes to sell a house to 'B' on a consideration of Rs. 5,000/- on 1st Jan. 1980 in the City of Jaipur. Now, according to Rules 1 of this notification, a. notice will have to be given through the court of Munsif Jaipur City to 'C' who may be assumed to have a right of pre-emption under the old law. Now, Rule 2 comes into effect and 'C' fails to deposit the amount within three months from the date of service, then he would lose his right. In such a situation, can we do that right of 'C' would be revived if 'C' makes three 'Talabs' according to the customary Mohammedan law and 'A' or 'B' refuses it. The answer is bound to be in negative.

Now, let us further dissect this illustration. If he namely, 'C' pays the amount within-3 months and then the vendor refuses to sell him the property house and he files a suit for pre-emption or should he wait till the formalities of Talabs are made. In our view, letter and spirit of this notification show that as soon as he pays the amount within a period of three months from the date of notice, he gets a right of bringing a suit for endorsing such rights if that is so when the requirement of Talabs has become redundant after the notification of 1927. It is obvious that Jaipur State was conscious of the fact that the pre-emptor remains in great Predicament as he is required to stand watch and be vigilant as to when the party would complete the sale and would present the sale deed for Presentation so that he can make 'Talabs'. It should not be lost sight of that advancement of the society, increase of the population and prosperity, the transaction of sale of property became more frequent and what was very rare under the ancient customary Mohammedan law in the old pre-emptive test, became frequent and, therefor, Jaipur State Council became ceased of inconvenience, defects and anomalies of enforcing the customary law to the extent of waiting for registration and then making Talabs and then undoing the sale, created a lot of difficulties and complicity of litigations. It was the whole object of the Jaipur State prescribed by this notification to

give a notice through the court, then tender payment of consideration of house within three months, and thereafter prescribed three conditions either of which would be sufficient for giving a cause of action to the pre-emptor for filing a suit for right of pre-emption.

We may extract with approval, the following deduction of D.P. Gupta J made in Bhagwan Sahai vs. Satya Narain (Supra) :

> "After the enforcement of the Rajasthan pre-emption Act the requirement of making Talabs stood abrogated. The same position must be considered to have been brought about the enforcement of the aforesaid notification by Its publication on april 15 1927 so far as the territories comprised in the former state of Jaipur were concerned and in these territories the necessity of marketing Talabs stood abrogated and the Mohammedan Law of pre-emption stood modified on the extent provided by the aforesaid notification.

The Court refrained from giving any opinion on the validity of the notification of 1927, since the same war beyond the cope of reference.

Held that the requirements of talabs in the area of former Jaipur, State have become unnecessary after the notification dated the 7thApril 1927 published in the Jaipur Gazette dated 15th April 1927 and to this extent this notification has modified the customary; right of the pre-emption as prevailing in the former Jaipur State in respect of talabs. Radhabal labh Haldia vs. Pushalal Agarwal 1985 (1) WLN 468

6. Object of law.

[1] As we have read previously it has its origin in the Mohammadans law, it tends to follow the same object also. Its main object is to prevent apprehended inconvenience.

The new purchaser may be mischief monger and thus be a constant cause of trouble to the others. It tends to sole ownership of the property intended to be transferred. The policy underlying the law is to keep out strangers and thus to maintain the privacy and compactness of joint owners - Rat; Ram vs. Manichand, AIR 1959 Punj. 117.

[2] The second object of this enactment is to consolidate the stray provisions of this branch of law.

[3] Next object is to amend the law of pre-emption as was in force before this Act It tends to amend the customary law and the enacted law As well.

[4] The last object of his enactment is to make this branch of the law Uniform law and codify it so as to make it a statutory law.

[5] The object of the Act is plain and express viz to consolidate and amend the law relating to pre-emption in the State of Rajasthan

This branch of law has also been developed through various judicial pronouncements of the competent courts. May at times conflicting views have been expressed. To eradicate confusion and conflict codification of this branch of the civil law was all the more necessary.

Formerly there was a right of pre-emptions in the adjoining properties which was declared ultra vires. This right has been recognized by the Act also. The right of pre-emption among co-sharers and partners, holders of common way amenities and easements has been recognized.

As this is special law, thus all general laws for instance, as recognised under the personal law of Muslims or customary law of the land shall be ineffective hence forth.

(See sections 21 and 23 of the Act)

7. Nature of the Act —

A. Special law —

[1] Right under the Act is not based on any customary law but on codified law of pre-emption - No abatement of death of plaintiff.

Law of pre-emption in Rajasthan is a codified law - In Hazari vs. Neki, [AIR 1968 SC 1205], the Supreme Court said —

> "It is not correct to say that the right of pre-emption is a personal right on the part of the pre-emptor to get the re- transfer of the property from the vendee who has already become the owner of the same. It is true that the right of pre-emption becomes enforceable only when there is a sale but the right exists antecedently to the sale, the foundation of the right being the avoidance of the inconveniences and disturbances which would arise from the introduction of a stranger into the land. The correct legal position is that the statutory law of pre-emption imposes a limitation or disability upon the ownership of a property to the extent that it restricts the owner's right of sale and compels him to sell the property to the person entitled to pre-emption under the statue. In other words, the statutory rights of pre-emption though not amounting to an interest in the land is a right which attaches to the land and which can be enforced against a purchaser by the person entitled to pre-empt.
>
> The statutory right of pre-emption under S. l5(1)(a) of the Punjab Act is a heritable right and at decree for pre-emption can be passed in favour of the legal representatives of the deceased pre-emptor when the representatives are properly brought on record under the provisions of O. 22 R. 1 read with O. 22 R. 10, CPC. It is true that the right of pre-emption under S., 15(1) (a) of the Punjab. Act of 1913 is personal right in the sense that the claim of the pre-emptor depends upon the nature of his relationship with the vendor. But where the condition of S. 14 exits and an involuntary transfer takes place by inheritance, the successor to the land takes the whole bundle of the right which goes with the land including the right of pre-emption. In view of S. 306 of the Succession Act the right of pre-emption under S. 15(1)(a) does not abate with the death of the pre-emptor".

I am fortified in taking the view by the decision of the Supreme Court ' that the customary right of pre-emption cannot be equated with a right of pre-emption which is based on the codified law, namely, the Rajasthan Pre-emption Act, 1966. The right of

pre- emption under the Rajasthan Pre-emption Act is not a personal right on the part of the pre-emptor to get re-transfer of the property from the vendee who has already become the owner of the same. The statutory right of pre-emption is a heritable right and a decree for pre-emption can be passed in favour of the legal representatives of the deceased pre-emptor. When the legal representatives are property brought on record under the provisions of O. 22 - Babulal vs. Madadeen, **AIR 1988 Raj. 143 = 1988 RLW 113 = 1988(1) RLR 131.**

[2] The local law is as defined by section 42 of the IPC, is a law applicable to a particular part of India - Jethmal Kapoor *Trust vs State* - **AIR 1959 All. 702** *Meharsingh vs. Baldeosingh,* **AIR 1955 HP 12.**

[3] Thus the Act is a local law as it applies to the State of Rajasthan only and not to the whole of India.

The special law should be understood in a relative sense, the Limitation Act is a general law and another Act dealing with the question of limitation is a special law. (like section 21 of the Act) likewise the Code of Civil Procedure is a general law - Mst. Phoolbas Koonwar *& Another vs. Lalla Jogeshur Sachoy & Others* **(1876) 1 Cal 226 = 31 I A 7(PC)**

[4] According to Sinha, C.J. of the Supreme Court of India " A special law therefore means a law enacted for special cases, in special circumstances, in contradiction to the general rules of the law laid down, as applicable generally to all cases with which the general law deals. In this sense the Limitation Act 1963 is a general law." — Kaushalyarani vs. Gopal Singh, **AIR 1964 SC 260.**

[5] The Code of Civil Procedure, 1908 is a general law. Kandaswami vs. Kanappachetty, **AIR 1952 Madras 186 (FB)**

[6] Thus, the present Act is a special law dealing with the special branch of the civil law relating to pre—emptions. It is special as well as the local law too. '

It is a special branch or the civil law providing and enforcing the rights of pre-emptions on transfer of an immovable property. This Act recognises the civil right of pre-emption thus it is a substantive law to that extent the second chapter of the Act provides", the nature of right and persons, entitled to it. It also excludes certain properties and class of person against whom this right does not accrue. Chapter third of this Act I provides for the procedure to enforce such rights in between the parties and inter se or by the courts in a suit. Thus it is procedural law also.

It is exhaustive law so far as it determines the right of pre-emption, and class of persons to which such right accrues and the procedure to enforce the same. It is a. special law thus prevails over the general law. The provisions of Cr. PC. are supplementary to this Act so far the decree in a pre-emption suit is concerned or in the

matters of appeal, revision, and review or like miscellaneous matter to which the Act is silent but the provisions of the other enactments are not inconsistent to it.

7B. Technical law.

The right accrues on the transfer of an immovable property. This is a right recognised by the law yet it can be rendered imperfect by the vendor when he transfers the property to another person who is also having the equal or superior right to the claimant instead of the plaintiff pre-emptor. In order to render the claim of pre-emption nugatory, the vendor can repurchase back the same property. These are the instances of rendering the right nugatory by the act of the parties. There are instances in which the operation of law bars the suit for such claim of the pre-emptors plaintiff; sections 15 and 16 are such instances. Between the two rival claimants of the right of pre-emption, the law shall lean in favour of the superior claimant and thus the claim of an inferior pre-emptor shall not be enforced. The law permits to apply lawful devices to defeat such claims. The Act is not retrospective in effect. It is exhaustive except as to Rule 14 Order 20 CPC and the provisions of appeal, revision and review to which the general law, the Code of Civil Procedure, 1908 shall apply.

The Act contemplates to apply to the immovable properties only. But the principle may apply to the movable properties too in certain circumstances for instance the co-Sharer or partner have a preferential right to purchase the movables also in preference to the others.

Section 22 of the Hindu Successions Act, 1956 adopts the same principle, so also the partners in the firm can apply the doctrine.

7-C. Mandatory or directory.

[1] *Whether mandatory or directory - Test of mandatory provision.* - It is one of rules of construction that a provision is not mandatory unless non-compliance with it is made penal.—Jagatnarayan us. Jaswant Singh, **AIR 1954 SC 210.**

[2] The employment of the word 'shall' is i conclusive and similarly the mere absence of the imperative is not conclusive either. The question whether any requirement is mandatory or directory has to be decided not merely on the basis of any specific provision which, for instance sets out the consequences of the omission to observe the requirement, but on the purpose for which the requirement has been enacted, particularly in the context of the other, provisions of the Act and the general scheme thereof. It would inter alias depend upon whether the requirement is insisted on as a protection for safe guarding of the right or liberty of a person"or of the property which the action might involve*.-Collector of Mongyer vs. Keshva Pd. Goenka,* **AIR 1962 SC 1694.**

[3] See the under mentioned cases also. *Pratapsingh vs. Shrikishan Gupta*, **AIR 1956 SC l40**.*Punjab Co-op Bank vs. ITd Lahore* **AIR 1940 PC 230** (at page 233) *H.N,*

*Rishbud vs. State ofDelhi,***AIR 1955 SC 196.**

[4] It is well settled that an enactment in for mandatory might in substance be directory, and that the use of the word "shall" does not conclude the matter. The practical bearing of the distinction between a provision which is mandatory and one which is directory is that while former must strictly complied with in the case of later it is sufficient if it is substantial complied with- *H. V. Kamath vs. Ahmed Ishaque***, AIR 1955 SC 233** See also *Banwari Lal vs. State of Bihar* **AIR 1965 SC 849**- *Shatrusan Singh vs. NoorMohd*. **1959 RLW 431 = ILR 1959 Raj. 710**.

[5] It is not always correct to say that where the word 'May' has been used, the statute is only permissive or directory in the sense that non-compliance with those provisions will not render the, proceedings invalid.- *State of UP. vs. Manbadhanlal,***AIR 1957SC 912**;*Bijai Cotton Mills vs. State*, **ILR 1959 Raj. 1242.**

[6] Enabling words are construed compulsory whenever the object of the power is to effectuate legal right - *Punjab Sikh Motor Service vs. R.T.A. Raipur*;**AIR 1966 SC 1318**; State of U.P. vs. Baburam, **AIR 1961 SC 751**; *K.Narsinghah vs. H.C. Singrigovda*, **AIR 1966 SC 330**.

8. Validity of the Act -

A. General:-

[1] As we have seen the law of pre-emption as applied in India is adopted from the Mohammedan Law of pre-emption, thus, the sources of this law are three viz. (1) The Mohammadan Law, (ii) The customary law and (iii) the enacted law.- *Jallabegum vs. Gulam Zohra*, **AIR 1959 J&K 32**.

[2] Article 13 of the Constitution of India provides the expression 'law in force'. It means the whole of the existing law having the force of law thus it includes the statutory laws as well as the customs and usages having the force of law. Thus the expression law in force covers the personal and customary laws too - Ram Rakh. vs. Mst. Gulab - **1956 RLW 336 (Para 3);** *Panch Gujar Gour Brahmin vs. Amarsingh* **AIR 1954 RLW 204.**

[3] Hon'ble D.F.Mulla at page 205 (vide section 231) in Principles of Mohammedan Law (15th Edition) categories three classes of persons and no others who are entitled to claim the right of pre-emption.

(1) a cosharer in the property (Shafi-i-Sharik) as mentioned in clause (i) of sub-section (1) of section 6 of the Act.

(2) a participator in immunities and appendages such as right of way or a right to discharge water (Shafi-Khalid) as mentioned v in clauses (ii) & (iii) of sub-section (1) of section 6 of the Act.

(3) Owners of adjoining immovable properties (Shafi-i-jar) i.e. right in vicinage.

A claim of pre-emption by a co-Sharer or participator in immunities and appendages stands on a different ground than a claim by a person who is only an owner of the

adjoining property and the principles which under lie the upholding of the validity of a claim by a co-Sharer in respect of an agricultural holding apply in a great measure to residential houses as well. The acquisition of the various parts of a house by a single owner would certainly lead to harmony; avoid chances of litigation and in many cases lead to a better and fuller enjoyment of the property. The manner and custom of the society in which we live would welcome the privacy available by the enjoyment of the house by a single owner, and the enforcement of the right by a cosharer would thus promote decency and convenience and reduce chances of litigation. the operation of the existing law of pre-emption (which in the present case, is by custom) conferring a right upon shafi-i-sharik to claim the property sold in preference to a stranger, is a reasonable restriction on the to acquire, hold and dispose of property and is valid even after the commencement of the Constitution of India. - *Ram Rakh vs. Mst. Gulab*, **1956 RLW 336**; *Jagannath vs. Radheshyam*, **ILR 1960 Raj. 75**.

[4] The law conferring rights of prior purchase upon an owner in the Mahal is intended to preserve integrity of the village and of the village community. It cannot be held to be unreasonable restriction on the rights of a person to acquire, held and dispose of his property. Thus, the provision was held valid.- *Ram Saran vs. Munshi* **AIR 1963 SC 553,** Sarwarshah vs. Abdullah, **AIR 1963 J & K 14 (Para 2)**; Kesherdevi vs. Nanaksingh, **AIR 1958 Punj. 44 Vithal**; *Rao vs. Mahadu*, **AIR 1956 Hyd.47**; *Bhagsingh. vs. Kartara***AIR 1954 Pepsu 180.**

8-B. Constitutional validity of claims before 26-1-1950.

The right of pre-emption claimed on vicinage as was recognised under the customary law than exiting. Such right arose before the 26-1-1950 when the Constitution commenced and the decree in such suit was also passed (on 18-0-1941) before the enforcement of the Constitution such is a ripe which can not subsequently be invalidated on coming into force of the Constitution of India.- *Parbati vs. Isar*, **1859 RLW 267**.

8-C. Reasonable restrictions upon the right to acquire, hold and dispose of property.

[1] Now we come across an expression 'reasonable restriction' upon the fundamental right to acquire, hold and dispose of the property as guaranteed under Art. 19 (1) (F) of the Constitution of India, 1950.

The right of every citizen is obviously subject to such reasonable Conditions as may be deemed by the governing authority of the country essential to the safety, health peace order and morals of the community *Cooverji vs. Excise Commissioner* **Air 1954 SC 220**

[2] It is not enough that the restrictions are for the benefit of the public they must be reasonable as well as the reasonableness could be decided on a conspectus of all

relevant facts and circumstances. *Sagluir Mohd. vs. State of U.P*. -**AIR 1954 SC 723 (para 22).**

[3] The phrase 'reasonable restriction' in respect of a right to acquire, hold and dispose of property as conferred by Art. 19(A1) (F) connotes that the limitation on a person in enjoyment of the right should not be arbitrary or of an excessive nature beyond what is required in the interests of the public. The word 'reasonable' implies intelligent case and deliberations, that is, the choice of course which reason dictates what are have to ask ourselves is not whether we, as individuals feel satisfied that the restrictions are reasonable but whether the normal average, reasonable man would regard them as reasonable or not. *Jamath Mosque vs- Vakhan Joseph*, **AIR 1955 T.C 277 (FB).**

[4] The reasonableness of a custom or usage is not a constant factor and what is reasonable at one stage of the progress of society may not be so at another stage, *Panch Gujar Gour Brahmin vs. Amarsingh* **1954 RLW 204**.

[5] The preferential right to purchase allowed to collaterals by section 129 of the Alwar Revenue Code on account of relationship as against strangers is not a reasonable restriction on the right to acquire, hold and dispose of property as guaranteed by Article 19(1) (F) of the Constitution and as such is void.- *Behram vs. Phusa* **1956 RLW 523= AIR 1955 Raj. 144**; *Ladhuram vs. Kalyan Sahai*, **AIR 1963 Raj. 195.**

[6] The term 'law' includes the statutory law as well as the custom or usages having the force of law. Thus, the law of pre- emption as applied in India was a customary law. The customary law on the ground of vicinage imposes unreasonable restrictions on the fundamental right of a person to acquire, hold and to dispose of the property as guaranteed by the Article '19t1)(F) of the Constitution of India, 1950 and is void. *Sant Ram vs. Labhsing* **AIR 1965 SC 315(para 4);** *Ishwarsingh vs. Sumitradevi*, **AIR 1966 J. & K. 89.** See also *Bhimrao vs. Patil Buo*, **AIR 1960 Born 252.**

[7] Thus a suit for pre-emption based on such custom also is not maintainable. *Salimanbibi vs. Hafiz Mohammad***AIR 1964 All 372.**

8-D. Validity of right based on co-ownership.

[1] The right of pre-emption based on co-ownership is a reasonable restriction on the right of a person to acquire, hold and to dispose of the property and is in the interest of the general public. Thus the provision recognizing the right of pre-emption, where the sale of a property having a common stair case or entrance is also similar to co-ownership and is valid - *Bhau Rao vs. Baijnath. Singh*. **AIR 1962 SC 1476**; *Ramrakh. vs. Mst. Gulab* **1956 RLW 336***Jagannath vs Radheshyam* **ILR 1960 Raj 75**.

[2] Article 13(1) of the Constitution of India,1950 can have no retrospective effect

and is wholly prospective in its operation. As soon as the sale is completed, a full fledged right of pre-emption becomes vested in the pre-emptor to follow the property sold and this can be enforced by a suit. If the sale took place at any time before the commencement of the Constitution, the pre- emptor claiming his right of pre-emption is entitled to enforce it by a suit although it may be filed after the commencement of the Constitution. In view of section 6 of the General Clauses Act, inspite of the invalidity of the law relating to vacinage from the commencement of the Constitution the legal proceedings to enforce the right available to a person before the commencement of the Constitution can be held as if the law has not been declared invalid. The right remains intact and is governed by the law as it was before the commencement of the Constitution. *Nathuram U8. Patram*, **AIR 1060 Raj. 125 = 1960 RLW 162 = ILR 1960 Raj. 443;** *K Madhwa vs. State of Bombay***AIR 1951 SC 128** (followed - See also *Rangnath vs. Baburao* **AIR 1956 Hyd. 120** (not followed) - *Shankerlal vs. Poonamchand*, **1954 RLW 292 = ILR 1954 Raj. 310 = AIR 1954 Raj. 231 (over-ruled).**

[3] It is well settled that if certain provisions of law constituted in one way would make them consistent with the Constitution, and another interpretation would render them un-constitutional the court would lean in favour of the former construction. - *Kedarnath Singh vs. State of Bihar*, **AIR 1062 SC 955**; *Tilkayat vs. State of Rajasthan*, **AIR 1963 SC 1638**.

[4] The Supreme Court of India in the following case has laid down the principles determining the Constitutionality of any law as discriminatory and violative of the equal protection of law. - *Ram Krishna Dalmia vs. Shri Justice Pendolkar*, **AIR 1958 SC 538**.

8E. Validity of right based on vicinage.

The right is held to be void. For detailed comments, see S. 6 (1) (ii)

9. Repugnancy of the Act with other enactment

A. Order 21, R. 88 Civ. PC. A

A repugnancy between two statutes may be ascertained on the following principles:-—

(i) Whether there is direct conflict between the two provisions.

(ii) Whether the Parliament intended to lay down an exhaustive code in respect of the subject matter replacing the Act of the State legislature.

(iii) Whether the law made by the Parliament and the law made by the State legislature occupy the same field- *Deepchand vs. State of UP.***AIR 1959 SC 648.**

If a provincial Act, which had received the assent of the Governor-General, contained anything repugnant to a Central Act, then the province concerned, the provincial Act shall apply and not the Central Act– *M/s. Basant Lal as. Bansilal***AIR 1961 SC 823.**

The code of Civil Procedure and this Act. – The present act is a special act providing for the specific class of civil right i.e. the right of pre-emption. The Code of Civil Procedure is a general procedural law applied to all the cases of civil nature provided it is not inconsistent with the special procedure. Thus chapter III of the Act no doubt provides a procedure yet the whole Act is not exhaustive so far the procedure is concerned. The CPC supplements the requirements of procedure were the special Act is silent.

Rule 88 of Order 21 of CPC - According to sub-section (2) of Section 5 of the Act, nothing in the Act shall affect Rule 88 of Order 21, CPC the reasons are obvious :-

1. It is a court sale in execution of a decree i.e. involuntary sale.
2. The bidder is co sharer in an undivided immovable property.

B Hindu Succession Act, 1956, S. 22

Section 22 of the Hindu Succession Act, 1956 was introduced by the Joint Committee for the following reasons.

"The Joint Committee have come to the conclusion that it would just And proper to provide that in any case any heir desires to transfer his or Her interest I the property inherited under the provisions of this Act (Hindu Succession Act, 1956) the right of pre-emption should be given to others".

Truly speaking, what is conferred thereby is a preferential right to acquire ancestral property and not exactly – 'the pre-emption' i.e. the preferential right to purchase. The right given under section 22 of the Hindu Succession Act is given to the heirs merely in order to prevent apprehended inconvenience. *Mst. Girraj Kunwar vs.Irfan Ali*, **AIR 1952 All 686.**

This right under the Hindu Succession Act is confined to sharers of the first class in any immovable property or joint family business

	This Act		Section 22 of the Hindu Succession act
1.	A right under this Act is Available to all persons whether Hindus, or non- Hindus, and juristic persons too.	1.	Available to Hindu only
2.	No classification.	2.	Only to the heirs of the first class.
3.	Any immovable property which is transferred.	3.	Any property (which also includes movables) of the family and joint family business.
4.	Object same, integrity of	4.	Same object.

	the property and to avoid inconvenience.		
5.	Superior pre emption Shall be preferred	5.	The heir who bids the highest price shall be entitled to purchase the family property.
6.	It is a claim for pre-emption in the strict sense.	6.	It is acquiring of a property by a heir and not a claim for pre-emption strictly speaking.
7.	The Right is general	7.	This right is special to the heirs only. He can also claim pre-emption under the pre-emption law.
8.	It is adopted and developed from the Mohammedan law or customs.	8.	It is enacted law; no adoption from Mohammedan law.

(Section 23 of this Act shall be construed subject to section 22 of the Hindu Succession Act, 1956).

C. Limitation Act, 1963.

Section 21 of the Act provides a special provision for limitation thus 'Article 113 of the Limitation Act of 1963 shall not apply. The expression "notwithstanding anything contained in article 113 of the said schedule of the said Act" (i.e., First Schedule of the Limitation Act, 1963) supports the view that the general provisions shall not apply in derogation to the special provisions of law. (Further see section 21 of this Act).

D. The Mohammedan law.

This branch of law was introduced by Muslim rulers in India and it used to apply in India as a customary law (see the back ground of the Act)

The Mohammedan law recognises three classes of claim or pre-emption.

(i) Shafi-i-sharik (co-sharers and partners in property);

(ii) Shafi-i-khalit (owners of appendages and immunities); and

(iii) Sliafi-i-jar (right in vicinage).

This third category of right of pre-emption has not been recognised as it is an unreasonable restriction upon the fundamental right of a citizen to acquire hold and to dispose of the property as provided by Article 19(1)(F) of the Constitution of India, 1950. This category of right of pre-emption has been declared ultravires to the Constitution

hence void and unenforceable in India.

First two categories of rights have been given due recognition under the Act vide section 6 of the Act.

E. S. 52 of the Transfer of Property Act.

Section 20 of the Act provides that "any alienation of the property made by the original transferee or by any person claiming through him shall be voidable at the opinion of the decree holder with effect from the date of such payment." Section 20 is the consequential effect of section 15 of the Act, the relevant position of which runs as under "but where a decree for pre-emption has been passed in favour of a plaintiff, whether by a court of the instance or of appeal, the right of such plaintiff shall not be affected by any transfer or loss of his interest accruing after the date of such decree.

Provided that no voluntary transfer made in favour of the purchaser after the institution of a suit for pre-emption shall defeat any right which the plaintiff had at the date of such institution.

The proviso applies to transfers pending the suit and the other applies to the transfers after a decree in favour of the plaintiff. This idea has been borrowed from section 52 of the T.P. Act. The present Act has simplified the doctrine of lispendens.

10. Preamble

A. An Act to consolidate and amend:

[1] The long expression "An Act to consolidate and amend the law relating to pre-emption in the State of Rajasthan", makes it abundantly clear that the object of the present Act is to consolidate as well as to amend the existing state of the law relating to the pre-emptions as existing on or before the date of 9-2-1966 in the State of Rajasthan. The nature of the law of pre- emption was customary and thus not enacted, thus the law appeared in the judicial pronouncements of the High Courts in India. This law aimed at to codify the same to suit the conditions in the State of Rajasthan.

In view of Mr. Watson, J. "The very object of consolidation is to collect the statutory law bearing upon a particular subject and to bring it down to date, in order that it may from a useful code applicable to the circumstances existing at the time when the consolidating Act is passed" *Administrative General of Bengal vs. Premlal Mullick* **(1895) 22 Cal. 788.**- *Shantanand vs. Basudevanand,* **AIR 1930 All (225 (at page 230) (F.B.)**

[2] To consolidate means to reduce to a system of the whole of the statute law relating to the same subject matter as illustrated by judicial decisions. This clause means that the present Act not only codify the law relating to pre-emption but also amends it.

[3] The law should not be considered to have been changed unless the words used

by the legislatures clearly shows this *R.E. Ramsay vs. Pashupatinath*, **AIR 1955 Cal 255 (256).**

[4] In the case of an Act which is amending as well as consolidating Beyond the reasonable interpretation of its provisions there is no means A of) determining whether any particular section is intended to consolidate or amend the previously existing law - *Ramdass "Vithaldass vs. Amarchand & C0*. **AIR 1916 PC (Page 9).**

[5] In the consolidating Acts only, statutes not expressly repealed should be held to continue in force without modification.- *Shantanand vs. Basudevanand***AIR 1930 All 225 (FB).**

[6] The approval of the legislature of a particular construction put on the provisions of an Act on account of its making no alteration in those provisions is presumed only when there had a consistent series of cases putting a certain construction on certain provisions. - *Purshotam Dass Dalmia vs. State of W.B*., **AIR 1961 SC 1589.**

[7] Where the language of any Act is clear and unambiguous, it must be given due consideration without looking to the previous state of law as existed before the commencement of the Act. But where it is unclear and ambiguous, it is essential and unavoidable to examine the previous state of law.

B. Effect on previous state of law.

It is clear that the origin of the law is from the Mohammedan principles of pre-emption. Two classes of claims namely- Shafi-i-khalit have been recognised and is given due place in the Act but the third class of claim, namely Suf-i-jar (right in vicinage) has not been recognised as it is ultra vires to the Constitution.

Different modes of "Talabs' have been reduced to single mode of 'talab' as envisaged by section 8 of the Act.

The principle of law or procedure which has not been recognised by the present Act shall be deemed to have been repealed ipso facto in view of section 23 of the Act.

11. Retrospective operation of the Act

A. General principles.

[1] The Madras High Court in- *Balaja Singh. vs. Gangamma*, **AIR 1957 Mad. 85 page 86**.

Case have laid down the following principles for the retrospective operation of the Act:-

1. The legislative enactments have no retrospective effect unless ex-plicitly stated to be so in the enactments themselves.

2. The amending statutes should not be construed as having retrospective effect if they affect the vested rights.

3. The statutes which are declaratory or explanatory are to be constructed as having retrospective effect as they give an authoritative explanation of the words, phrases or clauses used in a statute, and whenever the statute has to be applied the explanation also should be applied.

4. No recital in a declaratory or amending statute can render void that which has been declared by the courts to have been done rightly under the law

5. The statutes which affect a mere procedure are retrospective in their nature.

[2] The same principle has been explained but in different words by the Supreme Court. - *The State of Bombay vs. Vishnu Ramchandram* **AIR 1961 SC 307**.

[3] It is the fundamental principle of law that no statute should be construed so as to operate retrospectively unless its language expressly so requires. Every enactment must be treated to be prospective unless contrary' is expressly provided in the section or by necessary implication so operates - *Motiram vs. Suraj Bhan*, **AIR 1960 SC 655**; *K. Madhav vs. State of Bombay*, **AIR 1951 SC 126**; *Janardan Raddy vs. State* **AIR 1951 S 124**; *Hiramony vs. State of Assam*, **AIR 1954 Assam 224.**

[4] The statute which takes away or affects the vested rights or imposes a new disability or confers a new right must be presumed not to operate retrospectively *C. Mohd Ynus vs. Sayad Unnisa,***AIR 1958 SC 544**; *Mst. Mohri vs. Mst. Chukli***1960 RLW 95** *State vs. Sangramsingh,* **1951 RLW 664 = ILR 1961 Raj. 984 = AIR 1962 Raj 43**; *Abdul Hussain us. P. Chaganlal Chaturvedi***1959 RLW 367 = ILR 1953 Raj 1053.**

[5] The enactment providing a proceeding law will always operate retrospectively for no right is created or affected in the procedure. *Meramraj vs. Adhur Yellgue*, **AIR 1955 Hyd. 56**.

[6] But the above rule shall not apply to such procedural laws which tend to affect the substantive right of remedial right, for example, the right of appeals, revision or reference or under contract. - *Hanuman Prashad vs. Ravindra Lal***AIR 1956 Assam 114**; *Firm Radhe Shyam vs. Kundanlal,***AIR 1956 Punjab 193**; *Mewar Textile Mill vs. Union of India*, **AIR 1955 Raj 114***Jehmal vs. Ambsingh*., **AIR 1955 Raj. 97**; *Samdukhan vs. Mandalal*, **1957 RLW 464 = ILR 1958 Raj 51 = AIR 1958 Raj. 62**

B. Indications

[1] Indications of retrospective operation when the commencement of a statute is postponed for a future date; the object behind it is to allow a concession to enforce the rights during the period of suspension.

[2] A statutory provision is held to be retrospective either when it is so declared by express terms or the intention to make it retrospective clearly follows from the relevant words and the context in which they occur.- *Mst. Rafiquenissa vs. Lal Bahadur* **AIR 1964 SC 1511.**

[3] The use of the expression "shall be deemed always to have meant" or "be

deemed always to have been inserted" clearly shows that it provides an express retrospective operation. AN amendment retrospective operation applies to the pending cases unless saved expressly - *Thakur Medan Singh vs. Collector Sikar*, **1954 RLW 1 = AIR 1954 Raj 104 = ILR 1953 Raj 605.**

[4] Section 22 of the act expressly bars the retrospective operation of the Act. Thus the Act does not provide to apply retrospectively. It operates prospectively from the 10th of February, 1966 the date on which this Act came into force.

12. General

[1] **Pre-emption- Suit for - Plaintiff valued only part of the suit property alleging that rest belongs to him. Alternatively he pleaded that if higher amount is found due to be paid to defendant he will pay - It was an alternative suit and plaintiff could fall upon alternative case regarding entire property setup by him.**

The plaintiff had mentioned in the plaint that the defendant No. 1 had sold the property to defendant No. 2 for Rs. 2,000. However, the plaintiff had pleaded that 'parasal' market EFGH belonged to him and the defendant No. I was not competent to sell it to defendant No. 2 for this reason the plaintiff valued the price of parasal at Rs. 500 and valued the suit only for Rs. 1500 which was the value of the remaining property. However, the plaintiff had mentioned in para 12 of the plaint that if the court fees also on the amount of Rs. 500 the plaintiff was prepared to pay the same. In the relief clause also the plaintiff, in the alternative, pleaded that in case the court, comes to the conclusion that higher amount than Rs. 1500 was payable by the plaintiff for sale of the house to him, he will pay the same to the defendant No. 2. On a rational construction of this pleading, it appears that the plaintiff had pleased an alternative case for the reason that he was claiming 'parasal' as belonging to him. However he was ready to pay the entire sale amount of Rs. 2000 in case the court decided and was also ready to pay the court fees on the amount of Rs. 500. As a matter of fact, the plaintiff paid the deficit court fee on the amount of Rs. 500 on February 27, 1976 when the office had report that the court fee was deficient. In such circumstances, it cannot be contended that the plaintiff's suit was only for partial pre-emption. It was an alternative suit and the plaintiff could fall upon the alternative case pleaded by him claiming pre-emption in respect of the entire property sold. - *Maganbai & J.K., LRs of Maganlal vs. Nasir Mohammad*-**1989 (2) RLR 626**.

[2] **Waiver of right by conduct - Agreement was executed between plaintiff and defendant not after sale of property to defendant nor that both the parties will have right to sale their houses whenever they desire but would not sell it to muslim- Conduct of plaintiff clearly amounted to waiver of his right of pre-emption.**

It is very pertinent to note that agreement Ex.6 was executed between the plaintiff

and defendant No.1 despite full knowledge to both of them that the defendant No.1 had already about six months prior to this agreement sold his house property to Nasir Mohammed (defendant No.2). On the date the agreement Ex. 6 was entered into Chhabilal defendant No. 1 was left with no right, title or interest in the house property which is the subject matter of this suit as he had already sold the same to the respondent on March 11, 1966. The real object of entering into this agreement on September 2, 1966 clearly, therefore, was a collusive design between the plaintiff and defendant No- 1 so that the plaintiff may be helped and strengthened to file suit for pre-emption in respect of the house property which had already been sold by the defendant No.1 to a Muslim named Nasir Mohammed six months prior to this agreement. Agreement Ex. 6 has one more necessary implication in it and it is that the plaintiff and defendant No.1 also agreed that they could sell their respective houses whenever they felt its necessity and the only restriction which they wanted to impose was that the vendee should not be Muslim, Bohra, and Harijan etc. This subsequent restriction is meaningless. What is important is that it was agreed that both the sides could sell their respective houses whenever they felt its necessity and this special feature in the agreement amounts to waiver of the right of pre-emption on the part of the plaintiff. A right ofpre-emption is a weak right and it should subsist up to the date of the suit as well as on the date of passing the decree the conduct of the plaintiff in agreeing that both the plaintiff and defendant No. 1 could sell their respective properties when they felt its necessity is a definite conduct in negation of the right of pre-emption of each other on the sale of the property. *Maganlal & J.K. LRs of MAGANLAL Vs Nasir Mohammed*-**1989(2) RLR 626**.

……..

Be it enacted by the Rajasthan State Legislature in the Sixteenth Year of the Republic of India as follows:-

CHAPTER 1

Preliminary

1. **Short title, extent and commencement**.- (l) this Act may be called the Rajasthan Pre-emption Act. 1966.

(2) It extends to the whole of the State of Rajasthan.

(3) It shall come into force at once.

COMMENTARY

"At once" - The phrase 'at once' denotes the day, i.e the tenth day of February, 1966. The day of its publication

2. Definitions. - in this Act. unless the subject or context requires otherwise.

(i) "co-sharer" used in relation to any immovable property, means any person entitled as an owner or a proprietor to any share or part in such property, whether his name is or is not recorded owner or proprietor in the record of rights or in any register prepared in accordance with law:

(ii) "foreclose" and "foreclosure" refer to the passing of a final decree for foreclosure under rule 3 of Order XXXIV of the code of civil procedure. 1908 (central Act 5 of 1908)

(iii) "house" means any hut or building and includes any compound or enclosure appertaining thereto

(iv) "immovable" property means land or house property wherever situated in the State:

(v) "land" includes things attached to the earth or permanently fastened to anything attached to the earth. When sold or foreclosed alone with the land to which they are attached but not other wise

(vi) "purchaser includes a person who has acquired immovable property under a final decree for foreclosure.

(vii) "sale' means a transfer of ownership in immovable property in exchange for a price paid or promised or partly paid and partly promised:

(viii) "transfer" means a sa1e or a mortgage where the final decree for foreclosure in respect thereof has been passed.

COMMENTARY

S Y N O P S I S

1. Definition: - Object of.....
   Unless the subject or context -
   requires otherwise,
2. Co-sharer -
   (a) Co-sharer meaning of -
   (b) 'Person' meaning & classification of-
   (c) Any person entitled as an owner
   (d) An owner or a proprietor.
   (e) Kinds of ownership -
      (i) joint ownership
      (ii) Co-ownership or ownership in common

(iii) Coparcenary
(iv) Partners in joint wall

(f) Property -
(i) Meaning of
(ii) Classification of
(iii) Popular classification

3. House
(a) Building
(b) Hut
(c) Compound or enclosure
(d) Appertaining thereto
4. Immovable property
(a) Meaning of
5. Land
(a) Meaning of
(b) "Attached to the earth"
(c) Permanently fastened to anything attached to the earth
(d) When sold or foreclosed
(e) Alongwith the land to which they are attached
(f) But not otherwise
6. Purchaser
7. Sale -
(a) meaning of
(b) modes of transfers
(c) Transfers of which the Act applies
(d) following are not transfers
9. Mortgage
(a) meaning of
(b) final decree for foreclosure
(c) foreclosure, meaning of

1. Definitions-Object of:-[1] The object in enacting General Clauses Act is to void superfluity of language in statutes whenever it is possible to do so. -*Rayarappan Nayanar vs. Madhui Amma*, **1949 FCR 667** (669).

[2] **Unless the subject or context requires otherwise-** In modern drafting, the words unless the subject or context requires otherwise or similar words like unless there is anything repugnant in the subject or context are used. The definitions run subject to the above qualifying words.

"It is perhaps worth pointing out that the words 'unless the context otherwise requires" which we find in the consolidating Act of 1929 are not to be found in the

amending Act of 1928. I attribute little weight to this fact, for in my opinion some such words are to be implied in all statutes where the expressions which are interpreted by a definition clause are used in a number of sections with meanings sometimes of a wide and sometimes of an obviously limited character" - Knightsbridge Estates Trust Ltd. vs. Byrne, **1940 AC 613**; *Kartick Chandra vs Harsha Mukhi Dasi*, **AIR 1943 Cal 345 (FB) (at pages 354, 355)**; *Mohd. Manjural Hague vs. Bissesswar Banerjee*, **AIR 1943 Cal. 361.**

[3] While Lord Denman, observed that "an interpretation clause is not receive so rigid a construction; that it is not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of a word must be under all circumstances. We rather think that it merely declares what persons may be comprehended, within that term, where the circumstances require that they should" - *The Queen vs. The Justices of Cambridgeshaire* (1838) **7 Ad & E 480 (page 491) = 112 ER 551**.

[4] The expression is used in every enactment at the beginning of all sections dealing with definitions in order to warn strictly not to make out an obscure meaning of any specific term as defined in that Act which can not fit in the context where such expression is used. All the definitions must be read subject to the qualifying words 'unless the subject or context requires otherwise' even though the definition clause does not contains these words- *Balkishna vs. Ashok Bank,* **AIR 1966 Kerala 42 (FB)**

[5] Normally, when the same word is used in several provisions of a statute and the statute has provided a dictionary of its own for the words need therein, then it must be presumed that the legislatures intend to use the same word in the same sense in the various provisions of the same statute. *Gamandi Ram vs. Shanker Lal* - **AIR 1966 Raj. 19.**

2. Co-sharer:

(a) "Co-sharer' meaning of - Mr. D.F. Mulla, J. described 'sharers' in his book Principles of Mohammedan Law as "sharers are those who are entitled to a prescribed share of the inheritance." This is one of the class of heirs who are preferred over Residuaries and Distant Kindred as provided by Hanafi law of inheritance among Sunni Muslims. This covers the sharers in movable or immovable property whether situated within or beyond the territories of the State of Rajasthan. The sharers as provided an understood in the Company Act, 1956 have no bearing upon the subject under discussion.

The person though a co-sharer but whose case is covered under clause (b) of sub—section (2) of section 5 of the Act can not claim the right.

The present Act has the restricted meaning of the term 'sharers'. The essentials are as under.-

1. Co sharers means any person,
2. Who is entitled:-
   (a) as an owner, or

(b) as a proprietor,

Whether his name is or is not recorded as such owner or proprietor in record of rights or in any register prepared in accordance with law.

3. To any share or part in the property.

4. Such property is an immovable property.

(b) Person meaning and classification of - Mr. Coke, according to the English law, classifies person as 'persons are of two sorts, persons natural as created by the nature i.e. human beings and persons incorporate or politique-created by the policy of man (and therefore they are called bodies, politique) those he of two sorts, viz either sole or aggregate of many".

Under clause (57) of section 32 of the Rajasthan General Clauses Act, 1955 defines the term person as under:-

"(57) Person shall include any company or association or body of individuals whether incorporated, or not"

Thus, the term 'person includes a firm, for a firm is manifestly a body of individuals and may be exposed to an order for payments of penalty whether it is registered or not *Comm. Of I.T. vs. S.V. Angidi Chettair-* **AIR 1966 SC 1970.**

The classification is as under

Person

I. Natural Human Beingst (Individual)	II. Artificial Juristic persons (two or more individuals when associate).
(1) Association of human beings (binding factor is their agreement)- (i) Partnership firm. (ii) Company limited or unlimited. (iii) Club or association, unions, corporation etc. etc.	(2) Statutory institutions (creature of statute):- (i) Local bodies:- (a) Municipalities. (b) Gram Panchayats (c) District Board" - (d) Universities (ii) Co-operative Societies (iii) Central and State Government.
(A) Government direct control.- (i) Board of Revenue. (ii) State Electricity Board	(B) Government s control is not ire Government enterprises:- Hindustan Steels etc. and other

(iii) Railways, Road Transport financial and business concerns.

'Any person' means, any person irrespective of the act that he is individual or an association of individuals.

An idol is a juristic person who can sue or be sued through their Mahants or Pujaries. Thus the juristic persons are also entitled to acquire, hold and dispose of the property or any share in such property which they own as any other individual human being can own the Juristic persons act thought their authorised agents, directors, managers, executors, administrators and partners in a firm.

(c) Any person entitled as an owner. - To be entitled to as an owner in ordinary parlance means possessed of the entire powers of an owner i.e.] acquire, hold and to dispose of the property of which he is an owner. he is also entitled to use when interfered with his that right and pursue it property if he is illegally dispossessed of.

The Concise Oxford Dictionary meaning of the word 'title' is a right to ownership of property with or without possession, facts constituting claim of ownership. The word entitle is a transitive verb derived from the noun 'title' which means to give the title of, to give a person ii claim to a thing or a property.

The Chamber's 20th century dictionary meaning of the word title is as that which gives a Just right to possession or ownership an Owner in regional language is called the 'malik'. The term 'malik' (Owner) was held to import full proprietory rights unless there is something in the context to qualify it – *Ram Kishori lal vs Kamal Narayan*, **AIR 1963 SC 890**, *Ram Gopal Vs Nandlal*, **AIR 1951 SC 139**; *Mst Sasiman vs Shiv Narayan* **AIR 1922 PC 63.**

The person holding khatedari rights in an agricultural holding is deemed to be a person entitled as an owner. - *Gattani, J.in Prabhadayal vs. Maahdevnath* **1972 WLN 755 = 1972 RLW 346.**

An ownership and possession are two separate legal concepts and in every transfer of ownership from one person to another by the act of parties, a transfer of possession is not necessary. *Mohd.Taliv Hussain Vs Inayatjan & Others*, **ILR 33 all 683 = 8 All LJ 746 = 11 IC 762.**

According to an eminent jurist Salmond the title is the defacto antecedent of which the right is the dejure consequent. Whether a right is inborn or acquired, a title is equally requisite.

The person having the title as an owner must necessarily exclude other circumstances of subordinate possession of the property for example as that of a tenant, lessee, sub-lessee, mortgagee and trespasser. Any defect in title of a person would exclude him from the definition of being an owner The person must be entitled to the property as a full-fledged owner and anything short of it would not be covered by this expression.

The title may be acquired in the following manners-

(1) A title acquired by transfer for example purchase for consideration exchange, gift under a will ripened into a letters of probate.

(2) A title acquired by lapse of period for example a person having continued adverse possession of any immovable property for a period exceeding 12 years

(3) A title is acquired under a decree and judgment of the court of a Competent civil Jurisdiction in favour of a person entitling him to continue possession of the property as of right free of any liability.

(4) Upon partition of the property which was owned jointly the full ownership is acquired.

(5) The title to the property passes to the heirs on the death of the last owner under the law of inheritance. So also the office of Mahantship or Pujariship passes to their Chelas on the death of the last Mahant or Pujari.

(6) The State becomes entitled to a property on the death of the last owner dying heirless under the Rajasthan Escheat Regulation Act, 1956.

(7) The State acquires the title by acquisition on payment of compensation for a property as determine by the court in the land acquisition proceedings any person claiming title in a property by being a spes successions does not acquire any title in the property.

(d) An owner or a proprietor.- The term 'own' is a verb which means to possess to be the rightful owner of belonging to one's self and to no other and the term owner is noun which means one who owns or possesses a thing property. The owner would not be ceased of the right of ownership simply on the ground that he is not in actual physical possession of the property. The owner may be constructively in the possession of the property through his tenant, licensee, and servant, but where the person in possession of the property claims the possession in himself denounces the title of the owner, the owner is deemed to be not in possession of property.

The person having possession of a property actual or constructive, with a power to dispose of the same is an owner is the true owner.

The minor though whose right to dispose of the property is suspended because of section 11 of the Indian Contract Act does not cease to be an owner of the property.

The trustee of a trust property having the possession and power to dispose of the trust property for the benefit of the cestui que trust or for the benefit of the trust property itself is still a trustee and can not be termed as owners. The trustee would act as an owner of the trust property as against the whole word except the beneficiaries.

The tenants and licensees hold a good title against the whole world except their landlords or the licensers.

We may define the right of ownership in a material thing as the general permanent, and inheritable right to the use of that thing.

Mr. Austin defines the right of ownership as "A right indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration over a determinate

thing.

According to Salniond, “ownership, in its most comprehensive signification, denotes the relation between a person and any rights that is vested in him. That which a man owns to this sense is in all cases a right.”

A man may possess a right without owing it, or as where the wrongful occupant of a land makes use of right of way or other easements appurtenant to it or he may own a right without possessing it or finally, ownership and possession may be united, as, indeed, they usually are, the dejure and the de facto relations being co existent and coincident.

A proprietor appears to be similar to that of an owner. The 20th Century Dictionary defines the meaning of the term “Proprietor” as “one who has anything as his property, as owner”. This Act has also treated his term synonymous to an owner.

It is the ownership in a suit property which gives rise to right of pre-emption and not the possession alone as a mortgagee. - *Gopichand vs. Meenalal*, **ILR 1951 Raj . 329 = AIR 1952 Raj .5.** Only the owners who can enforce the right but not their tenants, or the person in possession without title as waqifs or mutawallis.-*Gooniansing vs. Tripoosingh* **(1867) 8 WR 437**. *Beharee Ram vs. Mst. Soobhudra* **(1868) 9 WR 455** *Girraj Kr. vs. Irfanah,* **AIR 1952 All 686**.

(e) Kinds of ownership.— According to the nature of interest in property it is classified as under -

(i) Joint Ownership.

(ii) Co-ownership or ownership in common

(iii) Co-parcenary.- A co-parcenary interest arises when two or more persons succeed to the property by descent to their ancestors. There is unity of interest and possession and equal rights in the property. A Mitakshra Coparcenary is enlarged by the birth of males. Any one or more Coparcenary can demand partition for allocation of his share. Others can maintain the joint status of the coparcener.

Cosharer Rights of co-parcener of a joint Hindu Family - In a Joint Hindu Family after the shares of each coparcener are defined the parties may divide the property by metes and bounds or they may continue to live together and enjoy the property in common as before. But whether they do the one or the other, it affects only the mode of enjoyment, but not the tenure of the property. The property ceases to be joint immediately the shares are defined, the shares are defined, and thenceforth the parties hold the property as tenants-in-common. Therefore before the joint property is partitioned by metes and bounds, the coparcener who have concluded their status of the joint Hindu family can enjoy that property as tenant-in-common and unless the share of each of the coparcener is severed by partitioning property by metes and bounds, a coparcener can-not be said to have lost the entire interest in the property. The person having 1/48th shares in the property cannot says as to which portion of the property will come to his share on the partition by metes and bounds and, therefore, the interest to that extent

continue in the property. Such a person can conveniently fall within the definition of a co-sharer as given in section 2 of the act. As such he could claim as of right a decree for pre-emption in respect of the property in relation to which he can be termed as a co-sharer. - *Teeja Devi vs. Notatmal*, **1975 WLN 332**.

(iv) Partners in joint wall - The relevant criterion to determine whether a partner in the joint wall is only a neighbour or a co-sharer, is whether or not a partition of the said wall is a co-sharer as no partition has taken place. -*Jagannath vs. Radhey Shyam*, **ILR 1960 Raj. 75**.

(f) Property: (i) meaning of - The term 'property' has neither been defined in the present Act not in the Rajasthan General Clauses Act. In Ordinary parlance an aggregate of a person's proprietary rights in his estate assets or possessions constitute his property. According to the eminent jurist Salmond the term property, which we here use as meaning proprietary rights in rem, possesses a singular variety of different applications having different degrees of generality.

"A man's property is all that is his in law. In its widest sense, property includes all a person's legal rights of whatever description."

It includes a man's rights in his estate, liberty, life and reputation. It includes all a person's legal rights.

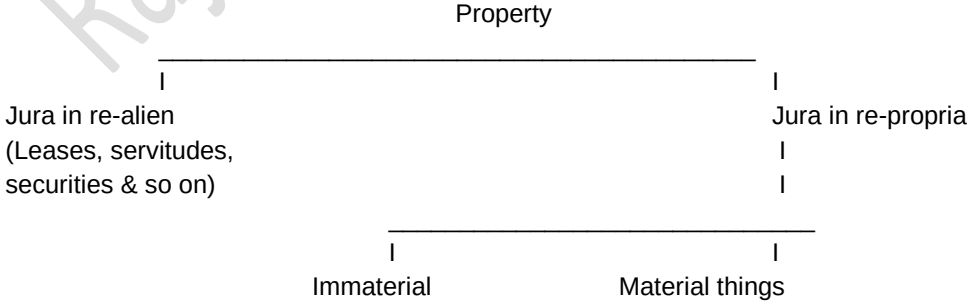
The property, as a legal concept, is the sum of a bundle of rights and in the case of tangible property would include the right of possession, the right to enjoy, the right to destroy, the right to retain, the right to alienate and so on *Garudatta vs. State*, **AIR 1961 SC 1684** (wider sense) - See also *Roman. and Raman vs. State*, **AIR 1956 SC 463.**

In its narrowest sense property includes nothing more than corporeal property i.e. the concrete things which are the subject of ownership - *Umrao Singh. vs. Kechrusingh*, **AIR 1939 All. 415 (F.B.).**

A property in relation to any land, is a bundle of rights exercisable with respect to the land. Minister of State for Army vs. Datzeil, **(1943-44) 68 Cr. L.R. 261.**

(ii) Classification of - According to Salmond, the broad classification is:-

(1) Corporeal (ownership in material things); and
(2) Incorporeal (any other proprietary right in rem).



things (Patents, copyrights, trade marks and so on)	(Land & chattels)

(iii) Popular Classification - Movable and immovable Property.

3. House:

(a) Building - The term 'building' means anything built upon a land such as a house Clause (3) of section 3 of the Rajasthan Municipalities Act, 1959 defines the term 'Building' as under:-

> "(3) 'building' means a house, hut, shed or enclosure, whether used as a human dwelling or for any purpose and includes walls, rooms, passages, verandahs, fixed platforms, plinths, projections door steps, stair-cases of whatsoever material constructed but does not include a rent or other such portable and merely temporary shelter."

Clause (1) of section 2 of the Rajasthan Panchayat Act, 1953 defines the same term 'building' as under :-

"(1) 'building' includes any hut, shed or other enclosure, whether used as a human dwelling or for any other purpose and walls, verandas, fixed platforms, plinth, door' steps and the like.

Thus, it is clear that the building must be a built or a constructed place of the permanent nature.

The word, 'building' means a thing composing of the fabric of the building and the ground that the fabric rests upon and encloses.- *Corporation of City of Victoria vs. Bishop of Vancovour*, **AIR 1921 P-C" 240.**

A wall in included in the term 'building' as defined by the Punjab Municipal Act, 1911 (same as the Rajasthan Municipal Act). The definition does not say that the wall should necessarily be detached from the building or should be standing by itself. A wall would, therefore, fall within the definition of a building whether it forms part of a house or not - *Delhi Municipality vs. Sham Dei*, **AIR 1947 Lahore 255.**

Thus, a wooden, structure of the permanent nature would be a building.

(b) Hut- In common parlance hut is a structure made up of earth and wood. It as Kachcha in form as building is a Pakka structure. Both are of permanent nature which may be used as a dwelling place or for other purpose also. The Chamber's 20th Century Dictionary provides its meaning as "a small or mean house", whereas the Concise Oxford Dictionary gives its meaning as "small mean house of rude construction".

(c) Compound or enclosure- A compound is an enclosed land by something which may be either a wall, fence, pillars or some other mark demarcating the separation from other adjacent land.

The dictionary meaning of the word 'compound' is as under -

"the usual name in India for the enclosure in which a house or factory stands, with its out houses, yard and garden."

The wood 'enclosure' is understood in reference to 'a land as enclosing it so as to make a property.

(d) Appurtaining thereto - This phrase has the reference with hut or the building around which is situated the compound or the enclosure. The compound or the enclosure belongs to the hut or house which is situated therein or adjacent to it.

The word appurtenant has been used in its natural, ordinary and non—technical sense which in ordinary parlance means relating to usually enjoyed or occupied with or adjoining. The word appurtenant means an appendage, an adjust or something incidental. The use of the word 'appurtaining' in the definition of the word 'house' in the Act appears that the legislatures intended to attach land or gardens strictly called the compound or an enclosure i.e. they imagined of the compound or an enclosure alongwith the hut or the building and not independent of it. This word governs both the compound and the enclosure adjoining such hut or building.

In law appurtenant denotes an annexation which of convenience merely and not of necessity, and which may have its origin at anytime, in both the respect it is distinguished from appendent. In conveyance of land and buildings it is usual to add to the parcels or to the habenium or to both, the phrase 'with the appurtenances' and to make sure to add or repeated as "appurtenant or belonging thereto."

This term is commonly confined to the purely incorporeal hereditaments that are commonly annexed to the lands of the buildings and may include as well common as any other rights. The words 'appertaining thereto' means the adjoining to hut or a building.- *Kalicharan. vs. Raghunath*, **AIR 1955 NUC 335.**

4. Immovable property:

Meaning of-Clause (iv) of section 2 of the present Act defines the term 'immovable property' as under :-

"(iv) "immovable property" means land or house property, wherever situated in the state."

This definition is very simple, it may be either a land situated within the State of Rajasthan or any house situated within the State of Rajasthan. The legislature did not mention to exclude timber, growing crops or grass.

In view of the present Act timber, growing crops or grass on the land is of a little importance. It appears that the legislature goes with the notion that as the house is understood with its affixtures doors, frames and bolts so also the land is understood inclusive of anything standing thereupon. This idea is further strengthened when we read the definition of the term “land” given under this Act. ,

'Such property’ means that immovable property in which the person (co-sharer) has any share or part as an owner, proprietor or partner.

5. Land:

(a) Meaning of - The present Act refers to all sorts of lands whether it is an abadi land, site of a building or an enclosure or a compound adjoining any building which is owned by a person as a full owner or as a Sharer.

The land can be classified as under-—

(1) As regards it physical nature:—
   (a) open land; and
   (b) compound or enclosed land

(2) As regards its purpose and use of the land:—
   (a) agricultural land; and
   (b) non—agricultural land i.e. abadi land.

The definition as stated above does not make distinctions between an agricultural and non—agricultural lands. thus the Act shall apply to the agricultural lands too subject to sub section (2) of section 5 of this Act.

The present definition of the term ’land’ runs with the word ’includes’ thus, the list of items enumerated is not complete. The definition is not exhaustive.

(b) Attached to the earth - The expression “attached to the earth’ has been defined under section 3 of the Transfer of Property Act, 1882 (Central Act No. IV of 1882) which runs as under:-

“(a) rooted in the earth, as in the case of tree and, shrubs;
(b) embedded in the earth, as in the case of walls or buildings; or
(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached" (for examples doors, windows in the house).

All those things attached to the earth have been treated to be an immovable property under sub section (37) of section 32 of the Rajasthan General Clauses Act, 1955. Under the English law it is technically called the ‘fixtures’. In England such fixtures become the part of the soil but in India thing attached to the earth does not necessarily become part of the soil though it is called an immovable property.

The definition is quite simple and self-explanatory. The phrase ’rooted in the earth’ is

also self-explanatory. The trees rooted in the earth are attached to the earth, yet timber, grass and growing crops are expressly excepted from the definition.

The phrase 'imbedded in the earth' is also self-explanatory. A well is imbedded in the earth, thus, it is an immovable property - *Harichand vs. Bala*, **188 Bom H C P J 125**.

So also a brick pillar is an immovable property. But a tenant which merely rests by its own weight on earth and whose string nails are only imbedded into the soil the tent itself cannot be treated as an immovable property but the string nails may be. - Munilal vs. Kishore Chand, **AIR 1927 Lah 373.**

A super structure on the land is an immovable property, but a wooden share resting on its own weight on the foundation prepared for it is not attached to the earth thus not an immovable property. - Charturbhuj vs. Thomas, **6 Bom LR 1073.**

A wooden barn resting upon a foundation of stone is not a fixture - *Wansbrough vs. Matan*, **I E R 1016**.

A flour mill which can change hands and can be removed from one place to another can not be treated as an immovable property. - *Krishan Chand vs. Nur Mohd.*, **AIR 1936 Lah 212**.

A thing attached to what is so imbedded in the earth will be a thing attached to the earth and thus it is an immovable property. This conception is further qualified by the expression "for the permanent beneficial enjoyment of that to which it is attached." Thus, it relates to two things:-

(1) permanent attachment to the earth, and
(2) for the beneficial enjoyment of the thing so attached.

Thus, its attachment is of temporary nature, it would fall short of being an immovable property.

The doors, windows, pipe fittings, and electrical connection are all fitting or the permanent nature with a view to have the beneficial enjoyment of the hut or the building imbedded in the earth. The decoration articles cannot be called the immovable property.

(c) *Permanently fastened to anything attached to the earth*- The conception of permanency is significant and thus excludes the temporary structures. The term 'permanently' is used as an antithesis to the word temporarily - *Secretary of State vs. Tarakchandra*, **AIR 1927 PC 172**.

Thus a machinery plant erected on a raised cemented platform which is attached to the earth is an immovable property. - *Munilal vs. Kishore Chand*, **AIR 1927 Lab 373**.

(d) When sold or foreclosed - This phrase, is significant for the whole law of pre-emption, applies at the moment when an immovable property is sold or an immovable property subject to mortgage debt is foreclosed i.e. a mortgagor is debarred from

redeeming it.

The property is deemed transferred the moment it is sold by the owner of the person having a share in the owners, of the property under a private transaction of transfer by sale or when the court directs by a final decree for fore-closure that the mortgagor is debarred from enforcing the claim for redemption.

(e) Along with. the land to which they are attached - All those items which are enumerated in the foregoing head note under this definition from the part of the land and thus they can be termed as an immovable property. The hut or building shall be transferred along with the soil (land in strict sense of the law) upon which the same is existing. A hint or building can not be detached from the soil. But there are many other items which are transferred along with the land upon which those are standing or attached would form the part of the land and thus it can only be an immovable property.

A tree is an immovable property so long as it is imbedded to the earth and if it is cut and removed, it ceases to be an immovable property.

A machinery plant attached to the earth is immovable property but as soon as upon removing the bolts etc. which made it attached to the earth ceases to be an immovable property. Then it becomes a movable property.

(f) But not otherwise - This phrase is significant which directs to make strict note of the things which tend to become movable property at some subsequent events. it is a negative direction which excludes cases of machinery plants, standing trees or such severable things which tend to change the nature from immovable to movable nature of the things. This phrase wants to impress upon us that such items of things shall be treated as an immovable property and the Act shall apply to them so long as they do not change their nature of being an immovable property or such things are not detached from the earth or unfastened to anything attached to the earth. The moment such things are detached from the earth or unfastened to anything attached to the earth, then such things shall cease to be called an immovable property and therefore this Act shall cease to apply to such things.

6. Purchaser. - In ordinary parlance we mean a person who acquires property for consideration under a transaction of sale. It would be convenient to understand the term 'purchaser' in reference to 'sale' & 'seller'. A transaction of sale is a bilateral act between the seller and the purchaser. The seller is one who transfer the goods (sells) under the contract of sale and the purchaser is a person who acquires goods under the -sale for consideration. The transaction is called sale, the subject matter of the transaction is goods or property, the consideration of the sale is the price and along with the goods the attribute of ownership of the goods is passed in favour of the purchaser by the seller for the consideration called the price or value.

The dictionary meaning of the term ‘purchaser’ is a person who acquires (ownership) something on payment of the price of it.

As we see the definition of the term ’purchaser’ is not exhaustive but enumerative. In addition to an ordinary meaning of the term ’purchaser’ it attaches an additional meaning too. Thus, it shall mean person who acquires ownership for value which can further be classified in two classes, namely :—

(i) under a contract of sale (voluntary transfer); and

(ii) under a final decree of the competent court in favour of mortgagee foreclosure thereby precluding the mortgagor to redeem the mortgage property henceforth.

Until a final decree for foreclosure is passed, the mortgagee remains a mortgagee and does not become the purchaser under the Act.

The subsequent transferee from purchasers shall be treated as purchasers as understood by section 2O of the Act by the expression “any person claiming through him”.

7. Sale.-(a) *meaning of* - It appears that the present Act has adapted the definition of the term ’sale’ from section 54 of the Transfer of Property Act, 1882 with suitable modifications. Section 54 of the Transfer of Property Act, 182 defines ’sale’ as under :—

> “Sale” is a transfer of ownership in exchange for a price paid or promised or part-paid and part promised."

The important ingredients in the definition of the word ’sale’ are three, viz :—

(1) transfer of ownership in (immovable) property;

(2) in exchange for price which may be either the whole price paid or partly paid and partly promised or the whole price is promised to be paid on any future date; and

(3) Subject matter of the sale is an immovable property. The sale is a speci of the genus transfer.

If an agreement to resell is incorporated in the sale-deed, itself, the transaction may not be a sale but a mortgage by conditional sale and there would be no right of pre-emption is such a case. - *Gangasingh. vs. Santosh Kumar*, **AIR 1963 All 194.**

According to the law both of England and of India, in order to constitute a sale, it is necessary that there should be an agreement between the parties for the purpose of transferring the title in goods which of course pre-supposes for capacity to contract, that is must he supported by money consideration and that as a result of the transaction property must actually pass in goods. Unless all these elements are present, there cannot be a sale. Thus, if merely title to the goods passes but not as a result of any contract between the parties, express or implied, there is no sale. So also if the

consideration for the transfer was not money but other valuable consideration, it may then be exchange or a barter but not a sale. And if under the contract of sale, title to goods has not passed, then there is an agreement to sell and not a complete sale. - *The State vs. M/s. Ganon Dnkerly Co*. **AIR 1958 SC 560**, *Devidass vs. Gopal Kishan*, **AIR 1967 SC 1895.**

The court has to consider the real nature of the transaction, whether the transaction is a sham gift in order to avoid the claim of pre-emption -*Harisingh vs. Kalu*, **AIR 1952 All 149.**

The same efforts should be made by the court when the dispute arise whether it is a sale or exchange, Commissioner of Income tax vs. M & G Stores, AIR 1968 SC 200.

The right of pre-emption does not accrue in the cases of contract for sale. *Radhakishan us. Shridhar* **AIR 1960 SC 1368**.

In the transaction of Muslim Hibabilevaz (gift for consideration) there is conflict of opinions, one view is that the law of pre-emption applies to it. It must be gathered from the intention of the parties. *Sitaram vs. Syed Jiaqul Hussain Khan*, **AIR 1923 PC 41.**

The conflict arose whether it is a sale pure and simple or a speci of gift. The High Courts of Allahabad, Calcutta, Madras, Nagpur and Patna holds it a sale, but judicial commissioners of Oudh held it is release from liability and other High courts have held it to be a gift. The point of time at which the transfer is to be affected, that is when the deed to transfer can be said to be registered that the necessary formalities for registration have to be performed and therefore, the performance of formalities before the sale is completed would not give a right to the pre-emptor to enforce his right of pre-emption unless the performs those ceremonies also after the date when the registration is completed under section 61(2) of the Act. Dominikuer vs. Ramasaranlal, **AIR 1957 Patna 545.**

As between the parties to the sale, sale is completed and takes effect from the date of the execution of the deed but as between third parties it

(b) The transaction must be a proved sale to apply this Act - It is "well established that this right is practical right and it imposes a restriction on the right of the owner to transfer his property to whomsoever he likes. The plaintiff is an aggressor who must prove affirmatively that the transaction. which he wants to pre-empt is a sale and that he has a preferential right over the vendee; in case there exists a doubt about the transaction in question being a sale, the suit must fail. The policy under lying the law is to keep out strangers and thus to maintain the privacy and compactness of joint owners. It the transaction in dispute is capable of two interpretations, the court should be disinclined to hold it to be a sale so as to force the owner of the property to transfer it to a person who is not of his choice. - *Ratiram vs. Mamchand*, **AIR 1959 Punjab 117**;

Sajjan Singh vs. Phumansingh, **AIR 1954 Punjab 115** See also *Harisingh. vs. Kala*, **AIR 1952 All 149.**

The right of pre-emption arises only out of a valid, complete and bonafide sale. The right becomes enforceable only when there is a sale. The sale is a condition precedent not to the existence of the right but to its enforceability - *Dominikuer vs. Ramasaranlal* - **AIR 1957 Patna 545**, *Audhbeharisingh vs. Gajadhar*, **AIR 1954 SC 417 (followed)**

When the original transfer is found fictitious and thus set aside, the claim of pre-emption can not be maintained. - *Ditram vs. Hansraj*, **AIR 1934 Lahore 101** - See also *Harisingh vs. Kalu*, **AIR 1952 All 149**.

A right of no right of pre-emption over a lease hold land - *Nathuniram vs. Gopinath* **AIR 1962 Pat 226 (FB)** - *Sheokumar vs. Sudamadevi*, **AIR 1962 Pat 125 (FB).**

(c) Effect on claims where the sale is cancelled by the court - The contract of sale and purchase having been completed, the right accrues and no subsequent dissolution of the contract between the parties injuries or dissolves the right of pre- emption. Even if the sale is cancelled or declared ineffective by a competent court of law in a suit to which pre-emptor is not party, such declaration would not affect the right of pre-emptor. If any person has any claim in respect of the property that claim in order to bind the pre-emptor must be adjudicated in his presence. - *Durgadevi vs. Jamna Devi*, **1962 RLW 642 = ILR 1962 Raj 195**; *Ditram us. Hansraj*, **AIR 1934 Lahore 101** See also *Harisirigh us. Kala*, **AIR 1952 All 149.**

8. Transfer. - (a) *Meaning of*-Section 5 of the Transfer of Property Act, 1882 defines the word “transfer of property” as under:-

> “In the following sections‘ "transfer of property" means an act by which a living person conveys property in present or in future, to one or more other living persons, or to himself, and one or more living persons, or to himself, and one or more living persons; and “to transfer property” is to perform such act.
>
> In this section “living person includes a company or association or body of individuals, whether incorporated or not, but nothing herein shall affect any law for the time being in force" relating to transfer of property to or by companies, associations or bodies of individuals.”

The word “transfer” thus conveys the sense that a right in property passes from one person to another. Thus, a right can be transferred by way of sale, mortgage, lease, gift, exchange, which are the species of the genus “transfer”.

(b) Modes of transfers : There are two main modes of transfers -

(i) Voluntary, and
(ii) Involuntary

Involuntary transfer means the compulsory transfer by the operation of law or an

order or a decree of a competent court; e.g. ---

(a) A transfer by sale in execution of a decree by a competent court.

(b) by operation of law e.g. the insolvents property went in the court upon adjudication.

(c) Crown grants.

(d) under the law of inheritance.

A sale or mortgage is a transfer between two persona resulting from their free consent and not under any compulsion.

The transfer under the Act must be a voluntary transfer, i.e. a transfer in law must imply a transfer by a person entitled to property in favour of a person having no title otherwise.— *Ramsingh vs. Dale Singh*. **AIR 1929 Oudh. 334. A**

Under the present Act the transfer contemplate two species of conveyance :-

(1) Sale is defined by clause (vii) of section 2 of this Act; and

(2) Mortgage where the final decree for foreclosure in respect there of has been passed.

Only in these two specific transactions the transfer is said to have taken place to which this Act shall apply.

(c) Transfers to which the Act applies - All those transfers which have not been recognised by section 5 of the Transfer of Property Act, 1882 are also not recognised by the present Act. In addition to this, present Act recognises the transfer by sale and transfer by mortgage in which a final decree for foreclosure in favour of the mortgagee have been passed. These two transfer have been recognised under this Act to which this Act shall apply. Thus, transfer by exchange, lease, gift or mortgages in general have not been recognised as transfers for the purpose of the present Act.- *Jindram vs. Hussain*, **49 PR 1914**.

The impugned sale was cancelled and therefore rendered ineffective yet a decree for pre-emption can still be passed. The pre-emptor's rights would not be affected by the declarations of the court in a suit to which he was not a party at all. -*Durgadevi vs. Jamnadevi*, **ILR 1962 Raj 965 =1962 RLW 642**; *Nandkishor vs Shridhar* **1964 RLW 583 = ILR 1964 Raj 1055 = AIR,1965 Raj. 124**

The claim of pre-emption applies to an auction sale conducted by a receiver in an insolvency proceedings as such auction sale has been treated as an act of the parties and not a transfer by the order of the court. -*Reghuvlrsaran vs. Kunj Behari*, **AIR 1945 All 39**; *Mangal Prashad vs. Abdul Rehman*, **AIR 1942 Oudh 424**; *Sankran vs. Narsinghula*, **AIR 1927 Mad 1 (FB).**

It being the treated as a private sale, it require registration of the transfer under the Registration Act. *Chokalingam vs. Subhaya*. **AIR 1940 Rangoon 186**.

The present Act has a limited scope to administer the law of preemption and therefore, specified class of transfers has been recognised by the Act. (Please further

see notes 6 and 7 under section 2(vii) 'sale' of the Act).

(d) Followings are not transfers- (1) A mere personal convenant to pay a certain sum of money does not involve in any transfer of property.- *Sarfaraz Ali Khan vs. Ahmed K. Mushtafa*. **AIR 1944 All 104.**

(2) An agreement to sell is not a transfer of any right in the property.- *Narssayya vs. Ramchandrayya*, **AIR 1956 Oudh, P. 209.**

(3) Mere delivery of document of title deeds does not constitute a transfer of the right in immovable property. *Khetra Mohandas vs. Vishwa Nath*, **AIR 1924 Cal 1047. 8.**

(4) An entrustment of nazul land to a local authority does not amount to a transfer so as to confer proprietory right in it. *Ugurson. vs. Tibhuwan Narayan*, **AIR 1943 All 82. A1**

(5) A partition of a joint estate amount the joint owners does not constitute the transfer. The view is based on the following grounds :-

(i) A right to claim partition is an incident of joint ownership. Thus, the partition does not amount to an exchange within the section 118 of T.P. Act. - *Gyannessa vs. Mobaraknnisa*, **ILR 25 Cal 210 = 2 CWN 91.**

(ii) The partition in fact, purports to be the subjective realisation of the co-parceners in corporeal right to have a partition.- *Spencer, J. in Indoji vs. Kothapally Ramcharla*, **AIR 1920 Mad. 20.**

(iii) The word 'transfer' implies the transfer by a person having right and title to a person not having such right or the title before such transfer.- *Raman. Singh. vs. Dilla Singh*, **AIR 1929 Oudh 334.**

By a partition, the joint property is transformed into several small estates and such one of such estate is assigned to each of the former joint owners or co-owners for his sole use and it is his sole property henceforth.

The partition has important aspects,

(a) It brings about an alteration in the form of enjoyment of the joint Property by all co- owners.

(b) The join property is into several estates and each of such estates become the sole property of the co-sharer to whom it is allotted.

Thus, the partition is not a transfer, for each of the co-owner gets his due. It is not conferring a new right in partition. *Sonattan. vs. Shrinath*., **AIR 1946 Cal. 129** *Narasimhalu vs. Someshwararao*, **AIR 1951 Mad**. **A 213** *Kishan. Slngh vs. Vishnu Bal Krishna,* **AIR 1951 Bom 4**; *Zaveri vs. Jetu*; **AIR 1954 San. 46**.

(6) A family arrangement does not amount to a transfer. *Kunmllal vs. Govind Krishna,* **ILR 33 All. 356**.

Strictly speaking, it is a family settlement between several members of the same family regarding their disputes. The object of it is to preserve the family peace and for which removal of a dispute is necessary.- *Dasodia vs. Gaya Pd*. **AIR 1945 All 101 (FB).**

There must be an expectation of future dispute or the present dispute, *Kauleswari*

vs. Yendapalli , **AIR 1958 Andh P. 147**. *Gangabz vs. Punaw* **AIR 1956 Nagpur 261**, *Madhodass vs. Mukundgama* **IR 1955 SC 481.**

(7) A compromise of a dispute claim is not a transfer*. Savitri vs. Savi*, **AIR 1938 Pat. 306 (396).**

(8) A release, relinquishment and surrender does not amount to a transfer. A release does not convey title though it may place the other man's title beyond doubt in case of dispute. A release deed can only feed title but cannot transfer title. *K. Hutch: vs. M. Rheema,* **AIR 1960 Ma. 33**; *Pakanjini Devi Vs. Sudhir,* **AIR 1956 Cal. 669**; *Bazdnathrai vs. Jaz Kumar,* **1957 Patna 706**.

A relinquishment also does not transfer title for it is simply extinguishes the existing right or claim.- *Provident investment Co. vs. Comm. I.T.* **AIR 1955 Born 95**; *Maroti vs. Krishna Rao,* **AIR 1929 nag. 455**; *Mohansingh. vs. State of Raj*., **AIR 1955 NUC (RaJ) 3451.**

A surrender of rights does not amount to transfer of rights. - *Kunju Verian vs. Chandrika*, **1959 Ker. LJ 395.**

(9) A charge is not a transfer of property. According to section 100 of the Transfer of Property Act, 1882, charge falls short of a mortgage thus it creates a lien only. It creates a shadow of an interest only. *Gobmd vs. Dwarkanath*, **ILR 35 Cal. 837;** *Jawaharmal vs. Indumati*, **ILR 36 All.101.**

9. Mortgage.-*(a) meaning of*- The Act does not define the term 'mortgage' therefore, we have to ascertain the meaning from section 28 of the Transfer of Property Act, 1882.

Thus the form 'mortgage' has the following essentials -

(1) There is transfer of an immovable property.

(2) The right so transferred is the interest in such immovable property

(3) The transfer is for the purpose of securing a loan for performance of an engagement.

(4) The amount of loan, interest thereupon and the terms of loan must be definite,

(5) All legal forms must be complied with (i.e. execution of deed in writing and registration etc.)

A mortgage is different in material points from a Moliamniedan widow retaining the possession in lieu of unpaid dower money. There is no agreement in this case. - Maina bibi vs. Vakil Ahmed, **AIR 1925 PC 63**

The transfer of an immovable property as a security to the loan advanced is the essence of the contract of any mortgage.- Ram Prasad Singh. vs. K. Kubra, **AIR 1944 Patna 163.**

The mortgage is classified into six main categories :—

(1) Simple mortgage.

(2) Mortgage by conditional sale.

(3) Usufructuary mortgage.

(4) English mortgage.

(5) Mortgage by deposit of title deeds.

(6) Anomalous mortgage.

See the following areas - *Dunhiparan. vs. Venkateshwar* - **AIR 1968 Kerala 38 (FB);** *Krishna Nair vs. Shivram*, **AIR 1967 Kerala 270 (FB);** *Janvedsingh. vs. Husena*; **1966 RRD 173.**

(b) Final decree for foreclosure - In a suit for recovery of mortgage money, the final decree for foreclosure by a competent court under Rule 3 of Order 34, CPC is passed when the mortgagor fails to pay the decretal amount by a given date in such decree.

(c) Foreclosure, Meaning of - The term 'foreclosure' in law means the following things:-(1) By a decree for foreclosure the mortgagor is debarred from redeeming the mortgage decree after a given date.

(2) If the mortgagor is in possession of the mortgage property, he is evicted therefrom.

(3) In the cases of the mortgage by conditional sale --

(a) the whole of the liability of the mortgage is discharged hence forth; and

(b) The mortgagee thereupon becomes the owner-purchaser of the mortgage property.

The remedy by way of foreclosure by Rule 3 Order 34, CPC is available in cases of -

(1) Mortgage with conditional sale;

(2) English mortgage; and

(3) Mortgage with deposit of title deeds,

Thus, it is a forfeiture of the legal right of the mortgage to redeem the mortgage property on his failure to repay the mortgage debt. The direction as to foreclose the right of redemption is given by the competent court only.

The Rule 3 of Order 34 of the Code of Civil Procedure provides following three remedies, viz :—

(1) An opportunity to redeem the mortgagor property (to the mortgagor debtor in preliminary decree);

(2) Foreclosure of the right to redeem (in the cases of mortgagor with conditional sale by way of final decree in favour of the mortgagee creditor); and

(3) Foreclosure and sale of the mortgage property in final decree.

A delivery of possession of the property under the order of a competent court is an involuntary transfer to which this Act does not apply. A court is not a person so it can neither own property nor transfer it.- *Mehdiali vs. Chunilal*, **AIR 1929 All 834.**

A transfer affected by a compromise decree which transfers the ownership from one person to another for price is an involuntary sale. - *Bindra Ban vs. Rajpat Singh*, **AIR**

1931 All 741.

An assignment of security bond by the court is an involuntary transfer. -*Ramdass vs. Yudhisthir*, **AIR 1931 389(FB).**

A sale of the minor's property under the order of the court of wards is an involuntary transfer.-Premenath vs. Swidra, **AIR 1960 Punj. 630.**

An auction sale conducted by a receiver in an insolvency proceedings shall be treated an act of the parties and not a transfers by the order of the Court or transfer by the order of the court or transfer by the court.- *Raghuvir Saran vs. Kunj Behari*, **Al 1942 All 39** *Mangal Prashad vs. Abdur Rehman*, **AIR 1942 Oudh 424**. *Sankaran vs. Narsinghulu,* **AIR 1927 Mad 1(FB).**

Even the sales by an insolvency court under section 58 of the Provincial Insolvency Act, 1920, is not excepted and requires registration. - *C. Hokalingam vs. Subhaya*, **AIR 1940 Rangoon 186.**

An auction purchaser in execution sale is not a person to whom the judgment debtor has conveyed the property. Thus, court, sale is not a voluntary transfer of a property.- *Rai Indranarayan vs. Mohd. Ismail,* **AIR 1939 All 687.**

Where the person acquires property by opinion of any law; law of inheritance. Succession Act etc. such acquisitions do not amount to a voluntary transfer.

A person inherits from his parent under the law of inheritance, to which he is subject, is not a voluntary transfer. The transfer of a property under a will is not at transfer.- *Surendra Vikram singh vs. Mania*, **AIR 1944 Oudh—65.**

The object of crown grants is to pay respect to or recognise the distinguished past services rendered to the society by a person to whom grant is made. It is in the nature of the gift for there is no money consideration behind such grants.

In view of the above discussions voluntary mode of conveyances are covered by the Act (particularly the sale and mortgages which have been foreclosed) but involuntary conveyances are excluded from the operation of the Act. A

The use of the word 'means' denotes that the definition is exhaustive and thus, there is no scope for further enumeration.

CHAPTER II
Pre-emption

3. "Right of pre—emption" defined. - The "right of pre-emptlon" is the right accruing under section 4 of this Act, upon a transfer of any immovable property to acquire such property and to be substituted as the transferee thereof in place of and in preference to the original transferee. and "pre-emptor" means a person having a right of pre-emption.

COMMENTARY

SYNOPSIS

1. Right of pre-emption—
   (a) meaning of
   (b) essentials of
   (c) incidence of
   (d) basis of
   (e) justification for such right

2. Classification of the right of pre-emption-
   (1) (a) Primary right
   (b) Secondary right
   (2) (a) Superior right
   (b) Equal right
   (c) Inferior right
3. Nature of the right
4. Right accruing u/section 4 of this Act.
5. Upon a transfer of an immovable property.
6. Pre-emptor-
   (a) Meaning of
   (b) Liabilities of a pre-emptor
   (c) Disabilities of a pre-emption
   (d) Burden of proof
7. Loss of the right of pre—emption
8. The right is not lost.
9. Instances of legitimate devices to defeat the claim of pre- emption. Duty of the Court in such circumstances, effect of waiver.
10. Whether partial pre-emption is permissible in the law.

1. Right of pre-emption.-(a) ***Meaning of-*** [1] *Concise Oxford Dictionary provides the meaning of the word 'pre-emption.' as "purchase by one person before an opportunity is offered to others" whereas Chamber's 20th Century Dictionary gives its meaning as "a right of purchasing before others ".*

Thus, pre-emption is a preferential right to acquire the property by way of substitution for the original vendee. It is not repurchase either from the vendor or the vendee. - *Donulnikuer vs. Ramsaranlal*, **AIR 1957 Patna 545.**

[2] According to Sir D.F. Mulla, the right of shufaa or pre-emption is a right which the owner of an immovable property possesses to acquire by purchase another immovable property. (Principles of Mohammedan Law of D.F. Mulla 15th Edn. at page 202).

[3] The right of pre-emption is a right to step into the shoes of a less qualified vendee or transferee, there must be such "a person acquiring property by a contractual relation of sale or transfer to entitle one to institute a suit for pre-emption. A right of pre-emption cannot arise upon the transfer of property by virtue of a decree in another suit for pre-emption. - *Abdur Razzaq vs. Mumtaz Hussain*, **1903 All WN 63-ILR 25 All. 334.**

[4] It is a preferential right of a person to purchase an immovable property which it has been sold to other.

[5] In ordinary parlance 'right of pre-emption' means of a right of first refusal and refers to the time when the sale takes place but a court of law is to take into consideration the legal significance of the term and not its popular meaning.- *Hidayatbaksha vs. Mansabdar,* **AIR 1935 Lahore 529**

[6] According to the opinion of the judges of the High Courts of Calcutta and Bombay, a right of pre-emption is a right of repurchase; but the High Courts of Allahabad and Patna held it otherwise, i.e., it is a preferential right of substance for the vendee. *-Achutanand vs. Bikibai,* **AIR 1922 Patna 601**; *Dominikner vs. Ramsaranlal*, **AIR 1257 Patna 545**; Babulal vs. Zorawarlal**, AIR 1956 MB 1** *Bishansingh. vs. Khazan.-Singh,* **AIR 1958 SC 838;** *Narayan. vs. Karthiayani*, **AIR 1962 Kerala 122**.

(b) **Essentials of the right of pre-emptions.-** Their Lordships of Supreme Court have laid down the following essentials of this right, viz.:-

(1) The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold.

(2) The pre-emptor has a secondary right or a remedial right to follow the thing sold.

(3) It is a right of substitution but not a right of repurchase i.e. the Pre-emptor takes the entire bargain and steps into the shoes of the original vendee.

(4) It is a right to acquire the whole of the property sold and not a share in the property sold.

(5) Preference being the essence of the right, plaintiff must have a superior right to that of the vendee or the person substituted in his place.

(6) The right is a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimants of a superior or equal right being substituted in his

place.- *Bishansingh vs. Khazansing,* **AIR 1958 SC** 838 (para 11); *Ramswaroop vs. Munshi;* **AIR 1963 SC *553*** *Rahakishan vs. Shridhar,* **AIR 1960 SC 1368.**

(c) **Incidence of the right of pre-emption.** - [1] The right of pre-emption is an incident of property and attaches to the land. It is true, that ordinarily the right of the pre-emptor is to follow the property which is the subject-matter of the sale deed. The law of pre-emption imposes a limitation or disability upon the ownership of a property and the benefit as well as the burden of the right of pre-emption runs with the land.- *Sunder Singh vs. Narayan Singh*, **AIR 1966 SC 1977.**

[2] The right of pre-emption is an incident of property and attached to the property itself. The proposition that a right of pre-emption is an incident of property and not a personal right only means that the right goes with the land as being annexe to it; it can not be separated from the property and transferred or enforced without it. -Bapulal vs. *Gowerdhandass*, **AIR 1956 MB 1 (FB).**

[3] It is an ownership in the property that gives the right and not merely the possession of it. -*Sakina Bibi vs. Amiran*, **ILR 10 All. 472.**

[4] Thus the tenant, mortgagee, benamidar, or a person having spes successions or a contingent interest shall have not right of pre-emption. -*Ujagarlal vs. Jialal*, **ILR 18 All 382.**

[5] The right cannot be considered independent of the land. - *Romeshwarlal Marwari vs. Pt. Ramdas,* **AIR 1957 Pat 695.**

(d) **Basis of the right of pre-emption**:- [1] The right of pre-emption had been recognized by the present Act. It has been held by the Allahabad High Court that a right of pre-emption must in the absence of a statute, be based either on custom or contract. - *Amlanand vs. Nondu*, **AIR 1924 All 318.**

[2] The claim for pre-emption cannot be based on justice, equity and good conscience alone for it is a weak type of right because it interferes with the freedom of contract and is opposed to a progressive state of society. -*Asharam vs. B Asharam*, **AIR 1946 All 133.**

[3] The right of pre-emption arises only out of a valid, complete and bonafide sale. The right becomes enforceable only when there is a sale but the right exists antecedently, to the sale, the foundation of the right being the avoidance of the inconveniences and disturbances which would arise from the introduction of a stranger into the land. The sale is a condition precedent not to the existence of the right, but to its enforceability. The law of pre-emption creates a right which attaches to the property, and on that footing only it can be enforced against the purchaser. -*Dominikuer vs. Ramsaranlal*, **AIR 1954 SC 417 (followed).**

(e) **Justification for such right.** - [1] The hardships and inconveniences of a joint owner would be greater than that of stranger vendee, and in having him as his participator, if may happen that he may be required to abandon his property.

[2] According to the Calcutta High Court the justification is not based entirely on the ground of preventing a disagreeable stranger as mentioned above, but it is on a conjunction with the lands sold that the right of pre-emption is grounded. - *Enatullah vs. Sheikh Kowsher Ali*, **AIR 1926 Cal. 1153**; *State Vs. Indersingh*, **AIR 1953 Punjab 20.**

2. Classification of the right of pre-emption. - The classification of the right can be made in two ways :

(1) according to its stage; and

(2) according to its popular view.

(1) *According to its stage*.- Classification according to its stage can further be divided into two forms, viz:-

(a) stage of the primary right; and

(b) stage of the secondary right.

(a) **Primary right.** - At this initial stage, before the sale, i.e. at the stage of an agreement to sale, the pre-emptor has the right of first offer (proposal) for purchaser from the seller. It is between the seller and the pre-emptor. It is out of the court before the suit.

(b) **Secondary right.** - It accrues when sale has taken place and the title thereto passes to the purchaser then only by a suit the pre-emptor claims the right of pre-emption. It is substitution for the vendee. The dispute is between the vendee and the pre- emptor. This right runs with the person whereas the former runs with property. - *Bishansingh vs. Khazansingh*, **AIR 1958 SC 838**; *Narayana vs. Karthiayani*, **AIR 1962 Kerala 122.**

So where the pre-emptor at the stage of primary right consents the seller to sell the property to the vendee, his right is lost, thus he cannot pre-empt even at the stage of the secondary right. - *Narain vs. Jagannath,* **AIR 1960 MB 85.**

(2) **According to its popular view.** - The right can be classified as under:—

(a) Superior right of pre-emption.

(b) Equal right of pre-emption.

(c) Inferior rights of pre-emption. The law does not recognise this classification yet under clause (c) of subsection of section 5 and section 16 of the act provide these expressions. This classification is as a matter of art only.

Under sub-section (1) of section 6 of this Act, it recognises following three classes of the right of pre-emption, namely:-

I. (A) Co-sharers or partners in the property.

(B) Co-sharers or partners in the joint wall.

II. Owners of other immovable property with staircase, entrance or other right or amenity common to such other property.

III. Owners of property servient or dominant to the property transferred.

The first category is of the superior kind among all the three. Among the first category, class (A) stands superior to the class (B) or others.

Second category is inferior to category first but superior to the last category.

Two or more claimants of the same class or category shall be called the pre-emptors having the equal right of pre-emption.

The right under the Act tends to diminish or improve according to the Act or omission of the claimant, for instance, the pre-emptor joins with a person having inferior claims in the suit, and his claim is to be reduced under section 16 of the Act.

There is scope to improve one's right of pre-emption, i.e. rise to promotion from inferior class to superior class. (Please see section 6 of the Act).

3. **Nature of the right of pre-emption.** - [1] The right of pre-emption arises only out of a valid, complete and bonafide sale. The right becomes enforceable only when there is a sale, but the right exists antecedently to the sale, the foundation of the right being the avoidance of the inconveniences & the disturbances which would arise from the introduction of a stranger into the land. The sale is a condition precedent not to the existence of the right, but to its enforceability. The law of pre-emption creates a right which attacks to the property, and on that footing only it can be enforced against the purchaser. -*Domiinikuer vs. Ramsaranlal,* **AIR 1957 Patna 545**; *Audh Biharisingh*. *vs. Gajadhar*, **AIR 1954 SC 417.**

[2] It is well established that a right of pre-emption is a practical right and it imposes a restriction on the right of the owner to transfer his property to a person of his choice, it, therefore, must strictly be construed. The plaintiff in such suits is an aggressor, he must affirmatively prove that the transaction is a sale. The policy of the law is to keep out strangers and thus to maintain the privacy and compactness of joint owners. If the transaction in dispute is capable of two interpretations the court should be disinclined to hold it to be a sale to as to force the owner of the property to transfer it to a person who is not of his choice. -*Ratiram, vs. Mamchand* **AIR 1959 Punj. 117**; *Jotram vs. Molar* **AIR 1945 Lahore 104.**

[3] The right of pre-emption is a peculiar right to which every member of a joint Hindu family becomes entitled. It is not a joint right in which case the manager alone would bind the family by his action.

The manager of the joint Hindu family may not without their consent where the act is necessary or incidental to the management of his joint family property and not in the matters of exercise of their individual right of pre-emption. The right of pre-emption being an individual right the manager's act can not bind the other members of his joint family. -*Rajayva vs. Sangrareddy*, **AIR 1956 Hyd 200**; *Lalta Prashadsingh vs. Sher Bahadur*, **AIR 1949 Oudh 65**; *see also Boharsingh vs. Fora,* **AIR 1939 All 347** (distinguished in AIR 1949 Oudh 65).

[4] The right of pre-emption is not a right which is attached to the land alone but is a personal right. The right is not one which is in existence prior of the sale but arises only when there is a valid and complete sale (or in case of mortgage final decree for foreclosure is passed) and in case of no other alienation. -*Panch Gujar Gour Brahmins*

vs. Amersingh, **AIR 1954 RLW 204 = AIR 1954 Raj. 100 = ILR 1954 Raj, 85**; *Hamedmiya vs. Benjamin*, **AIR 1929 Bom 206** relied.

[5] It is a right which comes into existence in persons who have been described as Shafi-i-sharik, Shafi-i-kahlit or Shafi-i-jar according to the Mohammedan Law, this is a personal right of the pre-emptor which is lost if the pre-emptor dies without enforcing the same by a suit. - *Panch Gujar Gour Brahmins vs. Amersingh*, **1954 RLW 204.**

[6] The law of pre-emption imposes a limitation or disability upon the ownership of a property to the extent that it restricts the owners unfettered right of sale and compels him to sell the property to his co-sharer or to the holder of right of easement as the case may be.

[7] The Crux of the whole thing is that the benefits as well as the burdens of such rights runs with the land and cannot be enforced by or against the owner of the property for the time being although the right of the pre-emptor does not amount to an interest in the land itself. The law of pre-emption creates a right which attaches to the property and on that footing only it can be enforced against the purchaser. *-Audh Biharisingh vs. Gajadhar Jaipuria*, **AIR 1954 SC 417**; *Dashrathlal vs. Dhodhubai,* **AIR 1941 Bom. 262 (FB)**; *Achutanand vs. Bikibai* **AIR 1922 Pat. 60.**

[8] The right of pre-emption is not equal to a right of repurchase. It is no more than a right of substitution in. place of the vendee which puts him in his shoes, but does not make him a transferee from him. - *Bisham Singh. vs. Khazansingh*, **AIR 1954 Pepsu 59**; *Narayana vs. Karthiayani,* **AIR 1962 Kerala 122.**

[9] It is a right which is not created by the sale but existed even before the sale incident of sale ,does is that it provides a real opportunity so enforce the right of pre-emption *Narayana vs. karthiayani,* **AIR 1955 N0C(M.B) 3002**; *Dominikuer vs. Ramsaranlal*, **AIR 1957 Patna 545.**

[10] The law of pre-emption is technical and has got its rules according to which it has to be applied. It is a weak right and any infringement of 2 those provisions of the law would take away the right and defeat the claim. Thus a pre-emptor or therefore losses his right of enforcing pre-emption by joining in his claim persons who are strangers and the fact that the latter get their names removed from the record by an amendment of the plaint does not make any difference or can Order 1, Rules 9 or 10 CPC held the pre-emptor. *-Badridatta vs. SrtIkishan*., **AIR 1954 All. 94.**

[11] The right must subsist at the time of sale, suit and the decree. The subsistence of a right at the time of a transfer of the property alone would not do. - *Hazarilal vs. Kundanlal*, **AIR 1954 M.B. 5**; *Sundersingh vs. Narain Singh*, **AIR 1966 SC 197**; *Champa Bharti vs. Jagannath*, **1964 RLW 136 = ILR 1964 Raj 454.**

[12] A contract of sale and purchase having been completed the right of pre-emption accrued and no subsequent dissolution of the contract between the parties injuries or dissolves the right of pre-emption. Even if the sale is cancelled or declared ineffective by a court of law in a suit to which the pre-emptor is not a party, such

declaration would not affect the right of pre-emption. - *Smt. Durgadevi vs. Jamnadevi*, **1962 RLW 642 ILR 1962 Raj. 965.**

[13] A right of pre-emption is not exercisable unless the plaintiff is in a position to show that his right is not only as good as that of the vendee but is superior to that of the vendee. Where the pre-emptor and the vendee are both co-sharers, the pre-emptor has no right of pre-emption and his suit must be dismissed. -*Nathuram vs. Patrani*, **1960 RLW 162 = AIR 1960 Raj. 125 = ILR 1960 Raj. 448**; *Bishan Singh vs. Khazansingh,* **AIR 1958 SC 858.**

[14] The right of pre-emption is not a right of repurchase either from the vendor or the vendee, involving any new contract of sale but it 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 all the right and obligations arising from the sale under which he has derived his title. -*Mohansingh vs. Rukminidevi*, **AIR 1946 Oudh 127;** *Narayan. vs. Karthiyani*, **AIR 1962 Kerala 122**; *Jethmal vs. Aidan*, **1945 Marwar LR 100 (Civil);** *Donuinikucr vs. Ramsaranlal*, **AIR 1957 Patna 545**; *Ratiram vs. Manchand*, **AIR 1959 Punjab 117.**

[15] The right of pre-emption is one of substitution rather than of repurchase. - *Mohd. Safi vs. All India*, **AIR 1934 Lah. 429.**

[16] Under the law of pre-emption, the pre-emptor is substituted in place of the vendee and prima facie all the right and liabilities attaching to the vendee in respect of the property should also pass to the pre-emptor. -*Sheikh Momudin vs. Maqbulalam* **AIR 1934 All 461.** *Narayna vs. Karthiayani,* **AIR 1962 Kerela 122.**

[17] When the original transfer is found fictitious and has been set aside, the title of the pre-emptor can be sustained.- *Ditaram vs. Hansraj*, **AIR 1934 Lahore 101.**

[18] The right of pre-emption is merely a right to be substituted for the vendee. Thus the pre-emptor must take the same risk as the vendee did and must pay the same price. In pre-emption suits, court cannot inquire into the title of the vendor.-- *Slzariffiussain. vs. Nurshah*, **AIR 1929 Lahore 589.**

[19] The right of pre-emption is primarily a right of substitution and if an agreement of sale has really taken place and a price has been fixed, the person entitled to pre-emption can claim the benefit of that agreement and can enjoy all conditions of the agreement including the price. It is only where the price had not been fixed in good faith that the court should go into the matter and determine the market value or fair consideration, the reason being that as stated above, price is usually not fixed in good faith so as to defeat the right of pre-emption. -*Nathusingh vs. Narayansingh*, **AIR 1935 Nagpur 195.**

[20] Now the question arises whether the pre-emptor would be bound by the terms and conditions in the contract of sale specifically favourable to the vendor which the pre-emptor would not admit when the pre-emptor is substituted for the original vendee?

A pre-emptor has got the right to be substituted for the vendee subject to the rights

and liabilities created by the sale deed.

The pre-emptor who chooses to pre-empt therefore must take upon himself the burden of the obligation subject to which the sale was made as well as the benefit accruing therefrom. The property, the subject of a suit for pre-emption was purchased by the vendors subject to an un-registered mortgage for Rs. 99.00. It was held that the pre-emptor must take the property subject to this unregistered mortgage irrespective of the question whether he had notice of it or not. -*Tejpal vs. Girdharilal*, **ILR 30 All l30**; *Chedalal vs. Basdeo* **14 IC 266.**

[21] A pre-emptor is bound to take the title which the vendee was ready to take. -Shabodrabibi vs. Bageshwri singh, **ILR 37 All 529 = 13ALJ 711 = 29 IC 1000**; *All Bax vs. Gulam Mohd. & Others,* **72 IC 484** See also *Mst. Banti vs. Manda*, **AIR 1928 Lah 357 (2).**

[22] The right of pre-emption is an incident to the ownership of one land and a burden on the ownership of another land. On general principles the incident and the burden respectively will follow such lands. -*Minzasadiq Hussain vs. Mohmadnn Karim*, **AIR 1922 Oudh 289.**

[23] The right of pre-emption is a personal right and does not descend to the heirs. -*Dayabhai Moti Ram vs. Chunilal*, **15 Born. LR 1136 = 22 IC**

[24] It is personal right which can never be transferred unless it arises from the owner ship of the property and runs with the land in which case. It can be transferred along with the land only. -*Jasudin Vs. Sakharam*, **ILR 36 Born 139 = 13 BLR 1042.**

[25] The right of pre-emption is not a right in land but only a right to acquire land; the right in land is not acquired till the money is paid in accordance with the decree of the court recognizing the right, -*Uttamsingh vs. Sundersmgh*, **24 SC 913.**

[26] The right of pre-emption does not come into existence till a sale takes Place. A right of pre-emption exits only in respect to a particular sale and the only parties against whom a cause of action arises are the parties to the sale. A subsequent transferee from the vendee is not effected. -*Karamda vs. Ali Mohd*, **13 IC 70.**

[27] The right of pre-emption has a twofold connotation, first it is right against the vendor to purchase the property directly from him and secondly a right to be substituted for the vendee after the sale has become complete. First is called the primary right and other is called the secondary right of pre-emption. -*Narayan vs. Katluiayani*, **AIR 1962 Kerala, 122.**

4. The right accruing under section 4 of this Act. - According to the wellknown maxim of jurisprudence ubijusibi rebedium where there is violation or right the law provides the remedy, thus a duty has been cast upon the courts to redress the infringement of the civil right of pre-emption under this law.

5. Upon a transfer of any immovable property.- [1] An enforceability of the right of pre-emption is subject to one condition i.e. on transfer of any immovable property,

there accrues a right of pre-emption. Unless the transfer of immovable property takes place, there cannot be a right of pre-emption.

This right accrues only after the transfer of an immovable property takes place, never before it.

Thus, where an agreement to transfer an immovable property takes place or a contract to sell an immovable property takes place, this right does not accrue for, there is no transfer of the property as yet.

The term 'transfer' has been defined under section 2(viii) of this Act in which it means only the transaction of sale or in case of a mortgage wherein the final decree for foreclosure has been passed. The sale is a condition precedent not to the existence of the right of but to its enforceability. The law of pre-emption creates right which is attached to the property and on that footing only it can be enforced against the purchaser. -*Dominikuer vs. Ramsaranlal* **AIR 1957 Patna 545;** *Audh Biharisingh vs. Gajadhar*, **AIR 1954 SC 417.**

[2] In a case of transfer by sale, the right of pre-emption would accrue as soon as the deed is registered. The accrual of right shall not depend It is the ownership in the property which gives rise to a right of pre-emption and not possession alone for possession may be as a mortgage. -*Gopichand vs. Madanlal*, **AIR 1952 Raj 5 = ILR 1952 Raj 329.**

6. Pre-emptor.-(1) Meaning of - A right of pre-emption is an interest recognised by section 4 of this Act. It is a right given to a person technical called the pre-emptor. The right of pre-emption. vests in pre-emptor. The pre-emptor who possesses the right of pre-emption is only entitled to bring suit for pre- emption and seek remedy under this Act.

As the right of pre-emption is a personal right, it cannot be transferred to others. Thus heirs or transferee of a pre-emptor cannot acquire the right of pre-emption, hence they cannot be termed as pre-emptors.

The pre-emptor is always to be a plaintiff, where there are two or more rival claimants claiming the right of pre-emption upon the same property, all of them shall be termed as pre-emptors but a pre-emptor having a superior right of pre-emption amongst them shall be preferred. On the death of the pre-emptor the right vanishes and it does not pass to his heirs.

When the manager of a joint Hindu Family sales the joint family property in a representative capacity, all the members constituting the joint Hindu family of which he is the manager, and the vendor in the eye of law and as vendors they cannot be pre-emptors of that very property as there is implied consent of all such members to the alienation even though in fact they might have different views from that of the manager with regard to the alienation. The vendor cannot be a pre-emptor. -*Shrikishan vs. Bansidhar*, **1956 RLW 381**; *Nandkishore vs. Shrinath,* **1964 RLW 83 = AIR 1965 Raj 124 = ILR 1964 Raj 1055**; See also *Basantilal vs. Ranveersingh*, **1962 RLW 645 .1 ILR**

1962 Raj 818.

(b) **Liabilities of a pre-emptor** - The pre-emptor talks what the vendee was ready to take and not say that the vendee should be compelled to establish his vendor's title or to make good any defect therein. The pre-emptor's right is to stand in the shoes of the vendee. - *Motilal vs. Rampal*, **195 RLW 380 = AIR 1957 Raj. 348**; *Basantilal vs. Ranveersingh,* **ILR 1962 Raj. 818 = 1962 RLW 645.**

The pre-emptor who chooses to pre-empt therefore must take-upon himself the burdens and obligations subject to which the sale was made as well as the benefits accruing therefrom. The property, the subject of the suit for pre-emption was purchased by the vendors subject to an unregistered mortgage of Rs. 99/-. It was held that the pre-emptor must take the property subject to this unregistered mortgage irrespective of the fact whether he had the notice of it or not.

The Pre-emptor had got right to be substituted for the vendee subject to the rights and liabilities created by the sale deed.

The pre-emptor is bound to take the title which the vendee was ready to take. - *Sheikh Moinudin vs. Maqbulalam*, **AIR 934 All 461**; *Shariff Hussain vs. Nurshan*, **AIR 1929 Lab 589**; *Banti vs. Mandu etc.,***AIR 1928 Lah 357.**

(c) **Disabilities of pre-emptor -** [1] After the decree in a suit for pre-emption, the pre-emptor deposits the purchase price in the court, he is substituted for the vendee and gets all the rights and interests of the vendor from the date of the deposit and the vendee losses all such rights in the property and becomes entitled to received the money so deposited. The pre-emptor is not entitled to prevent the vendee from the withdrawing the amount on the ground that he has not been able to obtain the possession of the property owing to an objection of the third parties. - *Surajkaran vs. Madanmohan*, **ILR 1952 Raj 663**; *Mst. Shabondrabibi vs. Bageshwari Sing,* **AIR 1915 ALI 154 = 29 IC 1000 = ILR 37 All 529.**

[2] The principle of pre-emption is substitution. The pre-emptor is bound to take the title which the vendee was ready to take. -*Mst. Shabodrabibi vs. Bageshwari Singh*, **ILR 37 All 529 = 29 IC 1000 a AIR 1915 All 154.**

[3] The pre-emptor is not therefore bound by a personal agreement to reconvey, entered into by the vendee in favour of the vendor after the execution of a sale deed. - *Ali Bux vs. Gulam Mohd.***72 IC 784.**

[4] The pre-emptor's right is to stand substituted for the vendee. The vendee can not be compelled to make good the defects in the title of the suit property. -*Motilal vs. Rampal*, **1957 RLW 380 -= AIR 1957 Raj 248.**

(d) **Burden of proof. -** [1] The plaintiff (pre-emptor) in a pre-emption suit is an aggressor, he must prove affirmatively that the transaction which he wants to pre-emptor is a sale and that he has a preferential right over the vendees; in case there exists a doubt about the transaction in question being a sale the plaintiffs suit must fail. The policy underlying this law is to keep out strangers and thus to maintain the privacy

and compactness of joint owners. It is quite lawful for a vendee to defeat the possible pre-emptors by all lawful means. -*Ratiram vs. Mamchand*, **AIR 1955 Punj. 117.**

[2] When the original transfer is found fictitious and has been set aside, the claim of the pre-emptor too cannot be sustained. -*Ditram vs. Hansraj.* **AIR 1934 Lahore 101.**

[3] In the suit, to support the plea a waiver, the vendor or the vendee must prove that either of them approached the pre-emptor and asked him to purchase for the consideration it was agreed to sale. -*Mishrilal vs Laxminarayan*, **AIR 1958 MP 412.**

7. Loss of the right of pre-emption. - [1] For the right of pre- emption, three dates are material :-

(i) Date of the sale (see section 19 of Act)

(ii) Date of the suit (see section 16 of the act).

(iii) Date of the decree (see section 15 of the Act).

If the pre-emptor is ceased of the right of pre-emption on any day before the date of the decree, his right to pre-emption is lost. - *Gopilal vs. Menalal,* **AIR 1952 Raj. 5 2 ILR (1952) Raj. 329**; *Narayana vs. Karthiayani*, **AIR 1962 Kerala 122.**

[2] The suit property was first sold in the year 1950 when the pre-emptor did not enforce his right of pre-emption as a co-sharer. Subsequently in the year 1952 when the property was again transferred, the pre-emptor claimed the right.

Whether the suit is maintainable? It was held that so long as the sale of 1950 subsist and has not been set aside by a proper court, the plaintiff cannot claim the right as a co-sharer. Without claiming any relief for setting aside the sale or cancellation of the deed of 1950 and without establishing there possession as co sharers, the plaintiffs could claim no pre-emption. It is not a case where the sale deed of 1950 could be ignored and treated void ab initio. -*Kutinabibii vs. Bakunath Chandra*, **AIR 1961 Assam 1.**

[3] The law of pre-emption is highly technical and the plaintiff, before he can succeed, must show that this right existed not only on the date of transfer or on the date of the suit but upto the date of the decree. -*Netram vs. Dalchand*, **AIR 1938 Lahore 481**; *Hansnath vs. Ragho Pd.*, **AIR 1932 PC 57**; *Surendrasingh vs. Narayansingh*, **AIR 1966 SC 1677. A**

[4] Where the vendee himself has a superior right is entitled to decree. The inferior claimant loses the right against the superior claimants.

[5] Where in cases of two or more rival claimants of the right of pre-emption, he who proves superior right of preemption shall be preferred to all other rival claimants and in that case, no decree shall be passed in favour of the inferior pre-emptors and their right is deemed to have been lost.

[6] When before a pre-emption suit is finally decided by the court of first instance, the vendee becomes a co-sharers' with an indefeasible title, the pre-emption suit has to be dismissed. -*Jai Narayan vs. Phal Narayan*, **AIR 1948 All. 192.**

[7] It is well settled that a vendee can improve his claim at any time between the date of transfer and the date of the suit in order to defeat the claim of the plaintiff. -

Phulchand vs. Sunderdas, **AIR 1946 Lah. 345 (FB).**

[8] Where the vendee resale's the suit property back to the vendor who possesses the superior or equal right of pre-emption to that of the plaintiff-pre-emptor, the suit shall fails, but if such re-sale taken place after suit, the plaintiff pre-emptor still holds a superior right of pre-emption, that suit must succeed. -*Poosaram vs. Sadarmal*, **1947 Marwar LR 65 (Civil)**

[9] Where the vendee transfers by exchange the same property to a third person before the institution of the suit for pre-emption having a superior right of pre-emption, the claim of the inferior pre-emptor plaintiff shall be defeated. -*Mahbubshah vs. Daud,* **AIR 1963 Pesha 3.**

[10] It is open to the vendee in law to take advantage of lawful weapon available to him, to defeat the claim of preemption of a plaintiff whose sole object is to unsettle a transaction legally entered into. Therefore, where after sale, but before the suit for pre-emption is instituted, vendee acquires property which gives him equal for better right of pre-emption than that of the plaintiff the suit must fail. There is nothing fundamentally wrong in a vendee improving his status subsequent to the sale in order to ward off the pre-emptor. If the right is lost, because the vendee has improved his position after the sale the suit must fail. -*Mohanlal vs. Rasula*, **ILR 1951 Raj. 17 = 1951 RLW 40 = AIR 1951 Raj. 117.**

See also:

[8] *Surajmal vs. Mohd. Bux*, **ILR 1951 Raj, 26 = 1951 RLW 39 = AIR 1951 Raj. 133;**

[9] *Salamatali vs. Noor Mohd.*, **AIR 1934 Oudh 303;**

[10] *Hansnath vs. Ragho Pd.*, **AIR 1932 PC 57;**

[11] *Poosaram vs. Sadarmal*, **1947 Marwar LR (Civil) 65,**

[12] *Gopichand vs. Mcenalal*, **ILR 1951 Raj. 329 = AIR 1952 Raj 5,** *Hetram vs. Dalchand*, **AIR 1933 Lahore 481 Foll.**

[13] *Satar Mohd. Sarafuddin*, **AIR 1952 JK 79.**

[14] The pre-emptor expressed inability to buy property, loses the right of pre-emption hence forth. *Purshottamdass vs. Madanlal*, **AIR 1955 NUC 3352**; *Baggasingh vs. Ghunilal*, **AIR 1952 Punj. 225.**

[15] A pre-emptor cannot claim pre-emption, when the vendee purchases the property at the pre-emptor request. -*Chaitu & Manchand vs. Mst. Naiz Begum etc.*, **11 (1910) PLR 205 (Page 584) = 8 IC 780.**

[16] By consenting to a transfer, the pre-emptor disqualifies himself from pre-empting and loses his right of pre-emption altogether. He is then estopped not only as against parties to the transfer but also against the rival pre-emptor *Ramdhawan vs. Ram Surat*, **1929 All 589.**

[17] The pre-emptor who associates with other persons who does not possess such right of pre-emption in that property, he becomes disentitle to the right of pre-emption. *Badridutt vs. Shri Kishan*, **AIR 1954 All 94;** *Rameshwerlal vs. Naseban*, **AIR 1951 Raj.**

14 = 1951 RLW 93; *Dwarka Singh vs. Shankersingh,* **AIR 1927 All 168**; *Umar Daraz vs. Shri Ramdass*, **AIR 1925 Pat 743**; *Shankerlal vs. Kirorimal*, **AIR 1924 All. 81**; *Udit Narayan. vs. RamlachmanRan*, **AIR 1923 All. 161.**

[18] Where the superior pre-emptor joins with an inferior pre-emptor, he forfeits his right of pre-emption. *Rahima vs. Razakali,* **AIR 1923 All 256**, (see section 16 of this Act).

[19] Where the pre-emptor fails to deposit, the pre-emption money. Price of property as by the court within a pre-scribed period, the suit shall Fail but suit must not fall if the money was deposited after deducting the costs of the suit awarded in favour of the pre-emptor. *Harchand Singh vs Bholasingh*, **AIR 1955 NUC (Punjab) 5714;**

[20] *Chandrika Prashad vs. Bhagwati Devi*, **AIR 1939 All 228** (see also section 14).

[21] An inordinate delay of 20 months in exercising the right would convert right to an instrument of torture and would defeat the purpose of the foundation of the right.- *Purshottam vs. Madanlal*, **AIR 1955 NUC 3352.**

[22] A claim for pre-emption can be defeated by any legitimate means there is nothing to debar the parties from resorting to any, legitimate method by which they can avoid the operation of the law of pre-emption. *Baikhan vs. Faizullah*, **AIR 1935 Peshawar 191**; *Harisinh vs. Kaloo,* **AIR 1952 All 149.**

[23] It is no fraud-*Radhakishan vs. Shridhar*, **AIR 1960 SC 1368.**

[24] For this purpose, a modification in the agreement to sale itself is not prohibited- *Mulla Qamrudin vs. Brzjmohan*, **AIR 1962 MP 25**; *Bhishan Singh vs. Kharan Singh*, **AIR 1958 SC 838.**

[25] This right once lost or extinguished can not be restored by any amount of effort made by the pre-emption.- *Salamatali vs. Noor Mohd*, **AIR 1934 Oudh 303.**

8. The right is not lost. - [1] The pre-emptor, prior to the suit of pre-emption, denied the vendor's title in the property, he is not estopped from maintaining the suit.- *Mst. Bandi vs. Ali Hussain*,**1960 IC 706**; *Thepai vs. Mahabir Prasad*, **1952 IC 621.**

[2] The holder of the decree enforcing a right of pre-emption who subsequently to the date of decree sales the property to a stranger does not by such conduct debar him from obtaining possession of the property in execution of such decree. *Faquir Modh. vs. Piadadkhan*, **AIR 1924 Lahore 615.**

[3] A vendee of property, subject to the claim of pre-emption can not defeat or hamper the right of the pre-emptor by creating a mortgage on it and if he does not create such a mortgage, and the pre-emptor has paid before of the price to the vendee, the mortgage can not enforce his mortgage interest in the property against the pre-emptor.

In the present case sale and mortgage are two distinct transactions and thus pre-emptor was entitled to pre-empt free of mortgage interest.

Where however the sale and the mortgage form part of the one and same transaction, the pre-emptor would take the property subject to the mortgage.-*Sukhdev*

vs. Shakhia, **AIR 1931 Oudh 42.**

[4] Where the transfer of property by sale was made by a father on his own behalf as well as the natural guardian of his minor sons, the pre-emptor instituted suit for pre-eruption in which father and his minor sons were made party. The minor son raised an objection questioning the validity of sale for want of legal necessity. This objection can be enquired into in the suit of pre-emption also.

Meanwhile the sale was set aside in a different suit in which the pre-emptor was not the party. Such decree is not binding against the pre-emptor for he was not a party to such decree. The pre-emptor is not representative in interest of the vendee.-*Nandkishore vs. Shrinath*., **ILR 1964 Raj. 1055 = 1964 RLW 583 -2 AIR 1965 Raj 124.**

[5] As the right accrues after the completion of sale, it is not lost because before the completion of sale, the property was offered to purchase to the pre-emptor which he then refused to purchase-*Mohammed Askari vs. Rahmatullah,***AIR 1927 All 548**; *Abida Begum vs. Inam*, **ILR 1 (1877) All 521**, *Kanhailal vs. Kalkaprasad*, **ILR 27 (1905) All 670**; *Bindrabau vs. Durgasingh*, **AIR 1930 All 220.**

[6] A pre-emptor is not bound to show his willingness or to go to the vendor and the vendee and warn them that he has a right to pre-emptor, even when he knew that the property was going to be sold. He would not be estopped to pre-empt unless the property was offered to him at the price settled and he had refused to purchase the same.-*Chandridevi vs. Devki Nandan*, **AIR 1952 All 561.**

[7] The right to pre-emp't is not lost because the pre-emptor refused to purchase for a price which is not fair and bonafide.- *Shrikishan vs. Baccha*, **ILR 33 All 637.**

[8] The right of pre-emption as claimed on vicinage as was recognised under the customary law then existing. Such right arose before the 26-1-1950 when the constitution commenced and the decree in such suit was also passed (on 18-10-1941) before the enforcement of the Constitution, such is a ripen right which cannot subsequently be invalidated on coming into force of constitution of India.-*Prabat vs. Isar*, **1959 RLW 267.**

9. Instances of, legitimate devices to defeat the claim of pre-emption.- [1] To defeat the claim of pre-emptor given under this law by any legitimate means is not fraud on the part of either the vendor or the vendee and a person is entitled to steer clear of the law of pre-emption by all lawful means.-*Radhakishan vs. Sridhar*, **AIR 1960 SC 1368**; *Mulla Qamrudin vs. Brij Mohan*, **AIR 1962 MP 25**; *Bishansingh vs. KhazanSingh*, **AIR 1958 SC 838.**

[2] It is permissible to resort to a device, if it is not illegal, to defeat a claim for pre-emption. But the rule permits neither evasion or any unjust encroachment on the right of others. It only permits a proposed vendee to improve his position vis-a-vis the likely pre-emptors by acquiring a status equal to or superior to the plaintiff.- *Harisingh vs. Kalu*, **AIR 1952 All 149.**

[3] No doubt it looks very unsavoury that a defendant by his unilateral and voluntary

act should defeat the plaintiffs suit which was perfectly justified when it was brought – *Gopichand vs. Meena Lal* , **AIR 1952 Raj . 5**; *Satarmohd. Vs sarafuddin* , **AIR 1952 JK 79.**

[4] Following are some of the instances of :—

(1) Exchange and gift are two such transactions which are most frequently restored.- *Harisingh vs. Kalu*, **AIR 1952 All 149;**

(2) *Hansnath vs. Ragho Prasad*, **AIR 1932 PC 57.**

(3) By resorting to notify the original agreement for sale. Any modification of an agreement of sale is not prohibited by any law.*Mulla Qamruddin vs. Brij Mohandas*, **AIR 1958 MP 25.**

(4) The vendee can defeat the claim of pre-emptor by transferring the suit property to a person having an equal or superior right to the plaintiff. *Bishansingh, vs. Khazansingh*, **1958 SC 838 (Para 11).**

(5) The vendee himself can acquire the right equal to or superior right to that of the pre-emptor.- *Mohan Lal vs. Rasula*,195l **RLW 40 = AIR 1951 Raj 177 = ILR 1951 Raj 17.**

(6) By creating an indefeasible title in property in favour of the vendee.-*Jainarain vs. Phalnarain*, **AIR 1948 All 192.**

(7) A vendee in a suit enforce the right of pre-emption can resist successfully on the strength of his own title to an adjoining property conveyed to him by means of the same sale deed. *Phulchand vs. Sunderdass*, **AIR 1946 Lahore 345 (FB).**

(8) A subsequent legislation, therefore, can as much enable a vendee to improve his status as any voluntary act on his part. *Satar Mohd. vs. Sarafuddin*, **AIR 1962 J&K 79.**

(9) Leaving the unsold strip in the possession of the vendee which is situated adjoining his house.

(10) Transfer of the suit property be hiba-bil-evaz (gift for consideration) exchange mortgage, gift etc. etc.

(11) If trees on the land are sold then the land itself hereby creating an interest of co-sharers.

(12) Partition of the property sought to be sold is given by gift making the donee co-sharer then transfer of the remaining land to the doneé by sale. But see the following case.- *Harisingh vs. Kala*, **AIR 1952 All. 149.**

(13) Demand the high price so as to discourage the pre-emptor to purchase then subsequently adjust the balance.(This device can not help the vendee because the court in such cases would proceed to determine the fair market value of the suit property under sub-section (4) of section 11 of this Act).-*Labhsingh vs. Tajdin*, **AIR 1931 Lahore 436 (8).**

(14) The vendor must sue for declaration that the sale is invalid or a sale IS with an option to repurchase and after the declaration allow the property to remain in the possession of the vendee to claim adverse possession by lapse of 12 years.

(15) A device as to permanent lease is not valid.- *Mohd. Niaz vs. Mohd. Idris*, **ILR 40 All 322.**

(16) But all this is subject to one important limitation. The device must be resorted to at least before the date of the institution of the suit.-*Mohan Lal vs. Rasula*, **1951 RLW 40 = AIR 1951 Raj. 117 = ILR 1951 Raj. 17.**

(17) Where the application of device does not involve in further transfer of the suit property then, such devices to improve the status of the vendee can be applied before the date of the decree. *Satar Mohd. vs. Sarafuddin*, **AIR 1962 J&K 79.**

(18) Where the vendee allows the claimants (other than the plaintiff) of a superior or equal right being substituted in his place, it may take at any time before the date of suit, it would be up held. *Bishansingh vs. Khazan Singh*, **AIR 1958 SC 838.**

Duty of the court in such circumstances.-[1] Where the device of high and unfair price is demanded so as to discourage the pre-emptor to purchase the property in that case court must proceed to determine the fair market value of the suit property under sub-section (4) of section 11 of the Act.- *Labh Singh. Vs. Tajdin*, **AIR 1931 Lahore 436.**

[2] The court's jurisdiction is not ousted simply on the allegation that the disputed transaction is gift or appears to be gift to which the Act does not apply. The court is still entitled to consider the real nature of the transactions.-*Hare Singh vs. Kallu*, **AIR 1952 All 149**; *Labhsingh vs. Tajdin*, **AIR 1931 Lahore 436.**

Waiver-effect on the right of pre-emption.-[1] The meaning of the term waiver's is an under:-

'Waiver' in its highly accepted sense means waiver which is contractual and may constitute a cause of action. It is an agreement to release and not assert a right. *Madem Setty vs. G. Yellojirao*, **AIR 1965 SC 1405.**

[2] A waiver is a bilateral act in which the person may agree to waive the breach of condition which may be express or implied and without which he may otherwise sue the other for such breach.

To deprive a person of any right that he possesses there must be clear and cognate evidence on the record justifying that course and the mere oral statement of a few witnesses deposing to certain circumstances from which may be possible to infer that the prospective pre-emptor had knowledge of the sale would not be enough to prove that he had positively relinquished the right.- *Kidarnath. vs. Baghsing*, **AIR 1937 Lab. 504.**; See also *Jethmal vs. Sajanmal*, **1947 Marwar LR 36.**

[3] Where a person having a right of pre-emption in respect of a property knows that it is being transferred to another for price and does not assert his right, he is estopped from claiming pre-emption subsequently.-*Ram Rathi vs. Mst. Dhiraj*, **AIR 1947 Oudh 81**; *Abdul Latif vs. Wasilkhan*., **AIR 1947 Pesha 35**; *Baynath Singh vs. Fakirsingh*, **AIR 1950 All 190**; *Govaradhan vs. Mukharam*, **ILR 1949 Nag. 465 = 1949 NLJ290.**

[4] But different view is taken that a pre-emptor is not bound to show his willingness

to purchase or to go to the-vendor or the vendee and warn that he has a right of pre-emption. He would not be estopped from pre-empting the property unless the property was offered to him at the price settled and he had refused to purchase it.-*Chandevi vs. Deokinamdan*, **1950 All LJ 237**; See also *Jethmal vs. Sajanmal*, **1947 Marwar LR 36 (Civil).**

[5] Where a Karta of the joint family had knowledge of a sale and was consenting party there to (or refuses to purchase) in exercise of his right of pre-emption, his refusal is binding on all the member of the family to which he is the karta and disentitled them to enforce the right. - *Bhonrasingh vs. Fora*, **AIR 1949 All 347.**

[6] But the contrary view was expressed in the following cases.- *Lalta Pd. vs. Sher Bahadur*, **AIR 1949 Oudh 65**. *Rajayya vs. Sangreedy*, **AIR 1956 Hyd 200.**

[7] A mortgagee possessing superior right of pre-emption can not be deemed to have waived the right by reason of his accepting payment of mortgage money from the vendee without any reservation of his right to sue to pre-empt the sale.- *Ganga Singh vs. Zanda Singh*, **AIR 1948 Lah 5.**

[8] Mere presence of the pre-emptor at the auction side is no waiver but making no claim after that till that last day of the period of limitation amounts to waiver. *Alamsher Khan vs. Allahadin*, AIR 1939 Lah. 517.

[9] The plea of estoppel or waiver is open to the vendee alone but also to the rival pre-emptors who are party to the suit. By consenting to a transfer the pre-emptor disqualifies himself and losses the right in toto. He can not waive his right in favour of some and reserve it as against other. A person who has forfeited his right of pre-emption is debarred from enforcing the same either as a plaintiff or as a defendant.- *Wazir vs. Taluqdar*, **AIR 1930 Oudh 447**; *Jangiram vs. Roopanbai*, **AIR 1927 Lahore 501**; *Arjmandkhan vs. Shanlzer Laletc.*, **AIR 1925 Lahore 359 (FB).**

[10] Where a pre-emptor refused to enforce the right for lack of funds can not afterward enforce it. It is held to be waived.- *Mohd. vs. Mohd. Ali*, **AIR 1926 Lab 243.**

[11] The waiver of right by father does not disentitle his son to bring a suit.- *Sanwaldass vs. Jaigomal etc.*, **AIR 1924 Lah 68.**

[12] Not exercising the right of pre-emption till more than a year a sale inspite of previous wide publication of the intention to sell is tantamount to waiver of the said right.- *Naunihalsingh vs. Ramratan*, **37 IC 511 = ILR 39 All 127**; *Purshottamdass vs. Madantal*, **AIR 1955 NUC 3352.**

[13] There can not be waiver of right of pre-emption by a minor.- *Hakimsingh vs. Gurbachansingh*, **62 PLR 691.**

[14] The pre-emptor refused to purchase when the property was first transferred but at the time of subsequent transfer of the same property, that very pre-emptor offered to pre-empt. it was held that such pre-emptor can not pre-empt. *Rutinabibi vs Kunthanath* **AIR 1961 Assam 1.**

[15] The pre-emptor at some time before suit had denied the title of the vendor in

the suit property would not estoppe him from enforcing the right.- *Alibandi vs. Ali Hasan,***60 IC 706**; *Tephai vs. Mahadeo Pd.*, **52 IC 61.**

10. Whether partial pre-emption is permissible in the law.-[1] There can be no partial pre-emption because pre-emption is the substitution of the pre-emption in place of the vendee. Either accept the whole or refuse the whole.- *Ramswaroop vs. Munshi*, **AIR 1953 (SC) 553.** *Bishansingh vs. Khazansingh*, **AIR 1958 SC 838**; *Mohd. Wajid Ali Khan vs. Puransingh*, **AIR 1929 PC 58.**

[2] A suit for pre-emption is not maintainable where the pre-emptor does not seek to pre-empt the entire property.- *Shabedrabibi vs. Bagesh Warisingh*, **ILR 37 All. 529 = 29 IC 1000.**

[3] This principle is subject to certain exceptions.- *Askari vs. Rahmatullah,* **AIR 1927 All 548**; *Gourishanker vs. Hakim Mohd. etc.*, **AIR 1942 Oudh 117**, *Sheodutta vs. Mahant Bhagwatdass*, **AIR 1942 Oudh 113**; *Mst. Jainabibi vs. Umar Hayatkhan*, **AIR 1936 All 732.**

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4. Cases in which right of pre-emption accrues. Subject to the provisions contained in section 5, the right of pre-emption shall, upon the transfer of any immovable property accrue to the persons mentioned in section 6.

COMMENTARY

General —

[1] Upon the transfer (i.e. not before the transfer - when the sale or in case of mortgages when a final decree for foreclosure has been passed). It determines the time when it shall accrue.

[2] The transfer is with respect to an immovable property. It determines the subject matter of the right.

[3] To those persons only who are described in section 6 of the present Act. As it is a personal right of a very technical and weak type, it accrues to the specified class of persons only. It determines the class of persons upon whom this right has been conferred and further excludes who are not covered by such class.

These conditions satisfy the salient characteristics of a legal right as discussed under section 3 of this Act.

[4] The right of pre-emption under the Act arise only out of a valid, complete, and bona fide sale. The right becomes enforceable only when there is a sale, but the right exists antecedently to the sale foundation of the right being the avoidance of the inconveniences, integrity of the property and disturbances which would arise from the introduction of a stranger into the property. The sale is a condition precedent not tops

the existence of right but to its enforceability. The law of pre-emption creates a right which attaches to the property and on that footing only it can be enforced against the purchaser. - *Domini Kuer vs. Ram Saranlal*, **AIR 1957 Patna 545;***Oudh Bihari Singh vs. Gajadhar*, **AIR 1955 SC 417** (followed).

[5] This right shall not accrue to the class of property, persons or transfers as mentioned in section 5 of this Act. This restriction is a statutory one which limits the operation of the Act to the persons, properties and transactions as covered by section 5 of this Act. Any person or court is not competent by consent or otherwise to restrict the scope of operation of section 5 of the Act.

5. Case in which right of pre-emption does not accrue. - (1) The right of pre-emption shall not accrue --

(a) Upon the transfer of a ship, katra, sarai, musafirkhana, dharmashala, temple mosque or other similar buildings; or

(b) Upon a sale —

(i) by or to the Central or State Government, or

(ii) by or to any local authority, or

(iii) to any company under the provisions of Part VII of the Rajasthan Land Acquisition Act. 1953 (Rajasthan Act 24 of 1953), or

(iv) for the purpose of a manufacturing industry: or

(c) on a transfer to any of the persons mentioned in section 6 to any person who has an equal or inferior right of pre-emption: or .

(d) in the case of a transfer by joint owners. to a party to such transfer; or

(e) in respect of

(i) any sale in execution of a decree of a civil or revenue court, or

(ii) any sale in default of payment of land revenue or of any sum legally recoverable as an arrear of land revenue:

Provided that, in the case contemplated by sub-clause (iv) of clause (b) the right of pre-emption shall accrue, subject to the other provisions of this Act, on the expiry of one year from the date of the registered deed from the date of taking physical possession of the immovable property sold if such property has not been used in good faith for the purpose for which it was ostensibly purchased.

(2) Nothing in this Act. shall -

(a) effect the provision of rule 88 of Order XXI of the Code of Civil Procedure, 1908 (Central Act 5 of 108) or provisions of the Rajasthan Tenancy Act, 1955 (Rajasthan Act 3 of 1955) or of the Rajasthan Land Revenue Act, 1956 (Rajasthan Act 15 of 1956). or of the Rajasthan Colonisation Act. 1954 (Rajasthan Act 27 of 1954); or

(b) confer on any person the right of pre-emption in respect of any immovable property which such person is not entitled to purchase under any law for the time being, in force.

COMMENTARY

SYNOPSIS

1. Right shall not accrue
   (a) in respect of specified class of transfers
   (b) in respect of specified class of persons
   (c) in respect of specified class of property
   (d) Miscellaneous
2. Competent Court to try claims in pre-emption
3. Whether the claim for pre-emption in khatedari rights in agricultural lands is enforceable under the Act.

1. Right shall not accrue.- The effect of section 5 of the Act is to create general exceptions under the Act and thereby reduces the scope of applicability of the Act.

This section provides a category of persons, property and transactions A to which the Act shall not apply.

(a) In respect of specified class of transfers
(b) In respect of specified class of persons (see sec. 6).
(c) In respect to specified class of immovable properties, and
(d) Miscellaneous

(a) In respect of specified class of transfers. - The Act shall not apply to respect to following specified class of transfers:-

(i) Any transfer of shop, katra, sarai, musafirkhana, dharamashala, temple, masque, or other similar buildings for example, church, public school or college buildings, public libraries, sports and games centres or play grounds, grave yard, tanks and bathing places, public gardens and hospitals, art gallaries and museums etc.

(ii) Transfers by sale from or to the following persons :
The Central Government
The State Government
The Local authority

(iii) Transfer by sale to any company under the Rajasthan Land Acquisition Act, 1953 (Rajasthan Act No. 24 of 1953).

(iv) Transfer by sale for the purpose of a manufacturing industry which may be an existing manufacturing industry or one to be set up in future.

(v) Transfer by co-owners to a party to such transfer.

(vi) Sale in execution of a decree of a civil court or revenue.

(vii) Sale made by any authority to recover any amount in default of same recoverable as an arrear of land revenue.

(viii) Transfer to a person having a right equal to or superior to the claimant. .

(ix) The nature of transfer is such to which section 2 (viii) does not apply i.e. the transaction is one to which the Act does not apply such as mortgage, exchange, lease, gift, agreement to sale, hiba-bil-evaz, release, transfer by partition etc.

Shop.-[1] The Act does not define 'shop'. Mere use of the word 'shop' in the sale deed alone may not be sufficient to hold that a shop has been transferred and whether a building is a 'shop' or not, is a question to be decided by the court upon the particular circumstances of every case. The situation of the property, the nature and its construction, the primary of main purposes for which the building was constructed and was being used at the time of the sale are some of the relevant considerations in holding whether a property which is described as a 'shop' is in fact a 'shop' or not.

If the property at the time of sale is being used for sale 'and purchase of goods and for other trading activities, then it will be a shop for the purpose of the section. AIR 1925 Lah 544, AIR 1927 Lah 328, AIR 1924 Lah 213 = 72 IC 591 and 73 IC 454 Ref., *Kishan Chand vs. Nandkishore*, **1980 RLW 650.**

[2] Suit for pre-emption in respect of roof and stair case leading to roof of shop — Not shop - Section 5 is not applicable.

In the present case, the property in dispute consists of an open roof and a stair case leading to the roof. This open roof is a cover to the shops located in the main bazar known as Kedalganj Market. The roof being open, it is as such neither a room nor an apartment nor a building. The structural appearance of the property in dispute which is an open roof is not that of a shop.

Held, that it is not a shop within the meaning of S. 5. AIR 1915 Lah. 143, *Laxmi Narain vs. Smt. Gopal Devi Malpani* decided on April 29, 1974 by the Rajasthan High Court, Unreported, relied on) - *Chhittar Mal and Anr. v. Motilal & Ors.*, **I.L.R. (1974) Raj. 993 =-- 1974 RLW 456 = 1974 WLN 523.**

(b) In respect of specified class of persons. - [1] This category can be subdivided into seller and purchaser. Where the sellers are the following persons:—

(i) The Central Government

(ii) The State Government,

(iii) The Local authority,

(iv)The judgment -debtor whose property is sold executions of a Decree by the civil or revenew court

(v) the person who is liable to pay land revenue but have not paid an whose property is sold in recoverier thereof.

Where the transferee or purchaser is one of the following persons,-

(1) The Central Government,

(2) The State Government.

(3) The Local authority.

(4) The company under the Rajasthan Land Acquisition Act, 1953.

(5) The purchaser purchasing for the purpose of the manufacturing industry.
(6) The purchaser is the person having an equal or a superior right of pre-emption to the claimant-plaintiff.
(7) An auction purchaser in an execution sale.
(8) An auction purchaser in a sale in default of payment of land revenue or of any sum legally recoverable as an arrear of land revenue.
(9) In case of transfers by joint owners to a party to such transfer.
(10) Transferees under a transaction, to which Act does not apply such as gift, mortgage, lease, exchange, partition, hibabilewaz, release and an agreement of sale.

[2] **Cl. (c) of sub-section (1) - Accrual of right.**

The right of pre-emption does not accrue to any person who has an equal or inferior right of pre-emption. It will accrue to a person who has a superior right of pre-emption. *Akbarrali vs. Ambalal*, **AIR 1982 Raj. 263 = 1982 RLW 113 = 1982 WLN 169 = 1982 RLR 355;**

[3] **Maintainability of suit.-** Sale deed executed by Court as per decree passed in a suit for specific performance- Effect of sale deed same as that executed by a party.- Not a sale in execution of a decree – *Suit maintainable. Gaurishanker vs. Madan Mohan*, **1983 RLR. 901.**

(c) **In respect to specified class of immovable properties. -** The Act shall not apply in respect to the following specified class of immovable properties -

(i) Shop, katra, sarai, nusafirkhana, dharamshala, temple, mosque or other similar buildings such as church, public school and college, public libraries, public play grounds, grave yards, public hospitals and clinic centres, tanks and bathing places, public gardens, public art galleries and museums, protected historical monuments, national highways etc.

Ordinarily a shop consists of four walls, roof, door and floor. All these are indivisible parts of a shop. An open roof and a stair case leading to other roof is neither a room nor an apartment nor a building but a site for construction of a shop and not a shop within the meaning of section 5 of the Act, *Chhitarmal vs. Motilal* **1974 RLW 456 = 1974 WLN 523.**

(ii) An immovable property vesting in or belonging to or placed at the disposal of the Central Government, State Government, or local authority.

(iii) An immovable property transferred to a person for the purpose of manufacturing industry.

(iv) A property sold to a company under the provisions of the Rajasthan Land Acquisition Act, 1953.

(v) A property subjected to auction sale in an execution of a decree.

(vi) A property purchased by a person possessing a right equal or superior to the plaintiff pre-emptor.

(vii) A property transferred by the joint owners to a party to such transfer.

(viii) A property subjected to sale in default of payment of land revenue or any sum legally recoverable as an arrear of land revenue.

(d) **Miscellaneous-**

(1) The right of pre-emption shall case to accrue after the expiry of the period of limitation as prescribed by section 21 of the act.

(2) The right of the pre-emption shall accrue to a transfer made for the purpose of a manufacturing industry provided within one year of the transfer the said immovable property has not been utilized for that purpose and remained idle.

(3) The transfer shall not be affected if it is governed by any of the following Special acts such as-

(i) Rule 88 of Order 21 of the Code of Civil Procedure 1908

The object of this rule is to enable the co sharers in an undivided property to keep out strangers by enforcing their right of pre-emption even at the stage of a sale in execution of a decree - *Mannalal vs. Gopilal*, **AIR 1940 Nagpur 337**

(ii) The Rajasthan Tenancy Act 1955 (Rajasthan Act No 3 of 1955)

(iii) The Rajasthan land Revenue Act, 1956 (Rajasthan Act No, 15 of 1956)

(iv) The Rajasthan Colonisation Act, 1954 (Rajasthan Act No. 27 of 1954)

(4) Nothing in this act shall confer on any right of pre-emption in respect of any immovable property which such person is not entitled to purchase under any law for the time being in force.

3. Competent Court to try rights in pre-emption - [1] whether civil court only to try a right to enforce a claim of pre-emption is a right of the civil nature, and a suit to enforce such claim is ordinarly triable by the civil courts. The learn civil court seems to be under the impression because their properties in respect of which the right of pre-empation is claimed is an agriculture property, the suit is exclusively triable by a revenue court. *Ghinsa vs Acmda*, **1960 RRD 114.**

[2] **Whether the claim for pre-emption in khatderi right in agricultural lands is enforceable under the Act** - To put in it other words 'said Gattani J' whether the sale of Khatedari rights in favour of vendee can be said to be the transfer of ownership in the disputed agricute land (para 6)

Section 5 of the Act speaks of the case in which the right of pre-emption does not accrue. It know where expressly or by implication states that there will be no right of pre-emption in respect of sales of Agricultural land or Khatedari interest.

"Section 235 or 237 of the land revenue Act being the Special provisions in respect of pre-emption shall prevail over the general provisions of the Rajasthan pre-emption Act" (Para 12) "That the state is the owner of the agricultural land is more or less a legal fiction only, otherwise, the ownership for all purposes vest in the khatedar in whose name the particular holding is … when we look in section 213 of the Tenancy act which

lays down that the Khatedari right is liable to be sold for the arrears of the rent in respect of that Very holding and the Purchaser of the same would get all the rights and liabilities of the previous, Khatedar vis-a-vis that holding. If the State issue really to be treated as the owner of all the agricultural land when the question of selling the holding on account of arrears of rend would not arise" (para 13).

"The result of the above discussion is that the Khatedari rights in agricultural land like other immovable property can be held, enjoyed and disposed of. It is heritable as well. If sale is in fact of the ownership of such land as such the suit for pre-emption is maintainable - *Prabh Dayal vs Mahadev Nath*, **1972 WLN 455=1972 RLW 246** (Gattani, J)

[3] The right of pre-emption is a weak right as it introduces a restriction on the right to hold property and therefore, it cannot be availed of unless it clearly flows from statute. A khatedar tenant is not the owner of the holding under his occupation, though his rights may be larger than the rights of a Ghair Khatedar tenant. The right of pre-emption does not accrue upon the transfer of Khatedari rights in agricultural land by a khatedar tenant - *Sukhdco Singh vs. Sukhdeo Singh*, **1980 WLN 212.**

[4] Constitution of India - Art. 133 - Certificate for appeal - Whether right of pre-emption accrues on sale of Khatedari rights in agricultural land - Held, substantial question of law is involved and certificate for appeal to Supreme Court granted - *Sukhdeo Singh. & Ors. vs. Sukhdeo Singh. & Ors*. **1980 WLN 212**.

[5] The payment of rent by the holding of land is a clear proof of a tenancy. The person claiming to be an agricultural tenant must prove the existence of tenancy and payment of rent for the use and occupation of such agricultural land - *Kalu vs. Chiranjilal*, **1956 RRD 299.**

[6] The revenue record must also show the entries showing the nature of the possession of a person over such land. .

In order to determine whether a certain land is an agriculture land or not the relevant date for this purpose is the date of the sale. The land which had been used as a brick kiln for more than a year before the sale must be held to have ceased to be an agriculture land – *Dittu Ram vs. Balwant Rai,***ILR 1960 punj 43**

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6. Persons to whom right of pre-emption accrues .— (1) Subject to the other provisions of this Act, the right of pre-emption in respect of any immovable property transferred shall accrue to, and vest in the following classes of persons, namely:-

(ii) owners of other immovable property with a stair case or an entrance or other right or amenity common to such other property and the property transferred, and

(iii) owners of property servient or dominant to the property transferred.

(2) Among the different classes of persons mentioned in sub-section (1) person of the first class will excluded those of the third classes person of the second class will

exclude those of the third class

(3) Among the person of the same class claiming the right of pre-emption the person nearer in the relationship to the person whose property is transferred will exclude the more remote.

(4) Where two or more person of the same class claiming the right of pre-emption are equally entitled there to in all respect the right of pre-emption are equally entitled thereby in all respect the court may –

(a) Determine by drawing lots the person in whose favour pre-emption may be decreed or

(b) After taking into consideration the circumstance of the case and the respective requirement of all such person

(i) Determine which of such person may be allowed to exercise the right in preference to the rest, or

(ii) Direct the division of the property equally among all such person each of them paying an equal share of the consideration for the transfer

COMMENTARY

SYNOPSIS

1. Constitution validity of cl.(iii) of sub-section (i)
2. General
3. Persons to whom the right shall accrue
   a. Shafi-i-sharik
   b. Shafi-i-khalit
   c. Easement

3-A Right of pre-emption defeated

4. Pre-emption on the basis of joint wall
5. Common amenities
6. Owners of servient or dominant heritages
   A. Dominant owner
   B. Servient owner
   C. Rights conferred by cl. (iii) of sub-sec. (1) are unconstitutional
7. Determination of preferences among rival claimants.
8. Nearer in relationship will exclude the more remote
   A. Relationship among Hindus
   B. Relationship among Muslims
9. Applicability of sub-section (4)
   A. Determination of rights by drawing lots - cl. (a).
   B. Clause (b) - General

C. Sub-clause (i) of cl. (b)
D. Sub-clause (ii) of cl. (b)

1. Constitution validity of cl (iii) of sub-sec (1) - Scope - Cl. (iii) of sub section (1) is unconstitutional.

[1] A perusal of all the clauses contained in sub-s. (1) of S. 6 would show that cl. (iii), according to the scheme of this section, covers only the category of 'shafi-i-far' and not the other two namely, 'shafi-i-sharik' and 'shafi-i-khaliti'. Clause (i) unambiguously applies to co-sharers or partners in property i.e. 'sliafi-i-sliarik'. Clause (ii) covers the category of persons having common enjoyment of a staircase or in entrance or any other right or amenity common to the two properties. It is, therefore, obvious that the category covered by cl. (ii) in addition to the category covered by Cl. (i) is different from the category covered by C1. (iii). In other words, not only co-sharers of the property, but also owners enjoying the benefit of common use of any part of the property or any right of pre-emption claimed on the grounds similar to those in Clauses (i) and (ii) which were upheld as valid in Bhau Rani's case, (**AIR 1962 SC 1476**) (supra) treating them to be in substance the rights of a co-sharer of the property.

[2] The right based on easement of air and light or discharger of dirty water claimed by owner of the adjoining or contiguous immovable property cannot be construed as the right of a co- sharer or akin to it. As already indicated, to fall in the category of co-Sharer even according to the extended definition of co-sharer applied in Bhau Ram's case, there must be common enjoyment of at least some right or amenity of common use to the two properties - In the case of *Bhauram vs Bajnath,* **AIR 1962 SC 1476**, the real reason for upholding separate classification of persons claiming pre-emption as a co-sharer was indicated as under:

> ".....the question as to the constitutionally of a law of pre-emption in favour of a co-sharer has been considered by a number of High Courts and the constitutionality has been uniformly upheld. We have no doubt that a law giving such a right imposes a reasonable restriction which is in the interest of the general public. If an outsider is introduced as a co-Sharer in a property it will make common management. The result of the law of pre-emption in favour of a co-sharer is that if sales take place the property may eventually come into the hands of one co-sharer as full owner and that would naturally be a great advantage. The advantage is all the greater in the case of a residential house and S.16 is concerned with urban property, for the introduction of an outsider in a residential house would lead to all kinds of complications. The advantages arising from such a law of pre- emption are clear and in our opinion out-weight the disadvantages which the vendor may suffer on account of his inability to sell the property to whomsoever he pleases. The vendee also cannot be said to suffer much by such a law because he is merely deprived of the right of owning an undivided share of the property. On the whole it seems to us the right of pre-emption

based on co-sharership is a reasonable restriction on the right to acquire, hold and dispose of property and is in the interest of the general public."

The provisions giving a right of pre-emption where there was a right of use to a common staircase, entrance or other similar right or amenity was then upheld on the ground that these rights stood 'on the same footing practically as the ground relating to a co-Sharer.

[3] In *Sant Ram vs. Labh Singh*, **AIR 1965 SC 314**, another Constitution Bench of the Supreme Court followed the decision in Bhau Ram's case (**AIR 1962 SC 1476**) (Supra) to strike down as void a right of pre-emption based on vicinage claimed under a custom, it was held that the reasons to hold statute law void apply equally to customs. Yet another Constitution Bench of the Supreme Court followed the decision in Bhau Ram's case (supra) in *Smt. Prem Dulari vs. Smt. Raj Kumari*, **AIR 1967 SC 1578** to uphold as valid a right of pre-emption claimed on the basis of the right to use a common outer entrance. This right was upheld on the footling that it was akin to that of a co-sharer even when the common outer entrance was not of common ownership.

[4] A recent Constitution Bench decision of the Supreme Court in *Atam Prakash vs. State of Haryana*, **AIR 1986 SC 859 (1986) 2 SCC 249** re-affirms the view taken in Bhau Rani's case while dealing with a right of pre-emption based on consanguinity. The right of pre-emption based on consanguinity was declared to be void as offending Arts. 14 and 15 of the Constitution alter an earlier challenge based on Art. 19(1) (1') had been repelled in *Ramsarup vs. Munshi*, **AIR 1963 SC 553**. The decision in Bhau Rani'.s case (supra) was read as indicating that the statutory provision relating to pre-emption by vicinage not only offended Art. 19(1)(f), but also appeared to offend Art. 15 of the Constitution. The Supreme Court in this decision has ultimately struck down the provision relating to pre-emption based-on consanguinity as offending Arts. 14 and 15 of the Constitution even-if it 'did not offend Art. 19(1)(f). The reason given is that such a classification permitting a broader right of purchase to a person claiming the right by vicinage is not a reasonable classification to justify placing him along with co-sharers in a category distinct from that of the rest.

Accordingly, independent of the question of restriction on the right to acquire or dispose of property, the classification not being reasonable and there being no rational basis to justify the same, such a provision offends Arts. 14 and 15 of the Constitution. It must, therefore, be taken as the settled law that a provision conferring a right of pre-emption on a basis which does not justify separate classification along with co- sharers is void being unreasonable since it violates Arts. 14 and 15 of the Constitution.

[5] The Constitution Bench in Atam Prakash's case **(AIR. 1986 SC 859)** (supra) after reiterating that a right of pre-emption is an archaic right which the Courts should be slow to uphold in modern times on account of changed circumstances, pointed out that the validity of such a provision has to be examined with reference to Arts. 14, 15, 19(1)(d) and (g) In the background of the Preamble to the Constitution and Art. 39(0) of the

Directive Principles of the State Policy, even after deletion of Art. 19(1)(f). It has also been emphasised that the question has to be primarily answered with reference to Art. 14. Obviously it is so since reasonableness is a predominant feature of Article 14 conferring the right to equality and any extraordinary right which cannot be called reasonable in the existing circumstances would violate Art. 14 and be invalid for this reason along. It would be useful to quote a relevant extract from this decision which indicates the background in which the question has to be answered. It is as under:-

> "Whatever article of the Constitution it is that we seek to interpret, whatever statute it is whose constitutional validity is sought to be a questioned, we must strive to give such an interpretation as will promote the march and progress towards a Socialists Democratic State. For example, when we consider the question 'whether a statute offends Art 14 of the Constitution we must also consider whether a classification that the legislature may have made is consistent with the socialist goals set out in the Preamble and Directive Principles enumerated in Part IV of the Constitution. A classification which is not in tune with the Constitution is per se unreasonable and can not be permitted. With these general enunciations we may now examine the questions raised in these writ petitions."

We may also refer to an extract from this decision which expressly states that concurrence with the decision in Bhau Ram's case (**AIR 1962 SC 1476**) (supra) was based not only the provisions contained in Art. 19(1) (f), but also the right to equality contained in Arts. 14 and 15. While concurring with the view taken in Bhau Ram's case (supra) it was stated as under:-

> "In the first case, (Bhau Ram case), the right of pre-emption given to co-sharers was held to be a reasonable restriction on the right to hold, acquire or dispose of property conferred by Art. 19(1) (f) of the Constitution. What has been said there to uphold the right of pre-emption granted to a co-sharer as a responsible restriction on the right of the property applies with the same force to justify the classification of co –sharers as a class by themselves for the propose of besting in them the right of pre-emption. We do not think that it is necessary to restate what has been said in that case. We endorse the views expressed therein."

This decision of the Supreme Court clearly shows that conclusion reached in Bhau Ram's case (supra) is equally sustainable on the basis of Arts. 14 and 15 and not merely Art. 19(1) (f) of the Constitution.

[6] We shall now refer to the decision of this Court. The decision Panch Gujar Gaur, Brahmaas vs. Amarsingh, **AIR 1954 Raj. 100** were by a Full Bench of this Court. The only relevant part of this decision for our purpose is contained in para 9, which reads as under—

> "Now so far as the reconvenyance of the property to pre-emptor claiming as a co-sharer or a participator in immunities and appendages is concerned, there were certain reasons of convenience behind this principle, the chief being to prevent any

disturbance by a stranger to the enjoyment of the property by a co-sharer or participator in the immunities and appendages. Phear J. observed in - *Nusrut Reza vs. Umbul Khyr Bibee*, **8 W.R. 309** that the right of pre-emption is founded on the supposed necessities of a Mohammadan family arising out of their minute sub-division and inter-division of ancestral property. The right of an adjoining owner to claim the property in case of purchase by a stranger however rests on a different footing for the pre-emptor has nothing in common with the property sold beyond the fact that he happens to be owner of the adjoining property.

It is significant that the clear distinction between right of and adjoining owner and that of a co-sharer or a participator in immunities and appendages was indicated to suggest justification for separate classification of the two categories. We have already considered at length the decision by a Special Bench in Nathuram's case (**AIR 1960 Raj. 125**) (supra) and indicated how the observations therein cannot be constituted as deciding the question of validity of provision relating to pre-emption by an adjoining owner claiming the right on the basis of easement and not on the basis of any immunity or appendage or right or amenity common to owners of the two properties. Moreover, the decisions of the Supreme Court referred earlier by us which indicate the principles for deciding such a question furnish the guidelines and if there be anything inconsistent with them in Nathuram's case (supra) then the same cannot obviously be binding.

[7] A single Bench decision of this Court in Ladu Ram's case (**AIR 1963 Raj. 195**) (supra) is also of significance. The question therein related to pre-emption bared on the right of easement of light and air. It was held that such a right did not amount to shafi-i-khalit and was, therefore, not enforceable. This decision was subsequent to Nathuram's case **(AIR 1960 Raj 125** (supra) and was based on Bhau Ram's case (**AIR 1962 sc 1476**) (supra) with respect, we concur with the view taken in this decision

[8] Reference may now be made to full bench decision of Allahabad High Court in *Jagdish Saran vs. Brirj Kishore*, **AIR 1972 All 313**. It was held that a right of easement in plaintiffs favour does not make him a 'shafi-i-khalit'. This conclusion is based on the decision in Bhau Ram's case (supra). The facts of the Allahabad case being distinguishable, we need not express any opinion about the same.

[9] The general principles emerging from the Supreme Court decisions have already been mentioned by us. We are confining our decision to a right of easement of light and air or discharge of dirty water (in which there is no common enjoyment of any right or amenity by the owners of the two properties), which category is covered only by clause (iii) and not cl. (ii) of sub-s. (1) Of S.6 of the Rajasthan Act. Cases of common enjoyment of any right or amenity etc. by the two owners falling within the ambit of cl. (ii) of subsection (1) of S. 6 do not arise for consideration before us.

[10] Reference may be made to the decision in *Mahboob Hasanvs. Ram Bharosey Lal,* **AIR 1966 All 271**, wherein right of pre- emption was claimed on the basis of easement and it was held to be invalid. Bhau Ram's case **(AIR 962 SC 1476)** (supra)

was followed for reaching this conclusion. The nature of an easementary right in this context was indicated as under: ---

> "All that the owner of an easementary right may reasonably claim is continuation of his easementary right. Now it does not appear that sale of adjoining property endangers the easementary right Chapter V of the Indian Easement Act enumerates various cases of existinction of easementary right. Mere sale of adjoining property does not extin- guish easementary rights. There is, therefore, no good ground why the owner of an easementary right should object to the sale of adjoining property to a stranger .....We consider that the right of pre-emption on the sole ground that the claimant is the owner of the easementary right cannot be recognised as a reasonable restriction in the interest of general public under cl. (5) of Art. 19.....

In our opinion, the true nature of the easementary right such as that of light or air, or discharge of dirty water is correctly indicated in the above extract and we respectfully concur with this enunciation of the principle relating to such an easenien-tary right.

We may now refer to the decisions of the Jammu & Kashmir High Court on which strong reliance was placed by learned counsel for the respondents in addition to Kesar Devi's case. (**AIR 1958 Punjab 44**) (supra). We have already dealt with the decision in Kesar Devi's case (supra), the appeal against which dismissed in Bhau Rani's case **(AIR 1962 SC 1476)** (supra). There the suit was based only on the grounds contained in the first, third, fourth and sixth cls. of S. 16 of the Punjab Act as mentioned in para 5 of the Supreme Court decision and there was no occasion for the High Court to consider-the, validity of the fifth clause. For this reason the supreme court did not consider or decide the validity of The fifth clause. The decisions of the Jammu and Kashmir high court are *Tara Chand vs. Mehta Durga. Dass*, **AIR 1963 j & k 27**; *Sewanth vs. Faqir C*. *Land*, **AIR 1965 J & K 62 (FB)**, and *Habib Ullah vs. Gh. Ahmed Baba*, **AIR 1980 J & K 23 (FB)**. The view taken by the Jammu & Kashmir High Court is based on the reading by the learned Judges of the decision in Bhau Rani's case (supra). We have already indicated the manner in which we reads Bhau Ram's case (supra) and this we have done by also indicating the manner in which it was read by the Supreme Court itself recently in Atam Prakash's case (**AIR 1986 SC 859**) (supra). According to the Jammu & Kashmir High Court the Supreme Court in Bhau Ram's case (supra) by not specifically considering the fifth clause in the Punjab Act is deemed to have approved the Punjab High Court view that the same is valid. With respect we are unable to concur with this view for the reasons already given. The observations of the Punjab High Court regarding validity of the fifth clause were obiter since the suit was not based on it and for this reason the Supreme Court did not consider or decide its validity. We may also mention that the Jammu & Kashmir High Court did not examine the question with reference to the right to equality contained in Arts. 14 and 15 of the Constitution and upheld the right of pre-emption based on easement merely with reference to Art. 19(1)(f) of the Constitution. We have already indicated that even apart from Art 19(1)(f)

of the Constitution such a provision is bad as violating Arts. 14 and 15 of the Constitution. For these reasons we regret out inability to concur with the view taken by the Jammu & Kashmir High Court.

As a result of the above discussion, it follows that cl. (iii) of sub-s. (1) of S. 6 of the Rajasthan Pre-emption Act, 1966 is invalid being violative not only of Art 19(1)(f) but also Arts. 14 and 15 of the Constitution of India, *Nenmal vs. Kanmal*, **AIR 1988 Raj 33 = 1987 (2) WLN 805 = 1987 RLW 658 = 1987 (2) RLR 278.**

2. General

[1] **Nature of right -** The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. It is a right of substitution and not of repurchase and by the recognition of this right the pre-emptor is deemed to have entered the entire bargain and ultimately steps into the shoes of the original vendee.- *Sobhrajmal vs. Kamla Devi*, **1975 WLN (UC) 360.**

[2] **Co-sharer is entitled to pre-emption**.-On mere continuation of co-sharer in separate possession of the joint property does not mean that there is partition or their relationship of co-sharer comes to an end. The relationship of co-sharer comes to an end only by partition through court or by private party in accordance with law. This has not happened in the instant case.

After the will became operation, it is an admitted position that no partition suit was filed and there was no partition effected. Both the parties continued to enjoy the house as co-sharers under the circumstances, the plaintiff is entitled to have a right of pre-emption on the part of the property which was sold by the other brother. *Gauri Shankar v. Madam Mohan.* **AIR 1995 RAJ 163 = 1994 (2) RLW 331 – 1994 (1) RLR 332= 1994(2) WLN 411**

[3] **Right of pre-emption defeated.-**The plaintiff having not objected to the Sale of property on any ground in the earlier suit which was decided on compromise. He is not entitled now to turn back and claim the right of pre-emption. *Mangati Ram v. Onkar Sahai*, **1994 (1) WLN 300=1994 (2) WLC 142--.1994 (1) RLW 55.**

3. Persons to whom the right shall accrue --

A. Shafi-i-Sharik

B. Shafi-i-Khalit

C. Easement

[1] The right shall accrue to the following classes of persons:-

(1) Shafi-i-Sharik :- (a) co-sharers in the property, or

(b) Partners in the property.

The co-sharers or partners have two fold right of pre-emption (i) against the strangers, and (ii) against the other co-sharers of partners of the same class.

(i) The co-sharer shall have also like preferential right of pre-emption against any stranger.

(ii) The co-sharer can claim right proportionately against his co-sharers of the same class - *Mahmood HIassan vs. Bhikarilal*, **AIR 1953 All 705**; *Ramautar vs. Brijkishore*, **AIR 1933 Patna 653**; *Ladhbibi vs. Masadharali*, **AIR 1949 Assam 81**; *Enatullah vs. Kowsheral*, **AIR 1926 Cal 1153**; *Nadir Husain vs. Sidiq Husain*, **AIR 1925 All 361**; *Vithaldass vs. Jametram*, **ILR (1920) 44 Born 887 = 58 IC 279 (FB)**; *Amir Hasan vs. Rahimbux*, **ILR (1897) 19 All. 466.**

[4] **Right of Pre-emption** - Available only to co-sharers and not where jointness or commonness is claimed only in boundary wall - Rights sharer or partners in the property transferred. It is not applicable where jointness or commonness is claimed only in a boundary wall between the pre-emptor's property and the vendors' property.

Right of pre-emption under section 6(1)(i) is available only to co-sharer or partners in the property transferred. It is not applicable where jointness or commonness is claimed only in a boundry wall between the pre-emptor's property and the vendor's property.

There is concurrent finding of fact of both the courts below that the plaintiff has failed to establish that the wall in question was a common wall. Secondly, even if it was so, the right arising thereupon are only in the nature of easementary rights (i.e. cross-easementary rights) and the position of the plaintiff is no better than a neighbour and a right of pre—emption based on such neighbourhood or vicinage was void as held by the Supreme Court and does not revive by the omission of Article 19(1)(f) and Article 13 (1) by the Forty—fourth Constitution Amendment for the reason that the doctrine of eclipse is not applicable to it. The plaintiffs case in relation to "ahata" consequently fails.- *Dharm Pal vs. Smt. Kaushalya. Devi*, 1989 **(2) RLR 826.**

[4] Similarly where the property is sold to a co-sharer and a stranger jointly, another co-sharer can claim the right of pre- emption against the purchasers co-sharer and the stranger. - *Saligram vs. Raghubardayal*, **ILR (1887) 15 Cal 224.**

[3] **Pre-emption.-** In order to establish a right of pre-emption it is not alone necessary for the plaintiff to mention that he is claiming a right on the basis of being a co-sharer but he must also mention as to in what property and in what manner he is claiming the right of joint ownership. In the absence of specific pleading to that effect in the plaint and in the absence of anything of that nature in the sale-deed any oral evidence led by the plaintiff of other witnesses is of no avail - *Radhey Shyam vs. Smt. Prem Kanta*, **1982 RLW 345.**

[5] **Right of pre-emption granted to co-owner - Distribution of homogeneity of locality not relevant - Held it is not ultra vires Art. 14.**

Right of pre-emption granted to the owners of the property servient or a dominant to the property transferred is a right akin to such a right granted to a co-sharer or a co-owner of a property. This right is not granted on the footing that a stranger should not disturb the homogeneity of a locality or a class of people. I, therefore, feel that Sec. 6(1)(iii) of the Act is not ultra vires Art. 14 of the Constitution - *Paru Lal and Smt. Shanti*

vs. Motilal and others, **1980 WLN 574.**

[6] Applicability - 'Co-sharer'- Coparcener of Hindu joint family becoming divided in status - Share not defined by metes and bounds - Right to claim pre-emption as 'Cosharer' - see **(1975) Raj. LW 269 = AIR 1976 Raj. 95.**

B. Shafi-i-khalit. - [1] The pre-emptor who is owner of such an immovable property that his own property and another immovable property sought to be pre-empted have some common thing or amenities, such as

(a) common stair case,

(b) common entrance,

(c) common sweeper's door between their separate latrines etc.,

(d) other common rights, for example, right in common wall etc.,

(e) common amenities:-

(i) electric connections,

(ii) pipe fittings,

(iii) sanitary system i.e. common soak pit or sewage tank etc.

[2] The pre-emptor enjoys the right of easements and holds his own property as a servient or a dominant ownership in the property sought to be pre-empted.

[3] Where the plaintiff owned an undivided share in the part of a balcony and the stairs leading to the lower floor which were part of the property sold, it was held that he was a 'sharik' (co-sharer) for purposes of pore-emption and not a khalit only if he had only a sight of way over the balcony and stairs and did not own a share in it. *Jagamiath vs. Radheshyam*, **ILR 1960 Raj. 75.**

[4] The relevant criterion for determining whether a person is only a neighbour or a co-sharer is whether or not partition of the party wall by metes and bounds has taken place - *Jagannath vs. Radheyshyam,* **ILR 1960 Raj. 75.**

[5] A partner in a party wall is a pre-emptor falling in class 1, as a co-sharer. So is a partner in a party wall, who is not a partner in the house, but only a partner in the mansion and is almost in the same position as neighbour - *Jagannath vs. Radheshyam*, **ILR. 1960 Raj. 75.**

[6] There appears to be no case to support the wider view that the light of pre-emption of the class 'khalit' can arise from the existence of easements other than those relating to a right to discharge water. The plaintiffs in this case, it was held, even though they may have and right of light and the air over the property in dispute could not, on that account claim a right of pre-emption - *Ladhuram vs. Kalyansahai*, **ILR 1963 Raj. 873 = 1963 RLW 336 -= AIR 1963 Raj. 195.**

3-A. Right of pre-emption defeated -The plaintiff having not objected to the sale of

property on any ground in the earlier suit which was decided on compromise. He is not entitled now to turn back and claim the right of pre-emption. *Mangati Ram vs. Onkar Sahai*, **1994 (1) WLN 30021994 (2) WLC 142=1994 (1) RLW 55.**

4. Pre-emption on the basis of joint wall.

[1] **Not proved that ground floor was joint - Wall raised in second story - Held, newly constructed wall may or may not be joint.**

The plaintiff has been able to prove that there was a joint wall even In the ground floor & as such the question that the raising of the well in The second story exclusive by Surajmal should be considered to have been made by him on behalf of all the co-sharers the wall so raised should be considered to be a parti wall does not arise. The newly constructed wall may or may not be a wall exclusively belonging to the party constructing it, as it would depend upon the circumstances of each case - *Gauri Shanker vs. Madan Mohan*, **1983 WLN 420.**

[2] **Pre-emption - Public lane open to all - No common right to house owners - Held, sec. 6(1)(ii) is not attracted and right of pre-emption cannot be claimed.**

There is a public lane open to all and sundry and to such a public lane, it cannot be said that the house owners have got a common right of way, as envisaged under clause (ii). It appears that clause (ii) of sub-section (1) of Sec. 6 of the Act, can be attracted only when the two properties have the things in common, as stated under clause (ii) of sub-section (1) of Sec. 6 of the Act.

In my opinion the plaintiffs cases are not covered under clause (ii) of Sub sec (1) of sec 6 of the act so they cannot claim any right of pre-emption *Akhbar Ali vs Ambala*, **1982 WLN 169 = 1932,RLw 113.**

[3] **Right of pre-emption - No almirahs, on "alas" on apertures in second or first story separate parti wall in third story - Entire Intervening wall portion of house in possession of deceased – held merely resting of stone slabs on intervening wall would not give right of pre-emption.**

The very fact that as separate parti wall was constructed by the plaintiff in the third story alongwith the fact that there are no apertures, almirah and alas towards the intervening wall cannot be held to be a joint case.

Merely the resting of stone slabs on the intervening wall would not give any right of pre-emption to the plaintiff over the disputed property - *Gaurishankar vs Madan Mohan & Ors.***1983 WLN 419 =2 1983 RLR**

[4] The relevant criterion to determine whether a partner in the party wall is only a neighbor or a co-sharers is whether or not a partition of the said wall by metes and bounds has taken place. The partner in the joint wall is co-sharer so long as no partition has taken place. *Jagarnnath Vs Radheyshyam,* **ILR 1960 Raj 75.**

[5] A partner in a party wall is a pre-emptor falling in class first, as a co-sharer (shafi-i-sharik). So is a partner in the house. Yet a partner in the house is to be preferred over a partner in joint wall, who is not a partner in the house, but only a partner in mansion and is almost in the same position as a neighbour,

(1) Partner in the house (Special sharik).

(2) Partner not in the house but in the joint wall only (general sharik)

Both then are of the category of Co-sharers yet between the two former shall be preferred. *Jaganntha vs Radheshyam,* **ILR 1960 Raj 75.**

5. **Common Amenities**

[1] **Common amenities**.- The cases of common stair cases and common entrances are very common case of common right affecting two immovable properties belonging to two different persons.

[2] **Amenity** – **meaning of**. It is a noun derived from the French word 'amenity' . The Chambers twentieth Century Dictionary gives its meaning as pleasantness as in situation, climate, manners disposition" whereas the concise oxford dictionary meaning is pleasantness (of places, persons etc. in ordinary parlance we take it to be the comforts or facilities which are attracted to an immovable property and are available to its occupiers for enjoyment only.

The right is such which both of them enjoy and none of them have the right to prevent the use thereof, to another. It tends to further the property enjoyment of the properties by their respective owners or occupiers. With this view, the legislators have allowed the right of pre-emption in cases of common amenities;

To ascertain what is and what is not amenity, it is a question of fact to be decided on the facts of each case. It is indisputable that an electricity or water pipe connection enhances the desirability of a building. - *Ul-ladinker vs. Ratanbai*, **AIR 1958 Mysore 77.** (a case under the Rent Act)

[3] The word 'amenities' should not be given an extended meaning, *Kanayalal vs. Indumati*, **AIR 1958 SC 444** (But see also *Subramanium vs. Rajaram*, **AIR 1966 Mad. 353** wherein an extended meaning was given).

[4] **Cl. (ii) - Applicability.**

Cl. (ii) can be attracted only when the two properties have things in common, as stated therein. If a lane serves a common right of way and entrance to the plaintiffs houses as well as the properties sold, it cannot be made the basis for claiming any right of pre-emption under the said clause - *Akbaali vs. Ambalal*, **AIR 1982 Raj. 263 = 1982 RLW 113 1982 WLN 169 =1982 RLR 355.**

6. Owners of servient or dominant heritages -

A. Dominant owner.

B. Servient owner.

C. Rights conferred by cl. (iii) of sub-section (1) are un- constitutional.

[1] **A. Dominant owner** - The servient land or a dominant land are two technical terms of law. They are understood in reference to rights of easements. Now the question arises what is an 0easement? Section 4 of the Indian Easements Act (Central Act V of 1882) defines the terms easement and 'dominant and Servient heritages and owners' as under:-

"Easement" : An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent it something being done, in or upon, or in respect of, certain other land not his own".

[2] "Dominant and Servient heritages and owners:.- The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the Servient owner".

[3] In reference to the present Act, the dominant heritage or the servient heritage has been described as dominant property or the servient property respectively. Thus, the above definition as adapted in India is wider than the English conception of an easement. An easement in Indian law includes not only the enjoyment of the servient heritage but it includes what is called a profit a pendre i.e. a right to enjoy a profit out of another's land.

[4] The following are the essentials of a right of easements. -

(1) The person of inheritance must be the owner or occupier of a certain land.

(2) He must be entitled to do and continue to do or to prevent and continue to prevent being done something in or upon or in respect of another's land.

(3) The purpose of the right is for the beneficial enjoyment of the land which he owns or occupies.

(4) The land upon which this right is exercised must be owner or occupied by the another person i.e. both the lands must not belong to the same person having such right.

[5] An easement exists solely for the benefit of the dominant owner. An easement is always appurtenant to the dominant heritage and is inseparably attached to it and cannot be served from it and make a right in gross. There can be no easement, property so called, unless there be both a servient and a dominant heritage. In other words, a right of easement is called an "appurtenant" to the dominant heritage.

A dominant owner is entitled to so for an infringement of his right of easement not only the Servient owner but also any stranger as well who may obstruct him in the enjoyment of his right, *Ramchandra vs. Sherali* **AIR 1929 All 779.**

(b) Servient owner. - [1] The land upon which falls the liability of an easement is called a servient heritage. The liability consist sin certain acts being done thereon by the servient owner or any third person.

The servient owner does not have the capacity to prevent the enjoyment of the

servient heritage by any occupier of the dominant heritage may be even a trespasser- *Shimvudayal Vs Gujjumal,* **AIR 1928 Lahore 709.**

[2] The existence of a right of easement dose not imposes any personal obligation upon the servient owner. He has more negative duties to perform. An easement is a privilege in the land appurtenant to the dominate heritage. Its effect is only to restrict and not to extinguish the ordinary uses of the servient heritage. This is an interest in property.

Thus, in the eyes of law, an easement is valuable property. Thus where a servient owner transfers the servient heritage subject to easement undisclosed to the purchaser has been held to be material defect in the title which must be disclosed on the sale of land .

C. Rights conferred by cl. (iii) are unconstitutional

[1] In *Bhauram vs. Baijnath*, **AIR 1962 SC 1476**, the right of pre-emption conferred by statutory provision indifferent State came up for consideration. Therein, broadly stated the right of pre-emption claimed as a co-sharer in a property and on the basis of sharing in enjoyment of some right or amenity common to the two properties was treated as akin to a co-sharer's right and upheld as valid. On the other hand, a right of pre-emption based on vicinage was held to be invalid Para 9 of the decision makes it clear that validity of only the first, third, fourth and sixth clauses of S. 16 of the Punjab Pre-emption Act, 1913 was raised, considered and decided in Bhau Ram's case and not also the fifth clause. In addition the broader aspects of the provisions relating to pre-emption by vicinage were also considered in the light of Article 15 of the Constitution and it was pointed out that even though the pre-emption based on the right of a co-sharer or a right akin to it permitted separate classification of that category of persons, there was not reasonable or rational basis to classify with them persons claiming pre-emption on the ground of vicinage and therefore, Art. 15 also likely to be violated by upholding the right of pre-emption based on vicinage. In this context the real reason behind the law of pre-emption based on vicinage was also indicated for showing the unreasonableness of a classification including claimants of right of pre-emption based on vicinage along with those claiming the right as a co-sharer. Relevant extract from Bhau Ram's case (supra) indicating the emphasis also on Article 15 of the Constitution in addition to Art 19(1)(f) is as under:-

> " .....But the Constitution 'now prohibits discrimination against any citizen on grounds only of religion, race, caste, sex, 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. Though therefore the ostensible reason for pre-emption may be vicinage, the real reason behind the law was to prevent a stranger from acquiring property in any area which had been populated by a particular fraternity or class of

people. In effect, therefore, the law of pre-emption based on vicinage was really ment to prevent strangers i.e. people belonging to different religion, race of caste from 1 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 its impossible to see such restrictions as reasonable and in the interest of the general public in the state of society in the present day."

The transfer of the servient or the dominant heritage carries with it all the incidents thereof and the vendee steps into the shoes of the vendor enlarged or diminished. The only difference as a result of the transfer is substitution of the vendee for the vendor and no more. There being no sharing of any part of the property or right or amenity therein by the earlier owner, this replacement by another has no consequence on the easementary right, since no common management was involved at any stage. The very basis for upholding the co-sharer's right of pre-emption is non-existent in 'such a case. It is for this reason that the right of pre-emption based on vicinage or ownership of contiguous immovable property is held to be, unconstitutional in Bhau Ram's case **(AIR 1962 SC 1476)** (supra).

Applying this test that there can be no doubt that the right claimed by the plaintiffs in these cases is in substance merely the right of owner of contiguous property and, therefore, is based merely on vicinage. To this category of persons, the right of pre-emption given by cl. (iii) of sub-s. (1) Of S.6 of the Rajasthan Pre-emption Act, 1966 must be held to be unconstitutional. We have already indicated that cl. (iii) applies only to owners of such property who are neither co- sharers falling under cl (i), nor owners of any other immovable property enjoying common use of a stair-case or an entrance or other right or amenity common to the two properties

[2] There is no dispute that in view of the decision in *Waman Rao vs. Union of India*, **AIR.1981 SC 271** (para 12) the question of constitutional validity show S.6(1) (iii) of the Rajasthan Pre-emption Act, 1966 has to be adjudged 'also in the light of Article 19(1)(f) which was deleted by the constitution (Forty- fourth Amendment) Act, 1978 with effect from June 20,1979 since the; Rajasthan Act was enacted much earlier in 1966. However, in our opinion cl. (iii) of sub-s.(1) of s. 6 of the Rajasthan Act also violates Arts. 14 and 15 of the Constitution in as much as there is no reasonable basis to classify the owner of an immovable property claiming right or pre-emption on the ground of easement alone with a co-sharer of the property instead of an owner of adjoining property who does not share any common right or amenity with the other owner. This is so because the change of ownerships of either the servient or the dominant heritage in such a case dose not in any manner effect either property or its enjoyment and there is no common management of any property or any part thereof involved to which the

outside is inducted in our opinion the right to equality contained in arts. 14 and 15 is violated and this too is a ground to strike down cl. (iii) of sub-s. (1) of S. 6 as invalid.

It, therefore follows that Cl (iii) is invalid being violative not only of Art 19 (1) (F) but also of arts 14 and 15 of the Constitution of India. *Nenmal vs. Kenmal*, **AIR 1988 RAJ 33= 1987 (2) WLN 805 = 1987 RLW 658 = 1987 (2) RLR 278.**

[3] Right of pre-emption granted to the 'owners of the property servient or dominate to the property transferred is a right akin to such a right granted to a co-sharer or a Co-owner of a property. This right is not granted on the footing that a stranger should not disturb the homogeneity of a locality or a class of people Therefore, S. 6(1.) (iii) of the Act is not altra views are 14 of the constitution AIR .1962 SC 1476 and AIR 1954 Raj. 'FB', Relied on - *Parulal etc. vs. Motilal*, **AIR 1981 Raj. 119.**

7. Determination of preferences among rival claimants.

A co-sharer shall always be preferred to those owners of other immovable properties having shafi-i-khalit and such shafi-i- sharik shall be preferred to that who is owner of properties servient or dominant to take property transferred.

The pre-emptor of the first class (shafi-i-sliarik) shall exclude all other i.e., pre-emptors of the second class (shari-i-khalit) and the third class; likewise the pre-emptor of second class shall exclude the pre-emptors of the third class.'

8. Nearer in relationship will exclude the more remote.

[1] This is also tacitly recognised a doctrine of preference but differently. The nearer shall be preferred to one who is remote. The nearness of relation shall be determined in relation to the vendor only.

Where a Hindu brother sells his own share by the sale deed but does not sell the family property nor does he act as manager of the family, a coparcener has a right for pre-emption. - *Santa Singh vs. Ramdhari Singh*, **AIR 1945 All. 5**; *Ram Naresh vs. Mst Ganga Devi*, **AIR 1943 Oudh 4 4.**

[2] **Relationship among Hindus.-** Among Hindus section 22 of the Succession Act, 1956 shall apply which runs as under:-

> "22. Preferential right to acquire property in certain cases. (1) Where after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in class I of the Schedule, and any one of such heirs purposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.
>
> (2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, absence of any agreement between the

parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation - in this section, 'court' means the court within the limit of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Official Gazette, specify in this behalf."

[3] Section 8 of the Hindu Succession Act, 1956 provides the following classes of heirs:—

"THE SCHEDULE
(See section 8)

Heirs in Class I and Class II

Class I

Son, daughter, widow, mother, son of a predeceased son, daughter of a predeceased son, son of a predeceased daughter, daughter of a predeceased daughter, widow of a predeceased son, son of a predeceased son of a predeceased son, daughter of a predeceased son of a predeceased son, widow of a predeceased son of a predeceased son.

Class II

I. Father
II. (1) Son's daughter's son (2) sons' daughter's daughter.
(3) brother, (4) sister.
III. (1) Daughter's son's son, (2) daughter's son's daughter,
(3) daughter's daughter's son; (4) daughter's daughter
IV. (1) Brother's son, (2) sister's son, (3) brother's daughter
(4) sister's daughter.
V. Father's father, father's mother.
VI. Father's widow, brother's widow
VII Father's brother, father's sister.
VIII. Mother's father, mother's mother

IX. Mother's brother, mother's sister

Explanation - In this Schedule, reference to a brother or sister do not include reference to a brother or sister by uterine blood".

(If there is no hear of the two classes agnates take the inheritance and lastly, if there is no agnate, then upon the cognates of the deceased See section 8 of the Hindu Succession Act, 1936).

Section 12 of the Hindu Succession Act, 1956 provides the order of succession among agnates and cognates as under:-

"12 Order of succession among agnates and cognates - The order of succession among agnates or cognates, the case may be, shall he determined in accordance with the rule of preference laid down hereunder:-

Rule 1. - Of two heirs, the one who has fewer or no degree of ascent is preferred.

Rule 2. - Where the number of degree of ascent is the same of none, that heir is preferred who has fewer or no degrees of descent.

Rule 3. - Where neither heir is entitled to be preferred to the other under Rule 1 or Rule 2 they take simultaneously."

[4] **Relationship among Muslims.** - The Mohammadan law does not recognise the principle of nearness of the relationship while exercising the right of pre-emption - *Imambakhah Shah vs. Muhammadali*, **AIR 1946. Sindh 55**; *Nageshar vs. Ram Harakh*, **AIR 1924 All 541**; *Sayeeduddin vs. Latifunnissa*, **AIR 1922 All 391.**

[5] But nearness of relationship may be recognised it is recognised by custom. *Dhanraj vs. Rameshwar*, **AIR 1924 All 227.**

(6) In the absence of the customary recognition of the principle of nearness to relation, all the pre-emptors of the same 'class have equal right in immovable property *Karimbakhsh vs. Khudabakhash*, **ILR (1894) 16 All 247** - See also *Bachansingh vs. Bajaisingh*, **AIR 1926 All 180.**

[7] But as the principle of nearness of relationship has been recognised statutorily under the Act to determine the order of preferences to the claimants or pre-emptors.

Among Muslims, husband or wife, sons and daughters shall be preferred to other class of heirs.

See the following cases - *Syeeduddin vs. Latifunnissa*, **AIR 1922 All. 391**; *Nageshar vs. Ram Harakh*, **AIR. 1924 All 541**, *Imambakhash vs. Mohd.* **A-ll, AIR 1946 Sindh 55.**

9. **Applicability of sub-section (4)**-[1] this sub-section would apply under the following conditions:—

(1) Two or more rival claimants of the right of pre-emption belong the same lass.

(2) Such rival pre-emptors are equally entitled in respect to the suit property i.e. neither of them is superior nor inferior to the other.

(3) Where sub-section (2) and (3) is not helpful to solve the conflict in favour of any of such claimants, sub-section (4) would apply.

[2] Sub-section (4) applies only when the court is unable to determine the claim of pre-emption to a person claiming the same in accordance with subs section (2)or 2(3) of section 6 of the Act. The phrase in all respect is a significant that after considering the nature of the right of pre-emption between two rival claimants in accordance with sub-section (2) and then accordance with sub-section (3) of the Act the court is unable to determine either the superiority of one or the inferiority of another. The court considers them possessed with the equal right of pre-emption.

[3] **Applicability of.-**

A. Determination of rights by drawing lots Cl. (c).
B. Clause (b) - General
C. Sub-clause (i) of cl. (b).
D. Sub-clause (ii) of cl. (b).

A. Determination of rights by drawing lots [clause (a)].- It is last but crude method of deciding any legal right of pre-emption. It must be sparingly used. As it is devoid of reasoning, it is seldom used. The lucky gets the right and the unfortunate loses. Still this mode of procedure is adapted so that the judges can maintain their impartial attitude and it also save them from adverse comments of partiality. The method of drawing lots should followed where in cases the procedure as laid down in clause (b) of sub-section (4) of section 6 can not be followed.

B. Clause (b) and sub-section (4) general. - Clause (b) of sub-section (4) is more sound and backed by reason and clause (a) is merely arbitrary devoid of reason. While applying clause (b) or this sub-section court has always to take notes of two points, namely:-

(1) Circumstances of the case, and
(2) Requirement of the rival pre-emptors.

By the circumstances of the case, we may take into account of the following facts of the case as relevant and material:—

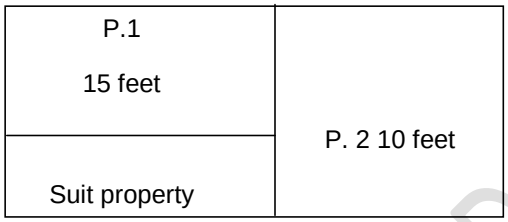
(i) nature of the suit property;
(ii) its situation;
(iii) vigilance on the part of plaintiff;
(iv) who comes to the court with clean hands; and
(v) bona fides of the plaintiff etc.

The court of law who is also the court of equality would not help those who do not come with clean hands who is guilty of delay and fraud.

C. Sub-clause (i) of clause (b).- A very crucial stage has arisen in the case where court is unable to determine the right of pie» emption on the given fact and there is no other alternative but to give a decision one way or the other still the court is supposed to

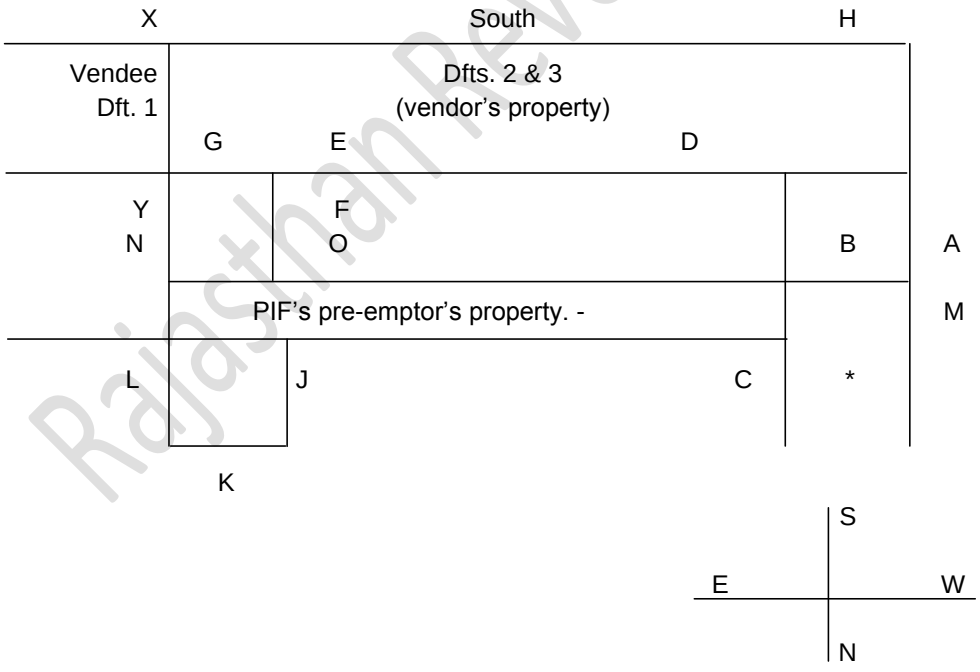
utilise best of his ability and sharp reasoning. The decision of the court must be supported with reasons. It calls upon the court to apply its mind and his experience.

Problem I - P and P 2 are two rival claimants of pre-emption, both of them are owners of common partition wall. The diagram illustrates they problem -



P. 2 is the owner of ten feet of the common party wall and P. 1 is the owner of fifteen feet of the common party wall in the suit property. None of them is co-sharers in the property but owners of the common party wall.

P. 1 shall be preferred as his interest in the suit property is more than 13- 2 by being owner of fifteen feet long common party wall in comparison A to ten feet long common party wall falling in P.2's side. Thus P.1 shall be preferred.



* Stair-case to the lower floor and balcony to the upper floor.

(b) Problem II. - The flat XYGNFEDBAH belongs to the vendors defendants Nos 2 and 3. The plaintiff- pre-emptor is the owner of another flat NLK JCBOF. These two first constitute a block which a staircase leading to the lower floor. The balcony market ABCM belongs to both the pre-emptor and the vendors-defendants Nos. 2 & 3. The vendee defendant No. 1 is the owner of adjoining flat which is separated by a common wall Marked X Y. There is no opening in wall XY. So that the only way by which one can enter the flat sold by vendors is through the joint balcony and staircase which jointly owned by plaintiff pre-emptor and the vendors defendants Nos. 2 and 3.

Whether the suit of the plaintiffs be decreed ?

The relevant criterion for determining whether a person is only a neighbour or a co-sharer is whether or not a partition of the party wall by metes and bounds has taken place. The owner of the joint party wall is a co-sharer as no partition has taken place. The owner of a joint party shall is a pre-emptor of class first, as a co-sharer. So is a partner in the property i.e. the house.

A pre-emptor shall be preferred against a vendee who do not have any right of pre-emption but all pre-emptors having similar rights (persons of the same class) are entitled to pre-empt the property which is to be divided equally among them.

(1) Partners in the house (special shafi-i-sharik), and

(2) Partners not in the house but in the joint party wall only (general shafi-isharik).

The former shall be preferred over the later though both of them are sharik (i.e. of the same class) for a partner in the joint party wall although he is co-sharer is almost in the same position as that of a neighbour.

It was held that the plaintiff who is special sharik i.e. he being the partner in the house has a preferential right over the defendant No. 1 vendee, who is simply a partner in the joint party wall almost like a neighbour. The plaintiff is, therefore, entitled to the decree of pre-emption for whole of the suit property which was purchased by the defendant No. 1 vendee under the sale deed.- *Jagannath vs. Radheyshyam,* **ILR 1960 Raj. 75.**

(d) Sub-clause (ii) of clause (b). Where the two or more pre-emptors of the same class are conclusive determined by the court to be holding an equal right of pre-emption, then all such rival pre-emptors holding equal right shall be given equal share in the property by dividing the suit property in equal shares.

Sub-rules (2) of Rule 14 of Order 20 of CPC follow the same principle. This principle has been adapted from the above rule. *Anup Misir vs. Ram Harak*, **AIR 1929 All 953**; *Mohd Wajid vs. Puransingh*, **AIR 1929 PC 58.**

The right of rival pre-emptors having equal share in the property can not be denied. The law of pre-emption does not grant any premium to greater diligence. If several pre-emptors have an equal right and all of them bring their suits within time the more fact that one of them comes to the court earlier than others will not defeat or adversely effect the right of those who institute their suits subsequently - *Bishan Singh vs. Khazan Singh,* **AIR 1954 Pepsu 59**; *Vithaldas vs. Jamietram*, **58 IC 279 (FB).**

In the absence of the definite allegation that the decreed holder is depositing the money solely on his own account (where the rival pre-emptors of equal share) and claims to reap the benefit of the whole decree, the court can only assume that the payment is being made for the benefit of the decree holders.- *Anrup Misir vs. Ram Harak*, **AIR 1929 All 953.**

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7. Powers to exclude. - (1) Whenever the State Government consider it expedient to do so on account of the prevalence of non-prevalence of any law or custom in any locality or in the interests of the general public of such locality or for the protection of the interests of any scheduled tribe in such locality or because of the existence of any other ground which the State Government considers to be reasonable and adequate in the particular circumstances obtaining in such locality, it. may, by notification in the Official Gazette, declare that in any local area or with respect to any immovable property or class of immovable property therein or with respect to any transfer or class of transfers therein no right of pre-emptors, or only such limited right as the State Government may specify in the notification, shall accrue.

(2) The notification issued under sub-section (1) shall be laid, as soon as may be after it is so issued, before the House of the State Legislature while it is in session. for a period of not less than fourteen days which may be comprised in one session or in two successive sessions and if, before the expiry of the session in which it is so laid or of the sessions immediately following the House of the State Legislature make any modification in such notification or resolves that such notification should not be issued, such notification shall thereafter have effect only in such modified form or be of no effect as the case may be, so however that any such modification or annulment shall be without prejudice to the validity of anything previously done thereunder.

CHAPTER III

Procedure

8. Notice to pre-emptors. - (1) When any person proposes to sell, or to foreclose the right to redeem, any immovable property. In respect of which any persons have a right of pre-emption, he shall give notice to all such persons as to the price at which he is proposing so to sell or as to the amount due in respect of the mortgage proposed to be foreclosed, as the case may be.

(2) Such notice shall be given through the civil court, within the local limits of whose jurisdiction the property concerned is situated shall clearly describe such property, shall state the name and other particulars of the purchaser or the mortgagee and shall be served in the manner prescribed for service of summons in civil suits.

COMMENTARY

Synopsis

1. Applicability, scope and object
2. When notice shall given
3. Notice whether Compulsory
4. Whether the transferee can given notice
5. To whom notice shall be given
6. Particulars of notice
   Sub-section (2)-
7. Procedure for giving notice.
8. Manner of service where the whereabouts of the pre-emptor is not known
9. Service by publication in the newspapers.
10. Service by post.
11. Direct notice (not given through the civil court) -Validity of.
12. Joint notice—Validity of
13. Relief of injunction
14. Waiver by consent
15. Offer not accepted by pre-emptor-Effect
16. Estoppel.

1. Applicability, scope and object:

[1] The main object of this section is to prevent litigation and resorting to enforce the primary right by allowing the pre-emptor to purchase the property at an initial stage.- *Bishansingh vs. Khazansingh,* **AIR 1958 SC 838.**

[2] It also aimed to set at rest the plea of want of notice and there by reduce the scope for large knowledge. This right being practical in nature thus it reduces the state of uncertainty as to the suits and limitation in respect to such suits.

[3] It also sets at rest the disputes arising as to the validity of notice sufficiency or otherwise of the service where the service of such notice is affected through the competent civil court. An express order of the court to that effect becomes binding on the pre-emptors.

[4] The valid service of notices compels the pre-emptors to make up their minds in respect rights to their within the period of two months. Any delay would defeat their right. (See sections 9 and 10 of this Act).

[5] The policy is to compel parties to bring suits with as little delay as possible.- *Brradhraj vs. Dhingarmal*, **ILR 1954 Raj. 200**; *Vishwanathan vs. Ethirazulu* **= AIR 1924 Mad. 57. 6**

[6] House purchased and reconstructed - Plaintiff not objecting to reconstruction. No estoppel to enforce right of pre-emption - Plaintiff to pay price and not of reconstruction under equity - *Nandkisore vs. Indira Bai*, **1988(1) RLW 291.**

[7] Right vested in seller cannot be exercised by purchaser - No duty cast on pre-emptor to respond to notice published by vendee's husband held, pre-emptor did not waive his right.

The step to be taken under S.8 is available to the vender only, and not to the vendee. The preferential right to purchase the property enjoyed by the pre-emptor can only be curtailed or forfeited if the provisions of S. 8 are resorted to by the seller. The right which the Legislature has vested in the seller by virtue of the provisions of the Act cannot be exercised by the purchaser of the property. A general notice issued in the present case by the husband of the vendee in a newspaper signifying his intention to purchase the property and inviting objections, if any, does not cast any duty on the pre-emptor to give any response to such a notice and put forth 1 is preferential right to purchase the property and negotiate with the purchaser to purchase the property. The failure on the part of the pre-emptor to pay any heed to such a' general notice issued by the husband of the vendee therefore, does not tantamount to waiver of the right of pre-emption on the part of the pre-emptor; but the matter sold be different if the pre-emptor enters into an agreement with the prospective purchaser that he would not enforce his right of pre- emption if the property was purchased by him. In that event it is open to the purchaser to put forth the plea that the pre-emptor has waived his right of pre-emption in his favour.

To support the plea of waiver it is incumbent, on the vendor and the vendee to establish that they had concluded an agreement for sale and that the plaintiff was approached and asked to purchase the property for the consideration for which the vendee was going to purchaser the property.

In the absence of reliable evidence to prove that after was agreement for sale

between the vendor and the vendee was concluded and the price was fixed between them, an approach made to the plaintiff to purchase the property in dispute for the price settled between the vendor and the vendee could not lead to the conclusion that the pre-emptor waived his right of pre-emption in favour of the vendee - *Smt Kala Devi vs. Radha Kishan,* **(1977) Raj. LW 301: AIR 1977 Raj. 203 = 1977 WLN 302.**

[8] **Scope and applicability.** - Notice by intending purchaser - Effect - The notice contemplated by the section can be issued at the instance of the seller. If an intending purchaser issues a general notice of his intention to purchaser, the person having a right of pre-emption is not bound to act in respect to such a notice as required of him under section 9. There is no statutory duty for a pre-emptor to negotiate with the purchaser for the purchaser of the property on the information received from the prospective purchaser.- *Sobhrajmal vs. Smt. Kamla Devi*, **1975 WLN (UC) 360.**

2. When notice shall be given. - [1] the notice shall be given:--

(i) when the owner of the immovable property proposes to sell the same, or

(ii) the primary right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called the primary or inherent right, pre-emptor has a secondary or remedial right to follow the thing sold by a suit. It is right of substitution but not of repurchase i.e. the pre-emptor takes the entire bargain and steps into the shoes of the original vendee.- *Bishansingh vs. Khazansingh*, **AIR 1958 SC 338.**

[2] This section contemplates a notice before the completed sale i.e. when an agreement to transfer is entered into and it is the stage when the primary or inherent right can be enforced. It is a stage when the title and possession of the property has not passed to the vendee.

3. Notice whether compulsory. - [1] the intimation by notice to the pre-emptors is compulsory. The law puts a statutory duty upon the transfer or to give a prior police intimating the particulars of the transfer. Want of notice from the transferor shall not take away the right of pre-emption of a pre-emptor though he had the knowledge of the transaction by other means, independent of such notice. AN omission to reply or delayed reply after a period of two months or more since the receipt of notice result in loss of the right of pre-emption.

It appears that the seller or the mortgagor must give the required notice.

[2] No estoppel or waiver unless notice under section 8 is given. See Note 16, *Nand Kishore vs. Indira Ban'*, **1989 (1) RLW 97**.

4. **Whether the transferee can give notice**.-[1] Sub-section (1) of section 8 of the Act is silent on the point. The expression 'any person proposes to sell, or to foreclose the right to redeem' supports the view that the notice shall be given by the seller or by

the mortgagor only. But this expression does not debar the transferees to give such a notice. So under a procedural law it shall be deemed to have been permitted unless anything is expressly prohibited. It ought not to be presumed that every procedure should be taken as permissible unless prohibited expressly. - *State vs. Sohan Lal*, **ILR (1959) Raj. 199.**

[2] The rules of procedure are intended to promote justice and not to hamper it. *Baxiram vs. Ashwini Kumar*, **1963 RLW 403 = ILR 1963 Raj. 891 = AIR 1963 Raj. 225.**

[3] So where the seller or the mortgagor declines to give notice as required by this section, the purchaser can give notice to the pre-emptors so as to save himself from the expenses of litigation and a state of uncertainty and inconvenience.

5. To whom notice shall be given. - [1] Joint Hindu Family property - Property not divided by metes and bounds although shares defined - Notice under section 8 given to father and uncle - It is not a notice to son who enjoys property as co-Sharer. In his own right - Waiver by father and uncle cannot disentitle son to exercise his right of pre-emption. Suit by some competent. - *Teeja Devi vs. Nortamal*, **1975 WLN 332.**

[2] The notice as contemplated under section 8 of the Act shall be given to all those persons who can claim the right of pre-emption under the Act. It is immaterial for the time being that the pre-emptor is a minor person who is incompetent itocontract. If the pre-emptor is or a person of unsound mind or otherwise incompetent to contract notice may be given to his natural guardian or a person having the custody of such person or to a person in the management of the properties of such person. Where the pre-emptor is a juristic person, the notice may be given to the manager, secretary or administrator, executor or such other person having the responsibility to take decisions in the control'and management of such person.

6. Particulars of notice. - [1] The notice required to be given under section 8 of the Act must contain the following particulars:-

(1) Name and description of the person giving notice (i.e. addresser),

(2) Name and description of the persons or persons who are pre-emptors i.e. to whom notice is given (addressee)

(3) Name and description of all the persons who are purchasers of the property. Where the name of one or more of such person is omitted in the notice, the transaction of sale made in favour of undisclosed person shall be treated as a fresh transaction and tlre pre-emptor shall have a fresh right of pre-emption though he has signified his refusal to purchase in respect to the previous notice.

(4) Particulars of the immovable property proposed to be sold showing the description of the same, house number or plot number or any other mark which can help to identify the property. As incorrect description of the immovable property proposed to be transferred would render the whole notice bad in law. P

(5) Particular as to the amount of price as consideration must be disclosed. It must be disclosed in words and numerical both. The notice must contain the correct statement as to the amount of price. Any incorrect statement as to price shall render the notice invalid and ineffective and the pre-emptor shall not be bound by such notice. Subsequently reduction to enhancement in the amount of price of the property shall render the whole notice infructuous and a fresh notice shall be required to be given.

[2] If the consideration is the mortgage money due, then the notice must disclose the fact of the actual amount. due together with the amount of interest and the total sum due in respect of which the mortgage is proposed to be foreclosed.

[3] There are no two opinions in holding that the pre-emptor is materially affected where in case the amount notified is higher than the one in which the property was actually transferred.

[4] What would be the legal position of the pre-emptor, where the price notified was smaller than that the property was actually sold? Would the pre-emptor be entitled to be substituted to the property for the price as notified in the notice? Where in response to the notice, the pre-emptor signified his willingness to pay the notified price for the proposed immovable property within a reasonable time, he becomes entitled to be substituted and the subsequent alteration in price would not be adversely affected the pre-emptor.

[5] Subsequent alteration in the amount of price would amount to a new transaction for transfer and in such cases the pre-emptor is entitled to a fresh notice. The expression 'shall give notice to all such persons as to the price at which he is proposing to sale' contemplates the real price for which it is to be transferred. Subsequently alteration in price would require a fresh notice. The proposed purchaser shall not be heard to say that when the pre-emptor was previously offered to pre-empt for the notified price which was lesser then one in which now the objector is purchasing and as the pre-emptor once has refused to avail the right previously for the lesser amount, he cannot subsequently claim the property for the enhanced price.

[6] The court would protect the rights and interests of the pre-emptor and the third person shall not be allowed to impede his statutory right for no fault of the pre-emptor unless the pre-emptor himself by his act or conduct causes such loss of right. .

7. Procedure for giving notice. - The notice shall be drawn in writing and shall be given through the civil court within whose jurisdiction such property is situated. '

The notice shall be drawn in the form of an application which shall be submitted to the court with the request that the same be served upon the pre-emptors personally in the manner prescribed for service of summons in civil suits (i.e. under order 5 of the Code of Civil Procedure, 1908).

The applicant seller shall submit as many notices as are the number of pre-emptors

together with the summons for its due service and endorsement.

8. Manner of service where the whereabouts of the pre-emptor is not known.- The substituted service is a recognised mode where the personal service of the notices can not be had for the reason that the person named in the notice is evading the service. The mode of the substituted service can not be applied to case where the applicant transferor giving the notice himself is not in know of the correct address or where about of the person named in the notice then in such case mode of substituted service can not help and a general publication in the local paper shall serve the purpose. Where the transferor himself is not knowing the addresses of the persons named in the notices or where the transferor himself is in doubt as to the total names of all the persons having the right of pre-emption, in such cases it is advisable to ask the transferor to give a general notice by publication in the local newspapers.

9. Service by publication in the news papers.- Such type of service is weak a type of service. The fundamental principle of service of summons is to affect the personal service. Order 5 of C.P.C does not expressly favour this mode of service can be resorted to prevent sub-sequent litigation on the ground or wanton notice.

Where the total names of possible pre-emptors together with their recent addresses are known, there is no need to resort to this mode of service by publication. Service by publication can be resorted to under the following circumstances -

(1) There are persons (pre-emptors) whose names and addresses are not known and therefore personal service can not be affected.

(2) The personal service can not be affected despite bonafide efforts to that effect. ,

(3) The applicant requests to the court to resort to this mode of service.

(4) The applicant is ready to deposit the requisite publication charges.

The court may on sufficient grounds allow this mode of service where the court is convicted that the service can not otherwise be affected.

The court can not adapt this mode of service as an additional regular practice of the court in every case unless the statute specifically provides so as in the cases of insolvency petitions, succession certificate etc.

10. Service by post. - [1] Rule 20-A of Order 5 of the Code of Civil Procedure, 1908 recognises the additional mode of service by post.

[2] Section 30 of the Rajasthan General Clauses Act, 1955 defines the meaning of the term “service by post” as under:-

> “30 Meaning of service by post - Where any Rajasthan law authorises or requires any document to be served by post, whether the expression is ”serve" or either of the expression “give” or “send” or any other expression is used, then, unless a different intention appears, the service shall be deemed to be affect by properly addressing, preparing and posting by registered post by a letter containing the document, and unless the contrary is proved, to have been effected at the time at

which the latter would be delivered in the ordinary course of post".

[3] The Central Act i.e. the Code of Civil Procedure, 1908 (Order 5, Rule 20-A) provides for the service by post, thus this section shall not directly apply. Still this section can be referred to a long with section 16 of the Indian Evidence Act, 1872.

[4] The presumption of a service is subject to the following three conditions :

(1) that it was properly and correctly addressed.

(2) posted under registered post with acknowledgment due, and

(3) all postal charges are pre-paid - *Prahladrai vs. Comm. Post of Calcutta* **AIR 1939 PC 11**; *Sushil Kumar vs. Gadesh Chandra*, **AIR 1958 Cal 251**.

[5] A notice incorrectly addressed by served. It was held that there is valid service — *Dwarka Prashad vs. Central Talkies,* **AIR 1956 Cal 187**.

[6] Where the notice returned unserved because the addressee evaded the service, it was held that is does not amount to a valid service of the notice. Nagendranath. vs. Jagdish Chandra, **AIR 1952 Cal 221**.

[7] A notice when tendered for delivery has the same effect as a valid service.- *Sheotibibi vs. Jagannath*, **AIR 1920 All 104.**

[8] A notice correctly addressed but refused by the addressee sent by registered post bearing an endorsement of the refusal, it would be presumed that notice has been validly served and it would not require further examination of the postman who tendered the notice for service. *Jagannath. vs. Amrendra*, **AIR 1956 Cal. 479.**

[9] The production of cover bearing the mark of refusal is sufficient to prove tender and service for the purpose and would not require the examination of a postman. - *Bachalal vs. Lachman*, **AIR 1938 All. 388.**

[10] When a notice was sent by registered post which was refused by the addressee, it was held that the addressee has the constructive knowledge of the contents of the notice - *Shrinath vs. Saraswatidevi,***AIR 1964 All 52.**

[11] Where the cover of the registered letter returned with the remark “addressee untraceable or not found” would not be treated equivalent to ’refused’. In such circumstances fresh notice with correct and recent address must be issued.

Mere denial of a notice is not sufficient when there is an endorsement of refusal on the cover of the letter.- *Asharam vs. Ravishankar*, **AIR 1956 All 519.**

[12] Where a notice was served upon the husband of the addressee sent by registered post, service is not valid - *Rajrani vs. Union of India*, **AIR 1952 Punj. 383.**

[13] This is a case under the Delhi Premises (Requisition and Eviction) Act, 1947. But in view of Rule 15 of Order 5 of CPC, any male member of his family residing with the addressee can take delivery of the notice.

11. Direct notice (not given through the civil court)-Validity of. - Sub-section (2) of section 8 requires that 'such notice shall be given through the civil court', thus any notice given directly (and not through the civil-court would be ineffective. The pre-emptor shall not be bound by it.

When the pre-emptor does not reply or makes an oral reply, it would not bind him and he can raise plea of want of a valid notice as required under section 8 of the Act. .

Where the pre-emptor signifies his express refusal to purchase in writing in reply to such notice, the vendor can not take plea of estoppel against the pre-emptor. Any defence of estoppel raised by the vendor shall not be sustainable in the absence of a notice through the civil court for the following reasons :-

(i) It is a mandatory provision, thus it must be complied with in accordance with the letters of the law.

(ii) the plea of estoppe can not oprate against the express provisions of law. — chandoo vs. Murlidhar, AIR 1926 Oudh 311.

(iii) The object behind sub-section (2) is to set at rest the-disputes as to the sufficiency, legality or otherwise of the service of such notices.

(iv) The notice not given or not served in accordance with section 8 is no notice at all and thus want of notice would be a valid ground for a suit under section 11 of this Act.

A notice given bu.t not through the civil court would not operate as estoppel or waiver against the pre-emptor - *Jethmal vs. Sujanmal*, **1947 Mar. LR 36.**

Thus a direct notice is bad in law and ineffective. A suit can be instituted on the ground of a want of a legal notice.

12. Joint notice-Validity of. - The expression 'shal1 b served in the manner prescribed for service of summons in civil suits make it sufficiently clear that every individual person shall be served separately and individually so also the notice shall be served on each person individually and independent of others. Two brothers living jointly can not be served with one single notice or single summon. The joint notice is not contemplated by the Order 5 of CPC, thus joint notice would be bad in law.

The knowledge of the Karta of the joint Hindu family in respect to a sale transaction can not be deemed to be the knowledge of the other members of the family so as to estop them bringing a suit for pre-emption. *Lataprashad vs. Sher Bhadur*, **AIR 1949 Oudh 65;** *Bohrasingh vs. Fora*, **AIR 1939 All 347** distinguished.

The right of pre-emption is a peculiar right to which every member of a joint Hindu family becomes entitled. It is not a joint right in which case manager alone could bind the other members of his family by his action. The manager of a joint Hindu family may act without their consent where the act is necessary or incidental to the management of his family proper- ty and not in the matters of exercise of their individual right of pre-emption. The right of pre-emption being an individual right, the manager s act can not bind the other members of his family - *Rajayya v. Sangareddy*, **AIR 1956 Hyd 200.**

13. Relief of injunction. - In a suit for pre-emption, an application for interim injunction was filed praying maintenance of status quo as regards the condition of the suit property and by restraining the defendants from alienating the same to avoid further complication. Relief refused. It was held that separate parts of the property are in possession of respective parties, who are the purchaser of different parts and are in respective possession, there is a common wall in between both the houses, no case has been made out to grant any status quo. *Nishat Alam v. Johar Ara*, **2001 DNJ (Raj.) 34.**

14. Waiver by consent.-Where it is proved that the plaintiff gave consent to the first defendant to purchase the suit property, even if it is believed that the plaintiff had the right of pre-emption, he cannot be section 8 of the Act was not given, it was not fatal. *Bhanwarlulp vs. Shanker Lal,***2000 (2) RLR 374=2000 (3) RLW 1757:2000 (3) WLC 375--.2000 '('2)' WLN 134 (Raj)**

15. Offer not accepted by pre-emptor-Effect.- Sale of property to another purchaser- Valid In the instant case an offer was made to the plaintiff pre-emptor to purchase the suit property at a consideration of Rs. 35,000/-, which was not accepted by the plaintiff. Under the circumstances, the plaintiff lost his right of pre-emption. The right automatically extinguished. *Satya Narayani vs. Hanuman Prasad*. **AIR 1999 RAJ 74=1999 (2) RLW 1141:1999 (3) WLC 242 (Ray).**

16. Estoppel. [1*] Defendant after purchase of house reconstructed the house and no objection raised by plaintiff - Plaintff thereby not be stopped to enforce his right of pre-emption. - He can be made to pay cost of reconstruction*.

The plaintiff was clearly not estopped from enforcing his right of pre-emption by waiver or estoppel and findings of the courts below in that respect are erroneous and are reversed. It has been found as by the District Judge that after purchase of the properties mentioned in paras 3 and 4 of the plaint: the defendant had spent an amount of Rs. 20,000 in reconstructing the house. The equity therefore, demands that the plaintiff will pay the amount of 20,000 to the defendant which has been spent by him in reconstructing the house apart from the amount of Rs. 5000 for which two properties were purchased by the defendant on January 22, 1972 from his vendors. - *Jethamal vs. Sajanmual* **[1947 MLR 36 (Civil)],** *Mohamniad Ismail v. Abdul Gani* **[AIR 1950 Raj. 1],***Nenmal v. Kanmal***[1987 RLW 658]** Ref. *Nand Kisore v. Indirabai*, **1988 (1) RLW 291.**

[2] *Unless notice as required under S. 8 of the Act of 1966 is given by person who propose to sell property and notice is duly served as prescribed - Question of estoppel or waiver does not arise Plea of estoppel or waiver raised in the case rejected.*

Sec. 8 of the Act clearly provides that when any person proposes to sell, any immovable property, in respect of which any person have a right of pre-emption, he shall give notice to all such persons as to the price at which he is proposing so to sell.

Such notice is required to be given through the civil court within the local limits of whose jurisdiction the property concerned is situated shall clearly describe such property, shall state the name and other particulars of the purchaser and shall be served in the manner prescribed for service of summons in civil suits. It is clear that in case of sale, the notice has to be given by the seller of the immovable property and it has to be given through the civil court. The right of pre-emption in respect of any immovable property to be sold is lost, if within two months from the date of the service of notice fails to pay or tender the price specified in the notice to the persons proposing to sell. In the instants admittedly no notice u/s 8 was given to the plaintiff by the venders of the defendant before selling the properties described in Paras 3 and 4 of the plaint to the defendant. Sec.11 of the act mentions the grounds on which a suit to enforce the right of pre-emption can be brought and the grounds specified in clause (a) of Sub-sec. (1) of See. 11 is that no due notice was given or served as required by See. 8 by the vendors of the defendant. *Jethamal vs. Sajanmual* [1947 MLR 36], *Mohammad Ismail vs. Abdul Gani*, [AIR 1950 Raj. 1] referred.

The plaintiff was clearly not estopped from enforcing his right of pre-emption by waiver or estoppel and findings of the courts below in that respect are erroneous and are reversed. It has been found as a fact by the District Judge that after purchase of the properties mentioned in paras 3 and 4 of the plaint, the defendant had spent an amount of Rs. 20,000 in reconstructing the house. The equity, therefore, demands that the plaintiff will pay the amount of Rs. 20,000 to defendant which has been spent by him in reconstructing the house apart from the amount of Rs. 5000 for which two properties were purchased by the defendant on January 22, 1972 from his vendors. *Nenmal vs. Kan Mal* [1987 RLW 658] Ref. *Nandkishore vs. Indira Bai*, **1989 (1) RLW 97.**

9. Loss of right of pre-emption on transfer. - Any person having a right of pre-emption in respect of any immovable property proposed to be sold shall lose such right unless within two months from the date of the service of such notice, he or his agent pays or tenders the price specified in the notice given under section 8 to the person so proposing to sell.

Provided that the right of pre-emption shall not be so lost if the immovable property in question is actually sold for an amount smaller than that mentioned in the notice or to a person not mentioned in the notice as purchaser.

COMMENTARY

S Y N O P S I S

1. Effect of service of the notice -
   (a) Primary effects
   (b) Secondary effects
2. From the date of the service of such notice
3. Whether the day on which the notice was served may be excluded while computing the period of two months?
4. Extension of the period
5. Payment in the court
6. Whether the part payment would prevent the loss of right?

1. Effect of service of the notice:

(a) Primary effects. - (1) The period of two months beings to run from the date, such notice is served on the pre-emptor or pre-emptors.

(2) (It compels the pre-emptors, so served with the notice, to decide within two months

(i) whether to enforce the right of pre-emption; or
(ii) whether to refuse to enforce such right.

(3) Where the pre-emptor devices to enforce the right, he must signify his willingness to enforce the same.

(i) It may be by paying or tendering the price of the country to the vendor, or
(ii) where in his opinion the price mentioned in the notice is unfair. He may assign his willingness to enforce his right but also expressly state that the price mentioned in the notice is unfair. The pre-emptor must do this at least before the expiry of two months:

One is entitled to get the amount of consideration determined by the Courts when he doubts the correctness of the consideration expressed in the notice or the deed of transfer. - *Rambishan. vs. Kuldip Singh*, **AIR 1931 Pat. 72.**

(b) Secondary effects. - Where the pre-emptor fails to enforce his right of pre-emption within two months of the service of the notice, his right of pre-emption extinguishes.

(i) It results into the loss of such right.
(ii) And consequently the right accrue in the vendor to sell it to the proposed vendee. The vendee gets the title in the property free of any claim for pre-emption.

2. From the date of the service of such notice. - The crucial date is the date of the service of the notice as required by the last preceding section. The period of two

months shall begin to run from the date of the service of the individual notice against that individual person only and not against those who have not been served with the notices, for his purpose, each notice has to be considered individually.

3. Whether the day on which the notice was served may be excluded while computing the period of two months. - [1] Lord Tenderden observed that by reducing the time to one day, in which case the party would clearly be entitled to the whole of the next day after he injury was done, otherwise he might have no time at all in which to give notice.- *Pellew v. Wonford*, **(1829) 9 B & C 134 = 109 ER 50.**

[2] In the expression from the date of the service of such notice the word from is very significant. .

Section 10 of the Rajasthan General Clauses Act, 1955 runs as under:-

> "10. Commencement and termination of time.- In any Rajasthan law, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word 'from' and the purpose of including the last in a series of days or any other period of time, to use the word 'to'.

The word from as a general rule excludes the day from which the time of limitation is to be reckoned except where the context otherwise requires.

The word 'from' excludes the opening day and any words fixing the closing day include that day. Vishnu v. Domakkee, **AIR 1958 Kerala 326** (page 333).

[3] The expression lfroni a certain day' means next after that day. - In re Court Fees, **AIR 1924 Mad 257 (FB).**

[4] Thus, where the period of two months is computed from the day of the service ofthe notice, the day on which the notice was actually served must be excluded.

4. Extension of period. — [1] The policy of the framers of this law is that the suits for pre-emption should be brought within as little delay as possible. Thus, where a notice under section 8 is given to a pre-emptor who happens to be minor or otherwise disable, he cannot pled extension of the period under sections 6 and 7 of the Limitation Act, 1963. Section 8 of the said Act bars the application of sections 6 and 7 of the Limitation Act, 1963 to the pre-emption cases. - *Biradhraj vs. Dhingarmal,* **ILR 1954 Raj. 200**;. (a case under the Marwar Limitation Act), *Vishwanathan vs. Etlurazulu*, **AIR 1924 Mad 57.**

[2] An agreement between the parties to extend the statutory period of limitation would be void for it would tend to defeat the provisions of the law under section 23 of the Indian Contract Act- *Choklingam vs. Narayan Chetttyar*, **AIR 1938 Rangoon 328.**

[3] It was emphatically held that no one can contract out of the statute of limitation 'and consequently where the result of the compromise was that the limitation provided by law was extended it was open to be judgnient-delitor to plead that the decree holder's application was barred by liniitation.- *Goberdhan vs. Daudayal*, **AIR 1932 All. 273 (FB).**

[4] Similarly any agreement not to plead limitation would be void under section 23 of the Indian contact act - *Chandoo vs. Murlidhar*, **AIR 1926 Oudh 311**

5. Payment in the Court. - Rule 14 of Order 20 of CPC requires the payment of price in the court. Section 14 of this Act recognises the mode pf payment into the court proceedings under section 8,9 and 10 of this Act ls legal Proceeding thus payment into the court is part of such proceedings, thus not bad in law.

6. Whether the part payment would prevent the loss of right. The provision is silent on this point. The part payment of the price would not help the pre-emptor in preventing the loss of his claim for pre-emption this view can be supported on the following grounds.

[1] The expression shall lose the right unless signifies that the loss of right is imperative and it cannot be saved unless a requisite act is not done.

[2] The Expression pays or tenders the price specified in the notice is peculiar which directs" that the whole sum is money which is mentioned in the notice mustbe paid yr tendered by the claimant

(3) The provision is silent as to the part payment of the price,

(4) In the absence of the contract to the contrary as between the seller and the pre-emptor is under duty to make payment or tender the whole amount as specified in the notice.

It is open for the seller and the pre-emptor to agree between themselves to accept the price partly paid and partly promised. There is nothing unlawful in such agreements. But unless such express agreement is entered into and certified before the court. The pre-emptor can neither prevent the loss of his claim nor shall he be heard to say in support of his right.

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10. Loss of right of pre-emption on foreclosure.-— When the right of pre-emption accrues in respect of the foreclosure of a mortgage, any person entitled to such right shall lose the same unless within two months from the date of service of the notice given under section 8, he pays or tenders to the mortgagee or his successor in title the amount specified in such notice:

Provided that the right of pre-emption shall not be so lost if the amount claimed by the mortgagee was riot really due on the footing of the mortgage or was not claimed in good faith.

COMMENTARY

Right of pre-emption does not amount to interest - It is not personal right and does survive to heirs - Held, legal representatives cannot continue suit or appeal

proceedings. - Right of pre-emption runs with the land and can be enforced by a or against the owner of the land for the time being, although the right of the pre-emption does not amount to interest in the land itself. Initially, it is not personal but it assumes personal aspect for the purpose of enforceability in a court of law. The right to sue for pre—emption does not survive to the heirs. Since the plaintiff pre-emptor had died, his legal representatives could not have continued the proceedings whether in suit or in appeal and they are not entitled to a decree for pre-emption *Kailash Chandra & Ors. vs. Smt. Gyarsi Devi & Ors.*, **1987 (1) WLN 10.**

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11. Suit to enforce right of pre-emption.-

(1) When a transfer has been completed. a suit to enforce the right of pre-emption shall, subject to the provisions contained in section 19, lie, and may be brought by any person entitled thereto, on any one or more of the following grounds namely

(a) That no due notice was given or served has required by section 8.

(b) that a tender was made under section 9 or section 10 but was refused:

(c) that in case of a sale, the price stated in the notice given under section 8 was not specified or was not mentioned in good faith.

(d) that, in the case of a mortgage sought to be foreclosed, the amount claimed by the mortgagee was not really due on the footing of the mortgage or was not claimed in good faith;

(e) that the amount so claimed by the mortgagee exceeds the fair market value of the property mortgaged:

(f) that the property proposed to be transferred was not property described in the notice given under section 8;

(g) that the property in question has been transferred to a person other than the purchaser mentioned in the said notice:

Provided that no such suit shall lie under this Act in respect of a portion only of the immovable property transferred unless the plaintiff has a right of pre-emption in respect of only a portion of such property.

(2) Where, in any suit on the basis of a sale, the court finds that the price alleged to have been paid was not fixed in good faith or was not actually paid. The court shall ascertain the actual price paid: (the burden of proving which shall lie on the purchase) or shall fix such price as appears to it to be the fair market value of the immovable property sold:

Provided that when the price alleged to have been paid represents entirely or mainly a debt greatly exceeding in amount the fair market value of the property sold. the court shall determine such market value which shall be the price for the purposes of the suit.

(3) Where in any suit on the basis of a foreclosed mortgage, the court finds that the

amount of the decree has been inflated by fraud or collusion and that the amount claimed by the mortgagee was not really due on the footing of the mortgage or was not claimed in good faith or exceeds the fair market value of the property mortgaged. the ainount to be paid to the mortgagee shall not exceed what the court finds to be such market value.

(4) For the purpose of determining the fair market value of any propeity. the court may consider the following among other matters as evidence of such value : ---

(a) the estimated amount of the average annual net assets of the property;

(b) the amount of the taxes assessed thereon:

(c) the value of similar property in the neighborhoods:

(d) the value of the property in question as shown by previous transfers.

COMMENTARY

SYNOPSIS

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   c. Nature of the right to sue
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   c. clause (c) amount of price
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   e. clause (e) Excessive claim of mortgage security

f. clause (f) Description of property
g. clause (g) Description of vendee
h. Proviso; claim for portion of property
i. These grounds whether serve as clause of action in the suit

7. Frame of suit; salient points
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10. Defences in such suits
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12. Duty of the court u/s. sub—section (2).
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    a. Purpose of determining fair market value
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    c. Fair market value, meaning of
    d. procedure for, determination of
    e. Other matters as evidence of such value, what are.
    f. Appreciation of evidence for valuation
    g. Effects of improvements while valuation
16. Nature of decree to be passed.

1. Suits for pre-emption:

(a) When suit shall not lie - The suit shall not lie under the following circumstances:

(1) Where the immovable property which is subject matter of the suit is transferred to a person having the superior right of pre- emption to the plaintiff.

(2) Where before the institution of the suit the subject matter of the suit is transferred to a person who is transferee from vendee having:-

(i) a superior right to that plaintiff, or

(ii) the equal right to that of the plaintiff (section 19).

But the rival pre-emption of equal class can sue to enforce their respective claim for pre-emption. In such cases the property in dispute ought to be dividing among the pre-emptors of an equal class *Ziauddin vs. Md abdul Hussain,* **AIR 1923 All** 520 *Nadir Hussain vs Sadiq,* **AIR 1925 All 351.**

(3) The vendee or the transferee from as vendee acquires an indefeasible interest in the property (section 19)

(4) The transaction is not a transfer a defined by clause (viii) of section 2 of this Act to which the Act apply.

(5) The transaction is not a compete transfer.

Where it is found that there was no real sale and thus no title passed to the vendee and the transaction being a fictitious one entered into with to defraud creditors, the suit for pre-emption on does not lie. *Badha vs. Hardeo Singh,* **AIR 1942 Oudh 206.**

(6) The transferee is a person to which this Act does not apply (sec. 5)

(7) The property the subject matter of the suit is such to which this Act does not apply (section 5).

(8) The suit for pre-emption shall not lie where the plaintiff desirous to bring the suit for pre-emption loses the right of pre-emption on or before the date of the suit; or the pre-emptor does not acquire the right on the date of the transfer of the suit property.

(b) When the suit shall lie.- The suit to enforce right of pre- emption shall lie after satisfying the following conditions, viz.-

(1) When the transfer of an immovable property has taken place

(2) The lawful claimant of the right of pre-empt1on is unlawfully prevented from being substituted in preference to the transferee in violation of the provisions of this Act.

(3) The transfer is such to which section 19 of this Act does not apply.

(4) The immovable property sought to be transferred, is such which is not covered by sub-section (1) of section 5 of this Act.'

(5) The pre-emptor is a person having a right of pre-emption under section 6 of the Act and he is not excluded under section 7 of the Act.

(6) The plaintiff is not otherwise disqualified to institute a suit for pre-emption, viz.-

(i) Section 9 or 10 of this Act does not apply against the pre-emptor.

(ii) The plaintiff has a subsisting right to claim pre-emption i.e. his right has been lost on any day on or after the date of the transfer of the property or on the date of the institution of the suit.

(7) The suit is not barred by limitation under the provisions of section 21 of this Act.

(c) Nature of the right to sue. - Where there is legal right there is remedy to enforce that right to prevent the violation of such legal right.

Ubi jus ibi remedium.. The right of pre- emption is a legal right recognised by this Act and the right to sue is a mere remedial right. This remedial right to sue is of a peculiar nature. It is not an unqualified right. It is subjected to certain restrictions as enumerated above. The object of imposing such restrictions is to minimise the pre-emption litigation between two persons having the right of pre-emption when the subject matter of the suit is purchased by a person having a superior or equal right of pre-emption to the plaintiff or where the suit property is of an indefeasible nature. Subject to the restrictions as enumerated under section 19 of this Act, the right to sue has been recognised and extended to any persons entitled thereto. The right can be enforced by any one or more of the person by a joint suit or by separate suits.

(d) Who can not sue. - It is ownership and 'not mere possession that gives right of

pre-emption - *Sankinabibi vs. Amiran*, **ILR 10 Ali 472..**

So a tenant, mortgagee, benamidar, person having a spes succession is or a contingent interest has not to raise to sue - *Ujagarmal vs. Jallal*, **ILR 18 All 382**; *Rameshwarlal vs. Ramdeo*, **AIR 1957 Pat 695.**

(e) Who can sue. Every person who has a right of pre-emption under section 6 of the Act can sue. He must not be a person who has lost his right under section 9 or 0of this Act. He is not a person who has been excluded by a notification issued under section 7 of the Act by the State Government of Rajasthan. The plaintiff must have a right on the date of the transfer of the suit property and must have the continued right till the date of the decree.

(i) The minor - The minor is a competent person to bring a suit for pre-emption. He can bring such suit through his natural guardian or a next friend in the manner as prescribed under order 32 of the CPC. The same principle would apply to the persons of unsound mind. - *Chaninidevi vs. Deokinandan,* **AIR 1952 All 561**; *Enatullah. vs. Sheikh Kowsher Ali*, **AIR 1926 Cal. 153** (Sp. B.)

(ii) Insolvent. -The insolvent as from the date of the petition is civilly dead and can not after the petition enters into any transaction in respect of the property which will bind the receiver or his creditors. Any person dealing with the insolvent after that date does so at his peril. Thus the receiver shall be substituted for the insolvent-plaintiff. The receiver can decline to continue the suit if the suit is such which is not relating to realisation of the assets of the insolvent for the distribution among his creditors. Thus, all the suits in which insolvent a interested shall be instituted and continued with the leave of the court and in the name of the receiver.

Now the question arises, what are those suits relating to maintain the assets of the insolvent ? Any suit by the insolvent wherein if the insolvent succeeds would result into increase the assets of the insolvent to maintain the existing quantum of assets or to prevent the diminition of the assets of the insolvent's property available to the receiver for distribution and satisfaction among his creditors. Thus, naturally the suits relating to money or properties are such suits.

The suit to enforce the right of pre-emption is one not covered by the suits mentioned above. It is a suit to enforce the personal rights or pre-emption thus, prior leave of the court is not required. At the most, for safety purposes, the vendee can request the court to direct the insolvent pre-emptor to furnish the security for costs of the vendee in the suit in case the insolvent pre-emptor's suit is dismissed in account of his failure to deposit the amount of price within the prescribed period. Merely an institution of a pre-emption suit by the insolvent to enforce his personal right of pre-emption alone does neither amount to enter in to a transaction of the insolvent nor the suit property vests in the insolvent upon such institution alone.

(iii) A tenant - The tenant is not entitled to sue for, he has merely the possessory

right to enjoy the property on payment of rend for it.- *Rameshwarlal vs. Ramdeo*, **AIR 1957 Patna 695.**

(iv) Pre-emptors of equal category. - The rival pre-emptors of equal class can sue to enforce their respective claim for pre-emption. In such cases, the property in dispute ought to be divided among the pre-emptors of an equal class. *Ziauddin vs.Mlohd Abdul Hasan*, **AIR 1923 All 520**; *Nadir Hussain. vs. Sadiq*, **AIR 1925 All 301.**

(v) The juristic person. - The section 6 of this Act only contemplates 'person' to whom right of pre-emption shall accrue. The term 'person' includes the juristic person. Section 11 also contemplates the same meaning of the term 'person' so much so, the partners in a partnership firm has specifically been recognized as a class of person to whom the right of pre-emption has been made available. Any one or more of the partnership firm can bring such suit. So also the manager of a company, director of the corporation or any person so authorised to bring such suits on behalf of the club or association can institute suit for pre-emption on behalf of its company, corporation or association as the case may be.

(vi) Female. – Neither the Act debars the females persons to bring such suits nor it provides any restrictions. "The females including the pardhanashin ladies are equally entitled to bring such suit as male can. *Ishardevi vs. Sheoram*, **84 IC 484; ILR 5 Lahore 435.**

But the female having the right of maintenance alone cannot sue.- *Karansingh. vs. Mohd Ismail*, **ILR 7 ALI 860**; *Bhupal Singh vs. Mohansing*, **ILR 19 All. 324.**

(vii) An individual member of the joint Hindu family can sue. - The Karta or the manager of the joint Hindu family can bring a suit for pre-emption for himself as well as on behalf of all other coparceners. Where the Karta of the family refuses the other coparceners to include in the suit, those coparceners can bring their separate suit for pre-emption.

The junior member of a joint Hindu family can bring a suit for pre-emption. The fact that he has admitted that the sale consideration would be paid from the officer the joint Hindu family and he was pre-empting the property for the benefit of the whole family does not change the situation and does not take away his right to pre-empt. *Mst. Chandidevi vs. Deokinandan*. **AIR 1952 All 561:** *Enatullah vs. Sheikh Kowsher Ali*, **1926 Cal. 1153 (Sp. B.)**

2. Whole claim to be included in the suit. - [1] The person claiming a right of pre-emption in a property must include whole of the claim comprising in the transaction between the seller and the purchaser. Thus, a suit which does not seek to pre-empt the whole of such interest is defective and should not be entertained. *Dhola vs. Khanum*, **AIR 1935 Lahore 635**. See also *Manbodh Singh vs. Brij Bhushan*, **AIR 1931 Oudh 52 -** *Durga. Pd. vs. Mumshi*, **ILR 6 All 423.**

[2] The pre-emptor can be allowed to split up the bargain. He would be at liberty to take the best portion of the property for himself and leave worst part of it with the vendee. The right of pre-emption was never intended to confer such a capricious choice upon the pre-emptors - *Sheobharos vs. Jiachral*, **ILR (1886) 8 All. 462**; *Durgaprasad vs. Munshi*, **ILR 1884 6 All. 423 (426).**

[3] Where the two or more such property are sold by the same transaction and some of which are subject to the law of pre- emption to which the right of pre-emption accrues, the pre-emptor can exclude such other and pre-empt the rest. - *Jainabbibi vs. Umar Hayat*, **AIR 1936 All 732**; *Mohamudi vs. Mustaque Ali*, **1958 All LJ 559**. See also *Abdul Karim vs.Gulam Nabi,* **AIR 1934 Lahore 402**; *Udaram vs. Atmaram* **AIR 1924 Lahore 431.**

3. The subject matter of the suit. - The subject matter of the suit for pre-emption is always an immovable property as defined by section 2 (iv) of this Act and never the transaction of transfer. The pre-emptor claims a preferential right to be substituted for the vendee in respect to an immovable property so transferred.

The transaction of transfer or any knowledge thereof subsequently gives a cause of action to bring an action under' this Act of course in order to give complete cause of action the act of transfer must be complete in law and fact.

The property must not be covered under section 5 (1) or 19 of the Act.

4. Parties to the suit.- Following are the necessary parties in a suit for pre-emption :—

(1) The pre-emptor i.e., the plaintiff having the claim of pre-emption and whose such right has been violated and who wants to be substituted for the purchaser is a necessary party.

(2) The vendor of the suit property for consideration is also a necessary party.

(3) The transferee-purchaser of the suit property is also a necessary party and he must be made defendant in the suit.

(4) Any subsequent transferee from the transferee purchaser before the institution of the suit must also be made a party being a necessary party for the plaintiff is to be substituted for him.- *Khetta Chandra vs. Nabin Kalldevi*, **ILR 35 All. 385 -= 20 IC 424.**

(5) In respect of a joint purchase by several co-vendees, all of the are necessary parties in such suit. - *Habibullah vs. Achaibar Pandey*, **ILR 4 All 145.**

(6) On the death of any party on record in a suit, all their legal representatives are the necessary parties.

(7) In benami transaction, real purchaser is the necessary party. It would not in any way change the character of the suit. - *Mohd Ismail vs. Abdul Gafoor*, **4 IC 488;** *Peshwarilal vs. Dharamchand*, **AIR 1941 Peck. 52**.

(8) The rival Pre-emptor is a necessary party :- *Rambhan vs. Ganeshdas Rao*, **AIR 1948 Nag. 32.s**

But if any rival pre-emptor is not made a party the suit is not rendered defective, for such rival pre-emptor can being a separate suit which on consolidation of suits under section 12 of the Act becomes parties to the suit automatically (see section 12 of the Act)

(9) But the mortgagee from the vendee or the vendor is not a necessary party. — *Munshiram vs. Abdul Aziz*, **AIR 1943 Lahore 252**; *Hiralal vs. Ramjas*, **ILR 6 All 57** See also *Brijnarain vs. BHK Bhaon*, **1942 Oudh 366**; *Daulatram vs. Amarchand*, **AIR 1950 Ajmer 11**; *Dee Raj vs. Govind Pd.*, **12 IC 647**.

Where the necessary parties are omitted, the suit will be defective for non-joinder of necessary parties and on that ground alone the suit may be dismissed.

5. Restrictions as to the making of parties. - The plaintiff must be very careful while making any person party in a suit for pre-emption. Any person made as co-plaintiff in violation of section 16 of this act would result into either the loss or degradation in the degrees in the right of pre-emption

6. Grounds of suits for pre-emption:

Clause (a) - Notice-

(i) want of notice under section 8
(ii) want of due service of notice
(iii) defective notice

Clause (b) — Refusal by vendor.- The vendor refused to accept the price tendered within the prescribed time.

Clause (c) - Amount of price.-

[1] (i) either undisclosed or otherwise not capable to ascertain from the notice, or

(ii) amount is excessive and tainted with malafide, or

(iii) the amount actually paid or proposed to be paid by the vendee to the vendor is smaller than as disclosed from the notice, or over stated, or

(iv) there is collusion or fraud between the vendor and vendee so as to prevent the plaintiff to claim right of pre-emption.

[2] The acts of bad faith are seldom proved by direct evidence. It is an out come of some secret conspiracy which can only be proved by circumstantial evidence. Thus, each must be weight and considered strictly upon the evidence on record. Mere - surmises and apprehensions can be substituted for legal evidence.

[3] In a suit for pre-emption, if one item of consideration is proved to be fictitious, the entire consideration as entered in the sale deed must be deemed to be fictitious and the conclusion is that the sale consideration entered in the deed is not bonafide.- *Abidali vs. Harprashad,* **AIR 1929Oudh 486.**

[4] Where the amount of price is higher than the fair value but settled and paid in good faith. It is no ground to bring the suit. The law does not bar the transfer to an

stranger, - **Abdul Khan vs. Bhola Khan**, **AIR 1943 Oudh 274**; *Gulzarilal vs. Mohd Shafi*, **AIR 1938 All 204.**

[5] An excessive price over the fair market value alone is not sufficient it must be the result of malafides, - *Laloosingh vs. Jagjiwan Pd.*, **AIR 1936 Oudh 100**; *Shiwaji vs. Rat i Ramy*, **AIR 1926 Nag. 171.**

[6] Where the plaintiff comes to the court with an allegation that the price mentioned in the deed is fictitious, the burden of proving it lies on the plaintiff. Since the transaction of sale often takes place behind the back of the plaintiff as a direct evidence as to the actual price can hardly be given. If the pre-emptor is able to bring on record certain facts which may show that the price was not paid or that it could not possibly by the real consideration the onus then shifts to the vendee. If from the evidence the court is unable, to satisfy itself as to the price, paid, the court has to proceed to determine the fair market value of the property. If the pre-emptor is unable to bring some facts on record which may put the vendee to prove the price paid by him, the mere fact that the consideration as mentioned in the sale deed is higher than the market value can not justify a court in reducing the consideration.

Where the price alleged in the deed is grossly in excess of the market value alone is not sufficient to prove that the price is fictitious. It is the circumstance which only can induce the court to call upon the vendee to explain why he was willing and prepared to sacrifice his money in order to buy the property at a price apparently so extravagant. — *Laluram vs. Tarachand*, **1951 RLW 249 = ILR 1951 Raj. 272.**

[7] Although very strong evidence to prove the actual pripaid in a pre-emption suit is not required yet the plaintiff have to produce some legal evidence which might satisfy the court that the ostensible price is not the actual price. - *Kanhyalal vs. Abdul Karim*, **1956 RLW 351.**

[8] A very slight evidence is sufficient to shift onus on vendee to prove the price is not fictitious. Such slight evidence must be relevant admissible and must be such that if believed by the court, it would justify the ground, *Mardan Khan. vs. Mahmoodi Khan*, **AIR 1930 Oudh 101**; *Abid Ali vs. Har Po*, **AIR 1929 Oudh 480.**

[9] In a suit brought by a pre-emptor challenging the bona fides of price entered in the sale deed, the fact that the price entered in the deed is higher than the market value would be a very strong piece of circumstantial evidence going to show the fictitious nature of the price entered in the deed. But it, in no case, should be considered as conclusive. *Mardan Khan vs. Mahmoodi Khan*, **AIR 1930 Oudh 101. .**

[10] The burden primarily rests on the plaintiff pre-emptor to prove the allegation by some prima facie evidence that the price shown in the deed is fictitious or inflated and the alleged price was paid privately i.e. not in the presence of the Sub-Registrar, so as to shift the burden upon the defendant to prove the actual price paid is same as entered din the deed. -*Shiwaji vs. Ratiram*, **AIR 1962 Nag. 171**; *Mishrilal vs. Dcvicharan* **See also AIR 1932 All. 561.**

[11] Any collusion between vendor and vendee can not be presumed simply on the ground that vendor was not produced as a witness, *Abdul Khan. vs. Bholakhan*, **AIR 1943 Oudh 274.**

[12] In a suit for pre-emption vendee proves the actual amount of price paid and also explain why he gave higher price and it is not proved that any portion of the price was returned to or retained by the vendor, it can not be held that the transaction is not in good faith. Thus, when an outsider pays a good price in good faith, he should not be forced to part with the property at a fair market — *Abdul Khan vs. Bhola Khan*, **AIR 1943 Oudh 274**; *Gulzarilal vs. Mohd. Shafi,* AIR 1938 All 204, *Shiwaji vs. Ratiram*, **AIR 1962 Nag 171.**

[13] It is for the pre—emptor to prove that a portion of the sale price has been refunded by the vendor to the vendee, and he has to prove it affirmatively and not by raising mere suspicious. In the absence of a clear proof of refund from the side of the pre- emptor, the mere fact that payment has been established shall person be enough to entitle the vendee to the price claimed. The court should not go into irrelevant questions as to the market value of the suit property or disparity between the actual price paid and market value - *Ali Akbar vs. Multan*, **AIR 1935 Pesha 12.**

[14] The fact that the vendee had some influence over the vendor is a circumstance tending to cast doubt about the genuineness of the amount of consideration as stated in the sale deed. That being so,the burden of proving that the ostensible consideration is the real consideration is on the vendee. *Anantrai vs. Bhagwanrai*, **AIR 1940 All 12**; *Dhanukhdarisingh*. *vs. Sureshsing*, **AIR 1930 All 363.**

[15] The onus shifts to the purchaser to prove the fact that the price stated in the sale deed is correct for it was actually paid by him to the vendor.

When the purchaser fails to discharge his burden the court is bound to infer that no full prices stated in the sale deed was paid or the consideration shown in the deed was not stated in good faith and thus court has reason to resort to find out what was the actual amount paid by him to his vendor or in absence of which resort to determine the fair market value of the suit property.

In such circumstances, the fair market value of the suit property can not exceed the price stated in the deed. *Zahiruddin vs. Ali Hussain*, **AIR 1924 Oudh 244.**

[16] **Effect of where the price is partly paid in cash and partly set off towards the lawful debt due.-** Thee is nothing illegal if the vendee sets of the money actually due to him under the mortgage or any other lawful debt against the sale consideration payable to the vendor. The legality of the transaction can not be impugned either by the vendor or by the pre-emptor - *Anantral vs. Bhagwanrai*, **AIR 1940 All. 12;** *Gulzarilal vs. Mohd. Shaft*, **AIR 1938 All 204**; *Mishrilal vs. Devicharan,* **AIR 1932 All 561.**

(d) Clause (d) - [1] In case of properties subject to mortgage sought to be foreclosed, the amount claimed to be due under the said mortgage is either nor really

due as stated in the notice or the amount of debt claimed to be stated without good faith in the notice.

[2] Burden of proof. the plaintiff pre-emptor must prove the following facts in evidence in order to succeed in a suit for pre-emption based upon this ground, viz:-

(1) the claim of the mortgagee is based upon mortgage transaction which is sought to be foreclosed, and

(2) the total amount of mortgage debt claimed to be due is not really due or

(3) the mortagees claim for mortgage debt due is tained with bad faith

For this ground, it does not require to prove whether the amount of debt claimed to be due is excessive of the fair market value or not. This may be the additional ground for suit as contemplated under clause (e) of sub-section (1) of section 11 of this Act.

(e) Clause (e) - The fifth ground for a suit for pre-emption relates to the mortgage transaction to which the suit property is subject. The mortgagee's claim for the total amount of mortgagee debt due is excessive of the fair market value of the mortgaged property. The pre-emptor does not want to pay more than the market value nor he can be compelled to pay any consideration over the fair market value of the suit property in a suit for pre-emption.

In the cases where property is sold in lieu of old debts, and if the vendor sells to discharge the debts and the debts are wiped out, the consideration for pre-emption is not the nominal value of the debts i.e. their arithmetical total, but their present or market value.- *Amirkhan vs. Shanker,* **AIR 1925 Nag. 194.**

(f) Clause (f). - The sixth ground for suit is that the property proposed to be transferred is different from one as described in the notice under section 8 of the Act. This difference in description of property may be due to the following reasons:-

(1) The property has not been described at all in the notice. The omission to describe the boundaries of the property is the ground for suit.

(2) The boundaries of the property has been misdescribed in the said notice. While reading the description of the property in the notice if it creates confusion in the mind of the pre-emptor and thereby he gives up the idea to enforce his right or the misdescribed property is treated to be one different from one respecting which the pre-emptor has the right or willingness to enforce his right of the pre-emption, in both such cases, the decision of the pre-emptor is materially affected and thus affords a ground for suit.

(g) Clause (g). - [1] The last ground of the suit is that the purchaser of the suit property is a person different from one as disclosed is the notice. The difference in identity of a person may be determined on the following lines:—

(1) There is complete absence of the description of the person intending to purchase the suit property in the notice.

(2) The proposed purchaser is misdescribed in the notice which materially affects the decision of the pre-emptor to enforce his right; and when the identity of the

purposed purchaser is touched upon the description disclosed in the notice, he appears to be a third person altogether new and different from one as is described in the notice.

[2] **Burden of proofs. -** The plaintiff pre-emptor is simply required to produce the original notice as served upon him under section 8 of the act to prove this as ground for suit.

The mistake in description of the proposed vendee in the notice which materially affects the decision of the pre-emptor whether to pre-emptor or not is the direct consequence of mistake as to the identity of the proposed purchase.

Strictly speaking, it is immaterial whether the pre-emptor is misled by the description as to the proposed purchaser given in the notice or not, or his decision is adversely affected or not, it simply requires the misdescription of the proposed purchaser in the notice pure and simple so as to invoke this as a ground for suit for pre-emption.

(h) Right of pre-emption only in respect from some portion of immovable property - Suit for - Duty of Court.

Under the proviso to sub-section (1) of section 11, if the plaintiff has a right of pre-emption in respect of only a portion of an immovable property transferred, he can file a suit for pre-emption only relating to such property and it is not necessary for him to file suit for the whole of the property transferred. Therefore if under the same sale deed in the immovable property transferred is also such property which is described in section 5 of the Act, relating to which no right of pre-emption accrues, a pre-emptor has to confine his suit only to portion of such property relating to which a right of pre-emption accrues to him under Section 6 of the Act. Though the Act does not provide as to how consideration entered in the sale-deed is to be apportioned in between the property pre--emptible and that portion of the property which is not pre-emptibie, in such case it is the duty of the court to make an enquiry and find out as to what was the market value on the date of sale of the property which is not pre-emptible and of the property which is pre-emptible. **AIR 1936 All 732** *Ref. Kishan Chand vs. Nand Kishore*, **1980 RLW 650.**

(i) These grounds whether serve as cause of action in the suit cause of action meaning of - [1] The phrase 'cause of action' would mean every fact which would be necessary for the plaintiff to prove traversed in order to support his right to the judgment of the court in ordinary and simple language it would mean whole bundle of facts which is necessary for the plaintiff to prove in order to succeed in a suit. In other words, it would mean every thing which if plaintiff fails to prove would give the other party at once a right to immediate judgment in his favour must be part of the cause of action. *Hiralal vs. State,* **AIR 1956Saurashtra 75**; *Abdul Gaftoor vs. Sesmal*, **AIR 1955 Raj. 53,- ILR 1955 Raj. 269**; *Inre Laxminaranae*, **AIR 1954 Mad 594 (F.B.)**

[2] But it does not include every piece of evidence which goes to prove such facts. - *Mohd Khalil vs. Mahbubai*. **AIR 1949 PC 78.** *Dwarkadass vs. Brijmohan*, **AIR 1956 Punj. 111**; *Hirralal vs. State*, **AIR 1956 San.75;** *Muzzfar Ali vs. Janan Damal*, **AIR 1955**

Punj. 93; *Deapnarayan vs. Deitert*, **ILR 31 CAL 274 (282)(F.B.)**

[3] The cause of action must be antecedent to the suit and must not be furnished by the pleading themselves. *Dominion of India vs. Nath & Co,***AIR 1950 Cal. 207.**

[4] The cause of action in suit may be used in narrower or wider sense. In the narrower it means the circumstances forming theinfringement of the right or an immediate occasion for the action. *Gandasingh vs. Zora Singh,* **Air 1950 Pepsu 21,** *Sheral Vs. Porapali,* **AIR 1942 Cal. 407.**

[5] In this narrower sense, the cause of action arises to the pre-emptor the moment the knowledge of the fact of transfer of the property in respect of which he has the claim of pre-emption first comes to him. The cause of action arises only when there is a complete transfer as defined by clause (viii) of Section 2 of the Act and the pre-emptor expression his willingness to be substituted for the purchaser.

In the wider sense it means the necessary conditions for the maintenance of the suit including not only the infringement of the right but an infringement coupled with the right itself - *Tribeni vs. Ramsurey*, **AIR 1931 Pat. 241 (F.B.).**

[6] It is in the wider sense that the grounds of suit also serve as the cause of suit in a pre-emption suit. The suit for pre-emption may be based on any one or more of the grounds stated above.

7. Frame of suit salient points.- (1) All the necessary parties to the suite must be made a party in the suit. The status of the defendants in respect to the property must be described in the body of the plaint.

(2) The description of the suit property must clearly and correctly be disclosed. If the suit property is known by its numbers it must be so described otherwise it must be described by disclosing the names of the neighboring owners or any other suitable manner.

(3) The plaint in a suit for pre-emption must allege the class of pre-emptors to which the plaintiff belongs, and the fact that the vendee does not belong to any of the three classes or belonging to the inferior category to that of the plaintiff. If the vendee is of equal class as the plaintiff, all of them shall share the property equally.

(4) The plaintiff must state the grounds of suit. If the ground for suit is in the alternative, same must clearly be stated.

(5) The plaintiff must state his readiness to pay the price of the property to the vendee. If the vendee has paid only the portion of the price to the vendor, he must to pay such amount as was paid by the vendee to the vendor and balance to be paid according to the terms of the sale deed or as the court directs in the decree.

(6) Where the plaintiff alleges the contemplated price to be not bonafide, he must state the fair price and pay the ad valorem court fee thereupon.

(7) If the suit is claimed to be within time from the date of defendant's taking possession, the date on which the defendant, obtains possession must be given in the plaint, otherwise the date of registration of the sale deed must be given.

(8) In case of a mortgage sought to be foreclosed the amount claimed by the mortgagee was not really due on the footing of the mortgage or was not claimed in good faith must be alleged.

(9) The whole property sold by the vendor to the vendee must be included in the claim except where the plaintiff is not entitled to pre-emptor any specified part of such suit property. *Jainab Bibi vs. Umar Hayat*, **AIR 1936 All 732.**

(10) The amount so claimed by the mortgagee exceeds the fair market value of the property.

(11) The plaintiff must be careful not to join with a person having inferior claim of pre-emption or having no claim for pre-emption as co-plaintiff in such suit.

(See section 16)

(12) The plaintiff is not required to state that he has a subsisting right to claim pre-emption on the date of the suit. It is for the defendant to prove the absence, diminution or extinction of such right of pre-emption on the date of transaction, date of suit or not the date of the decree.

8. Competent Court to try rights in pre-emption.

Whether civil court only to try. - A right to enforce a claim of pre-emption is a right of the civil nature, and a suit to enforce such claim is ordinarily triable by the civil court. The learned civil court seems to be under the impression because their properties in respect of which the right of pre-emption is claimed is an agricultural property, the suit is exclusively triable by a revenue court. *Chinsa vs. Acmda,***1960 RRD 114.**

9. Court fee. - An ad valorem court-fee upon the valuation of the suit property is payable but where the price disclosed in the notice is not bonafide, the fair market price of such suit property shall be determined and an ad valorem court fee is required to be paid.

10. Defences in such suits ('salient points).-

(1) The defendant vendee must expressly deny the plaintiffs right of pre-emption. He must further state the loss of such right on or before the date of the suit.

The defendant can draw the attention of the court by an application in writing alleging the fact that the plaintiff has lost the pre-emption on or before the date of the decree also.

(2) The defendant may plead that the present suit for pre-emption does not lie as under sections 5, 7, 16, 18 or 19 of this Act.

(3) The vendee defendant may plead that he is also the pre-emptor of a superior or of an equal class to that of the plaintiff himself.

(4) The plea that the plaintiff is entitled to portion of the property and Not whole of it

(5) The claim of plaintiff is lost by surrender, acquiescence or refusal to purchase or

failed to pay the price in the time as required by section 9 or 10 of the act after receipt of notice. *Kanhyalal vs. Kalu Pd.* **AIR 1927 ALL 670**

(6) That the plaintiff suit is barred by limitation.

(7) The plea that the suit does not cover the whole claim in respect to tne whole property may be raised.

(8) That the plaintiff has under valued the suit property and therefore suit is sufficiently stamped. On this ground that defendant can claim costs of the suit. - *Bairao vs. Abdul Gaffoor*, **AIR 1953 Nagpur 376.**

(9) The plea that the suit transaction is such to which the Act does not apply or it is not a transfer as defined under section 2(viii) of the Act may be raised,

(10) That the ground upon which the present suit is based doesnot exist or the ground taken is false.

(11) That the suit is pre—mature as the sale has not been completed as yet, It is not a valid, complete and bona fide sale yet

(12) The defendants may plead the loss of right of the plaintiff or reduction in degrees in the claim of the plaintiff (see section 16)

(13) Where the plaintiff does and the right to sue does not survive the suit abates or the legal representative of the deceased party is not brought on record within the prescribed period of 90 days.

(14) The nature of the right of the basis of the right claimed in the suit is such which is not recognised under the Act (See section 23 of the act)

(15) That the status of a plaintiff is such that the right of pre-emption does not accrue to him. – *Sakinabibi vs Amiran*,ILR 18 **ALL.472***Ujagarlal vs. Jailal*. **ILR 18 all 382**

(16) Any other ground of objection which helps to the dismissal of the Suit may be raised by the defendants for example an objection under rule 11 or Order 7 CPC may be raised any plea as to the legality, constitutional validity and vires of any provision of this Act may be raised at any stage of the suit or proceedings. An alternative objection may also be raised.

(17) Any objection as to the jurisdiction of the court may also be raised.

11. Cost in the suit. - But where the court finds that the plaintiff is guilty of very much understating the value of suit property, the plaintiff is liable to costs of the defendant. When the defendant is guilty of suppressing the truth as to the existence of transaction to appear what it really was not or the valuation is very much inflated, in such case the defendants are liable to costs of the plaintiff - *Bajirao vs. Abdul Gaffar,* **AIR 1953 Nag.379**; see also *Abdul Hakim vs. Mohd. Alijan*, **AIR 1943 Peshwar 76.**

12. Duty of the Court under this sub-section. Wherein a suit brought on the basis of a transaction based on sale, one Of the ground of such suit it as mentioned in clause (co of sub-section. (1) of section 11 of the Act, and wherein the court is convinced of the existence of ground, it shall then proceed —

(i) top ascertain the actual price which was paid by the purchaser to the vendor, or

(ii) to determine the price which appears to the court to be reasonable and proper after considering the situation, nature of the construction, depreciation, amenities and facilities provided therein. In case the price alleged in the transaction is discovered to be not fixed in good faith, it is called the fair market value of the property, - *Laloosingh vs. Jagjiwan Pd.*, **AIR 1936 Oudh 100.**

The court while determining the market value of the property must first ascertain whether any price of the suit property was ever paid previously, if so when, and that quantum of such price or where the court is unable to determine the actual price paid otherwise, then only the last resort for the court is to determine the fair market value of the property. It is based on sound reasoning that the seller must not be put to loss in price by fixing a fair market value of the property where the price actually paid was larger than the fair market value determined by the court. An assessment of a fair market value is the last resort for the court where other methods in ascertaining the actual price paid by the purchaser fails.

When the male fides of the vendee are clearly established and the price mentioned in the sale deed has not actually been paid, the question of market value arises and must be taken as the price to be paid.- *Mojiram vs. Shivlal*, **1945 Mar. LR 45 (Civil).**

Where in a suit the court arrives at a finding that the price stated in the sale deed has not been fixed in good faith and it is its duty to determine the fair market value. The market value however so determined must not exceed the price stated in the deed. - *Zahiruddin vs. Ali Hussain*, **AIR 1929 Oudh 244.**

In order to determine the market value of the property in dispute in a suit for pre-emption, it is advisable first to determine what amount of consideration was actually paid under the sale deed, for that amount is a good guide to help in determining the market value if it can not otherwise be fully established.

An endorsement on the document by the Sub-Registrar while registering it is admissible for proving the statement as to price paid as mentioned therein. — *Abdul Gaffoor vs. Kamaludin*, **AIR 1927 All 441.**

If one item of consideration is proved to be fictitious, the entire consideration as entered in the sale deed must be deemed to be fictitious and the conclusion is that the sale consideration entered in the deed is not bona fide. *Abidali vs. Harptshad,* **AIR 1929 Oudh 486.**

13. Proviso to sub section (1) — This sub-section is subject to one proviso. The proviso shall apply under the following conditions, viz -

(i) The transaction is a sale of property.
(ii) The consideration for such sale or price required to be paid is not paid in cash but represents the adjustment of previous debt or major part of the price consists in the adjustment of the previous debt between the vendor debtor and the purchaser creditor.

The proviso is based on reason and equity and its object is fairness the previous debt always represents the total sum of principal and an interest calculated thereupon which is larger and such which the debtor can not pay up upon sale in execution of his property. On the contrary the creditor purchaser also finds it difficult to get full satisfaction of his previous debt so he think it convenient and wise to settle the adjustment of debt by resorting to purchase the property for the debt due. The primary object is to settle the dispute and compromise but not the transfer of property. The value of the property is always lesser than the total amount of debt due for which settlement was made. Thus the transaction does not represent the correct amount of consideration as price of the property but in order to save both of them from litigation, difficulties of execution and with a sense of compromise, they settle by transfer of property of the debtor to the creditor in lieu of this debt.

Though the whole of the outstanding debt is stated to be the price of the property yet is does not represent the actual value of the property and thus the court is required to ascertain and determine the fair market value of such property. When court determines the fair market value of such property, the pre-emptor may enforce his right for pre-emption on depositing the same in the court. The pre-emptor can not be directed to pay any sum in excess of such fair market value of the property as determined by the court.

In cases where property is sold in lieu of old debts, and if the vendor sells to discharge the debts and the debts are wiped out, the consideration for pre-emption is not the nominal value of debts i.e; their arithmetical total, but their present or market value. - *Amirkhan vs. Shankar*, **AIR 1925 Nagpur 194.**

Where a suit for pre-emption is based on the ground that the price enteudies the roak deed was not fixed in good faith but neither of the party leads evidence to ascertain the market value of the property sold, then the sum actually paid would be deemed to be its fair market value. The plaintiff can pre-empt the state on payment of such price. - *Shukhdoesingh vs. Ramsundersigh*, **AIR 1937 Oudh 367**; *Zahiruddin vs. All Hussain*, **AIR 1929 Oudh 244.**

In a suit for pre-emption the evidence of price actually paid by the purchaser is not in admissible in fixing the fair market value of the property and the court should not ignore the price actually paid in fixing the market value. *Lalloo Singh vs. Jagjiwan Pd.* **AIR 1936 ALL 100**; *Qadir Hussain. vs. Mohd. Fazal Haq*, **1931 Oudh 137.**

Market value - [1] It is the market value of ownership - *Secy. of State vs. Shanmugaraya Mudaliar*, **20 IA 80 (page 88).**

[2] The legal concept of market value in relation to land is that it is the price, which

an owner who willing but not obliged to sell, might reasonably expect to obtain from a willing prudent purchaser. - *Nagaswara Roa vs. SPL Dy. Collector*, **AIR 1959 AP 52.**

[3] The market value means the net value of property which is the subject of the transfer and not its grown value. The net value should be ascertained after deducting only the rateable amounts of their liabilities under mortgages existing at the time of sale if they cover other properties - *Khedan Ahir vs. Ram Rekha*, **AIR 1934 All 934.**

[4] Their Lordships of the Privy Council observed: “Now, the principle upon which valuation of property compulsorily acquired should be measured has been repeatedly laid down before by this Board and by the House of Lords. To use the words to be found in *Fraser vs. City of Fraserville* **(1917 A.C. 194)**. It is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for the purpose for which the property is compulsorily acquired - *Raj Bahadur Lal Narsing vs. Sect of State*, **23 CWN 852 (Page 824)**

[5] In cases of lands acquired for the public purposes under Land Acquisition Act the faisest and most favourable principle of determining the amount of compensation is to enquire about what is the market value of the property, not according to its present disposition but laid out in the most lucrative and advantageous way in which the owner of the property could gladly dispose of it. - *Alaula Huq vs. Sect. of State*, **11 CLJ 393 = 2 IC 277;** *Premchand vs. Collectorc*, **[LR (1876) 2 Cal 103** *(page 106).*

[6] The principle of compensation is indemnity to the owner and the basis on which all compensation for lands acquired or taken should be assessed, is their value to the owner as at the date of notice to treat and not their value when taken to the pre- em pters the question is not what the persons who take the land will gain by taking it but what the person from whom it is taken will lose by the having it taken from him. The application of this principle must depend upon the special circumstances in each case (The Principles & Practice of Valuations by John A. Parks, 2nd edition, 1960 at page 10)

[7] Mr. Eve, J have summarised the principle of valuation of property in compensation cases as under:—

> "(1) The value to be ascertained is the value to the vendor, not its value to the purchaser: (2) in fixing the value to the vendor all restrictions imposed on the user and enjoyment of the land in his lands are to be taken into account, but the possibility of such restriction being modified or removed for his benefit is not to be overlooked; (3) market price is not a conclusive test or real value; (4) increase in value consequent on the execution of the undertaking for or in connection with which the purchase is made must be disregarded; (5) the value to be ascertained is the price to be paid for the land with all its potentialities and with all the use made of it by the vendor; and (6) the true contractual relation of the parties that of purchaser and vendor - it not to be obscured by endeavouring to construe it as another contractual relation all together that of indemnifier and indemnified” — *South Eastern. Railway*

Co. vs. London, Country Council, 1915 **(2) Ch D 252 (page 258)**

[8] The 'market value' according to Mr. John A. Parks, F.S.I in his book "The Principles and Practice 'of Valuations, 2 edition, 1963 at page 14 is stated as under -

> "The Price that a willing purchaser would pay to a willing seller for a property, having due regard to its existing condition, with all its existing advantages, and its exiting advantage and its Potential possibilities when laid out in its most advantages manner excluding any advantage due to the carrying out of the scheme for the purposes for which the property is compulsory acquired."

[9] Thus the principles of compensation laid out in the land acquisition law and the market value assessed, therefore will not be of much help to ascertain the fair market value under the present Act on the following reasons :-

firstly, it is a compulsory acquisition in which free consent of the vender has no party to play

secondly, it is not the real value I.e mere Indemnity without prospective gain

thirdly, there is no equilibrium about the price according to the principles of economic theory of demand and supply.it is a compulsory take over under restrictions of use, and

lastly, the vendor under such cases does not get share in the profits by way of price which a promoter would get in future it is advantageous to one party only.

(c) Fair market value- Meaning of. [1] The term market value has not been defined under this act. Under the court his fees Act of 1870 it has been defined as meaning what the property would fetch in the market under the state of things existing at the Time, *Raj Gopal vs. Rama Sundermania*, **AIR 1924 Mad 19 (FB)**

[2] The market value is the value of a things at the date of the suit irrespective of the fact of subsequent development in it *Durgadass vs. Nihalchand.* **A1R 1918 Lahore 852**; *Mohd Banu Bagam vs. Sultani*, **AIR 1949 All 107**; See also *Shor Mohd vs. Ahmed.* **AIR 1924 LAHORE 380**

[3] The value of the improvements IS not to be treated as addition into the original price but the value of the property on the date of the suit *Surandardas and Hakim vs. Shamsingh & Raising,* **10 PR 187** (Case No 74 Civil)

[4] The court can not determine

e the value of the suit property as it can fetch on the date of the decree. – *Sis Ram vs. Sohanlal,* **AIR 1983 Lahore 311**

[5] It is the right of the plaintiff to pre-empt the property for a minimum of the consideration yet where the value of the property as declared by vender is claimed to be excessive, the plaintiff can not be allowed to put a tentative value of the suit property on any ground even to pay court fees on that basis – *Iftikharali vs. Thakursingh,***15 IC 347**

[6] In such cases, the value of the suit property disclosed in the notice by the vendor can not be the evidence of the price.

Where two suits of pre-emption regarding the same subject matter is pending, the

fair market value assessed in one of such suits shall be the valuation for the other suit (Note: This situation have been removed by section 12 of the Act by consolidation of such suits).

Where the vendee in good faith caused developments in the suit property and a suit for pre-emption is instituted subsequently, such developments must also be taken into account and added to while determining the market value of the suit property. - *Mohd. Anwar vs. Dialchand*, **AIR 1937 Lahore 239**, But see also *Sundardas & Halim vs. Shamsing & Raising* **(1875) 10 PR 134 (Case No. 74 Civil).**

[7] Where the market value is alleged to have been determined by a court in accordance with this Act shall be recognised but where the same has been determined not under this Act but under a different law on the same lines may also be considered as a relevant piece of evidence.

If the property is subject to mortgage or other encumbrances, the value of other encumbrances can not be ignored. - *Shconarayan vs. Ram Khelawan*, **AIR. 1945 Oudh 135**; *Baldeo Singh vs. Dy. Comm.*, **AIR 1924 Oudh 24.**

[8] Where the property subject to mortgage is purchased by the mortgagee himself, total sum of mortgage debt plus the value of the right of redemption so sold by the mortgagor shall be the total agreed value of such property but not the fair market value. — *Amir Khan vs. Shanker*, **AIR 1925 Nag. 194.**

[9] *The purpose of determining of fair market value* - The purpose to determine the fair market value of a property in a suit for pre-emption is two fold, viz :--

(1) for the court. --

(i) where the market value of the suit property itself is in issue because :-

(a) The price stated in the notice is claimed to be excessive or

(b) The price of the suit property can not otherwise be assessed

(ii) to prevent the fraud and collusion between the vendor and the vendee who intentionally inflated the price of the suit property with a purpose to discourage the pre-emptors to claim their right of pre-emption under the Act; and

(2) to satisfy the requirements to law, viz :—

(i) for the purposes of court fees and levy thereof,

(ii) to determine the pecuniary jurisdiction of the court in a suit for pre-emption.

[10] *Procedure for determination of fair market value* — The court may consider the following matters evidencing the fair market value of the property:—

(1) The estimated amount of the average annual net assets of the property.

(2) The amount of taxes assessed thereon.

(3) The value of similar property situated in the neighborhood.

(4) The value of the property in question as shown by previous transfers.

The above matters are of recognised evidentiary value for assess of the fair market value.

[11] *Other matters as evidence of such value- What are* - The legislature does not want to narrow down the scope of procedure and evidence by confining to the evidence as covered under clauses (a) to (d) of subsection (4) of this section. The court has been given ample scope to receive any evidence which can throw light or be a guide to the court in determining the fair market value of the suit property. The evidence must be legal, relevant and admissible to the fact in issue. The court may adopt anyone or more such matters of evidence, jointly, severally to arrive at a conclusion as to the fair market value. Thus, the discretion has been given to the court in this matter and no hard and fast rule has been laid downment under the Act. As Act does not provide for rules under the Act, it is thus deemed that the Act is exhaustive. Other matters may be summarised briefly as under :

(1) Any offer to purchase the suit property made by a person previous to the institution of the suit, is a relevant evidence. An offer (disclosing the amount of price) to purchase the suit property may be relevant evidence for this purpose but this is too much unreliable to be of any material guide to an expert when he goes to assess the value.

Their Lordships of the Bombay High Court have held:-

> "It appears to us that in ascertaining the market value under the Act too much importance must not be attached to evidence of offers. An offer does not come within the category sales and purchases. If an offer for the whole or a portion of the land under acquisition is proved it amounts merely to an expression of, opinion on the part of the offer. But this can only be proved by the evidence of the offerer himself and is then relevant. The evidence of offers made by irresponsible brokers on behalf of undisclosed principals or perhaps for their own purposes without any principal behind them, is in our opinion useless, even supposing it is relevant which we doubt, the evidence that the owner refused an offer so made through a broker is only evidence that in his opinion his land was worth more than the figure of value named or that the offer was for some other reason of a nature which he was unwilling to accept. Evidence of such offers by brokers for neighbouring land is still less effective. If the offerer himself gives evidence, it is evidence that in his opinion such neighbouring land was of a certain value and such evidence would only be relevant if he had formed an opinion by comparison of the land under acquisition". - *Government of Bombay vs. Mcrwanjtl Muncherji Cama*, **(1908) 10 B.L.R. 907** (Pages 910 - 920).

The court has followed the above principle - *T. Kathissabi vs. Revenue Divisional Officer*, **AIR 1923 Mad 31.**

[12] The valuation of the suit property assessed in an acquisition proceedings under the land acquisition laws.

Sales after the date of notification in suits for pre-emption (it may be after the date of

institution of the suit) must be discarded when it is proved that values have been affected one way or the other by circumstances which have arisen after that date. Govt. of Bombay in the matter of *Karim Tar Mohammed in the matter of* **ILR (1909) 33 Bom 325.**

[13] The date nearest to the declaration of fair market value or date of notification as the case may be is the best evidence for value *Sect. of State vs. Manmathnath,* **AIR 1925 Pat 129**.

[14] The Valuation determined by an expert commissioned for the purpose duly appointed by the competent authority.

[15] Other relevant evidence:

In cases where property is sold in lieu of old debts, and if the vendor sells it to discharge his debts and the debts are wiped out, the consideration for the property is not the nominal value of debts i.e. their arithmetic total but their present or market value.

In order to determine the market value of the suit property in a suit for pre-emption, it is advisable first to determine what amount of consideration was actually paid under the sale or that amount is a good guide to help in determining the market value if it can not otherwise be fully established - *Amirkhan vs. Shankar,* **AIR 1925 Nag. 194.**

In a suit for pre-emption, the evidence of price actually paid by the is not inadmissible in evidence while fixing the fair market value of the property sold and the court should not ignore the price actually paid in fixing the faire market – *Lalloo Sing vs Jagjiwan Pd.***AIR 1936 Oudh 100**;Qadir Husain vs. Mohd. Faz-ul-Haq, **AIR 1931 Oudh 137** – See also *Zahiruddin vs Ali Hussion*, **AIR 1929 OUDH 244.**

As to the payment of price paid , on endorsement on the document by the sub registrar while registering the document is admissible for proving the statement as to the actual price paid as mentioned there in – *Abdul Gafur vs. Kamaluddin*, **AIR 1927 All 441.**

[16] *Appreciation of the evidence for valueation* – the fair market value of property is a question of fact unless and error of Law in determining the market value is pointed out – *Zahiruddin vs. Ali Hussion*, **AIR 1929 Oudh 244.**

[17] Mere opinions of the witnesses without the mention of grounds on which such opinions are based are of no value in determining the correct fair market value of the property – *Nandlal vs. Courts of wards*, **AIR 1930 Lah 399.**

[18] It is very dangerous to believe the evidence of a witness who may be easily won Over by an ordinary price. So also a person who admist that he was a party to the fraud and then makes a volte face and exposes it, is hardly entitled to any respect. - *Ali Akbar vs. Multan*. **AIR 1936 Pesli 12.**

[19] In a suit for pre-emption if one item of consideration is proved to be fictitious the entire consideration as entered in the sale deed must be deemed to be fictitious and the conclusion is that the sale consideration as entered in the sale deed is bonafide - *Abid Ali vs. Harprasad*, **AIR 1929 Oudh 486.**

[20] See also the following cases. - Sukhdeosingh. vs. Ramsundersing. **AIR 1937 Oudh 367** - *Zahiruddin vs. Ali Hussein*, **AIR 1929 Oudh 244.**

[21] Effect of improvement while valuation -- The fair market value is the value of a property at the date of suit irrespective of the fact of subsequent development thereupon. - *Durgadass vs. Nihalchand* - **AIR 1928 Lab. 852**; *Mohd. Bantu Begum vs. Sultari*, **1949 All. 107**- See also *Sher Mohd. vs. Ahmed*, **AIR 1924 Lahore 380 —** *Srisram vs. Sohonlal*, **AIR 1938 Lahore 311** (never the value on the date of the decree).

[22] The value of improvements (pending the suit) is not to be treated as an addition in to the original price but the value of the property on the date of the suit - *Sundardas & Hakim vs. Shamsingh & Raising;***(1875) 10 PR 187 (Case No. 74 Civil)**

[23] Where the vendee after purchase in good faith caused improvements in the suit property and a suit for pre-emption is instituted subsequently, such developments must also be taken into account and added to while determining the market value of the suit property - *Mohd. Anwar vs. Drialchand*, **AIR 1937 Lahore 239** - But see also *Sundardas & Haim. vs. Shamsing & Raismgli*, **(1875) 10 PR 187 (Case No. 74 Civil).**

[24] Where the pre-emptor, soon after the registration of the sale deed, gave notice to the vendees not to undertake any construction and then filed the suit for pre-emption without delay, it was held that in the absence of a satisfactory explanation for the undue haste in taking up the work of construction the vendees could not be allowed the amount claimed by them on account of repairs and improvements - *Ghanshyam vs. Shrinath*, **1945 Mar LR 54 (Civil).**

16. Nature of the decree to be passed in such suit. - [1] A decree for pre-emption can be passed in favour of the plaintiff pre-emption only on payment of either the actual price paid to the purchaser or on payment of the fair market value of the suit property as determined by the court under this section to the purchaser. — *Anan Rai vs. Bhawanrai,* **AIR 1940 All. 12.**

[2] Where in a Suit for pre-emption, suit property is sold subject to encumbrances, after the sale the vendee pays of the encumbrances on the property, this payment ought to be added in the purchase price as specified in the decree for pre-emption. The decree may be amended accordingly – *Baldev Singh vs. Dy. Comm Kheri*, **AIR. 1924 Oudh 1.**

[3] Where in a suit the court arrives at a finding that the price stated in the sale deed has not bee fixed in good faith and it is its dut to determine the fair market value. The market value however determined must not exceed the price stated in the deed. — *Zahiruddin vs Ali Hussain*, **AIR 1929 Oudh 244.**

[4] the decree must be drawn in accordance with Rule 14 of Order 20 of the code of civil procedure.

[5] *Purchased by tenant of tenancy land –right of pre-emptor decree holder to evict vendee tenant - Merger- Effect.*

Where a tenant in possession of the property purchase that property and a

successful pre-emptor obtains a pre-emption decree in regard to that purpose, the pre-emptor decree-holder is entitled to exit the vendee tenant in execution.

As soon as the lessees purchased the suit property, their tenancy right were extinguished, for they merged with their ownership rights u/s 111 , CL.(d), T.P. Act. Once the tenancy rights are extinguished, they must be deemed to have disappeared for all times to come and the extinguished tenancy rights can not revive subsequently at any time even if the sale which extinguished the tenancy right is successfully pre-empted by a decree for pre-emption the Judgment debtor vendee must therefore, handover vacant possession of the house in dispute to the decree holder pre-emptor *Shobhranjmal vs. Smt. Kamaldevi* (1977) **Raj .LW 408=AIR 1977 Raj.194.**

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12. Consolidation of suits. - Where more suits than one are pending pre-emption in respect of the same transfer the plaintiff in each suit shall be made a defendant in respect of the other suit and all the suit shall be consolidated and disposed of by a single decree which shall determine the extent to which the order in which, and the terms and conditions under which , each plaintiff shall be in titled to pre-emption

COMMENTARY

SYNOPSIS

1. Consolidation of suits - Meaning of
2. Object of consolidation
3. Conditions for consolidation
4. Procedure for the Court

1. Consolidation of suits - Meaning of. - where two or more suits having the common cause and relief are tried together by the court as one suit and are decided by the Common judgment is called the consolidation of suits. *Jaikishan vs. Bajmng Lal* **1961 RLW 47 = ILR 1961 Raj. 1173.**

2. Object of consolidation - [he objet consolidation of suits is the expedience advantage to the parties ,saving in expenses minimising the delay and saves the courts from under going lengthy proceedings in each of the case separately.

In order to avoid multiplicity of proceedings in each suit, needless expenses and inconvenience, the court can consolidate the suits.- *Nankoo Nathia vs. Parmcsh-waramma*, **AIR 1953 Hyd 130**; *Manohar vs. Laxman Anand*, **AIR 1947 Nag 248.**

[2] In deciding whether two suits should be consolidated or not, the whole question is whether or not in the long run it will be expeditious and advantageous to all

concerned (parties as well as to the court) to have the two suits consolidated and tried together as analogous cases. -*Hansraj vs. Haazarimal*, **1959 RLW 451**; *Ramawatar Prashad Verma vs. Satdeolal,***AIR 1939 Pat. 30**; *Nankoo Nathia vs. Parmcshwarmma,* **AIR 1953 Hyd. 130.**

3. Condition for consolidation — [1] The conditions for consolidation or suits are as under :

(1) the suits sought to be consolidated must involve substantially the same questions for determination. The mere fact that there is common question of pre-emption in two suits is not sufficient to consolidate them if there are other questions which are not common. *Prabirendra Malian vs. Berhampor Bank*, **AIR 1954 Cal 289**; *Balrmagayya vs. Varadarajulu*, **AIR 1939 Mad, 734**; *Secy. of State vs. Radhadevi*, **AIR 1937 Peshwara 61.**

But the word 'same' does not always mean 'identical'.

The consolidation of suits was allowed in the following cases.- *Poonammal vs. Rajambuammal*, **AIR 1946 Mad 250**; *Katilasa Tevar vs. Kasi Vishwanathan*, **AIR 1944 Mad 269.**

[2] In addition to the foregoing condition, the court must consider that whether evidence produced in one case can dispose of the other suits. If answer is in affirmative, the consolidation can be permitted.

[3] the Consent of the parties to the suits must be obtaied.The Court must approve the consolidation. BUt in the following suit, the suits were consolidated even without the consent of the parties. - *Dharamdas,***AIR 1917 All 336.**

[4] The consolidation of suits is the exception and not the rule and court should be slow to presume its existence where there is no express order to that effect, especially as the Code does not allow consolidation of suits in express term. *Gangaprashad vs. Mst Banaspati,* **AIR 1937 Nag 132.**

[5] The competence of the court to consolidate the suits is recognised under the inherent powers of all civil courts as provided under section 151 of the Code of Civil Procedure, 1908.

The present section expressly recognises the statutory power of a civil court to consolidate such suits provided the immovable property which is the subject matter of the suits remains the same throughout in all the suits. For the purpose of this section following two conditions must specifically be fulfilled: -

(i) the immovable property i.e. the subject matter of the suit must be the same, and

(ii) the cause of action arose in respect of the same transfer.

4. Procedure for the courts. - (1) An express order consolidating the suits must be passed by the court.

(2) Those suits which have been consolidated must also bear an express order that the same have been consolidated with another suits.

(3) The plaintiff in each such suits which have been so consolidated must be made defendants in the representative suit sought to be taken up for.

(4) The decree and judgment passed in one suit shall decide the rest of the consolidated suits. Therefore, a copy of such decree and judgment must be filed in all other suits so consolidated.

Sub-rule (2) of Rule 14 of Order 20, CPC also emphasises the consolidation of the suits of rival pre-emptors for the purpose of determining the share of the property and to pay accordingly - *Anurup Mishra vs. Ram Harakh,* **AIR 1929 All. 953;** *Mohd. Wajid vs. Puransingh,* **AIR 1929 PC 58.**

All the consolidated suits are decided by a single representative judgment aiid decree.

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13. Decree to fix time for payment - If the court finds for the plaintiff. the decree shall specify a date on or before which the purchase money or the amount to be paid to the mortgagee shall be paid.

COMMENTARY

SYNOPSIS

1. Requirements of Law
2. Section 13 of the Act & Order 20 Rule 14, CPC
3. Extension of time fixed by the decree
4. Effect of appeal on the specified date for payment
5. Set off of costs.
6. Violation of decretal terms

1. Requirements of law:

[1] The section provides that, if the court finds for the plaintiff, the Decree shall specify a date on or before which the purchase money or the amount to be paid the mortgagee shall be paid thus the law provides for the payment of Stamp duty expenses and registration expenses. The payment of duty and the registration expenses is a part of the execution proceedings and the sale deed can only be executed if the pre emptor decree-holder pays the amount, in such circumstances it cannot be said that the terms of the decree have been violated by the decree holder by not making the full payment.

It is also clear that application for the possession and application for the execution of the sale deed can be moved simultaneously. There is no bar under the law and the

application can be moved simultaneously and both the reliefs can be sought in the execution petition. Possession can be delivered after the execution of the sale deed by the Court by way of substitution of the decree-holder in place of vendee. Possession is consequential relief which can be granted by the court below after the execution of the sale deed. *Babulal vs. Madadeen*, **AIR 1988 Raj. 143 = 1988 RLW 113 = 1988(1) RLR 131.**

[2] Suit decreed but Court not fixing date for deposit of purchase money Plaintiff and defendant both filing appeal against decree which were pending. Plaintiff applying before trial Court to fix date for deposit rejected. High Court in revision directed appellate Court to fix the date in case appeal of defendant dismissed. - *Madanlal vs. Khuslui Ram,***1988 (1) RLR 236. A**

2. Section 13 of the Act and O.20 Rule 14, C.P.C. - [1] This section 13 of the Act is a reproduction of sub-rule (1-) or rule 14 CPC shall. Where whose of the purchase money is found duly paid by the pre-emptor before drawing the decree, the court shall straight way direct the defendant-vendee to deliver the possession along with the documents to the pre-emptor decree-holder where the suit property is sold subject to encumbrances and the vendee pay for such encumbrances on the property, such amount must be added to the price. The decree may be amended accordingly.-*Baldeo Singh vs. Dy. Comm. Kheri,* **AIR 1924 Oudh 1.**

[2] An omission as to the date in the decree renders it void and in executable. Instead of the specified date, if the court specifies the period for payment, the decree is not void and in executable. It is mere irregularity because the parties themselves can calculate the date for the purpose- *Kishanlal vs. Ibrahim*, **1954 RLW 80.**

[3] But the, Allahabad high court demands the strict compliance of the provision by specifying the date therefore – *Jagatnarayan Lal vs. Hawaldar*, **AIR 1926 All 58.**

3. Extension of time fixed by the decree.— [1] The Court becomes functus officio after the decree is passed, save section 152 CPC. Any alteration in decree is without jurisdiction— *Thokchom Haithumbasingh* **. AIR 1954 Manipur 4.**

[2] The court has no jurisdiction to extend time in a decree providing dismissal of suit in case of default of payment by a specified date in the decree. - See Section 14 *Kunwerpal Singh vs. Antoolal,* **ILR 1955 MB 67.**

[3] The payment may be made on the next opening day if the specified date for payment in the decree is a holiday. *Patram vs. Edwin,* **AIR 1931 Lah. 388**; *Mohd. vs. Shamlal*, **AIR 1925 All 218**; *Hanuman. vs. Fauja*, **AIR 1921 Lahore 6 (FB).**

3. Effect Of appeal on the specified date for payment. –

[1] Merely an appeal against a decree does not mean stay of the operation of the decree. *Naguba vs. Namdev*, **AIR 1954 SC 50**; *Badri Pd vs Mata Prasad* **AIR 1950 All 663**; *Keshav vs. Krishna, vs. Krishna*, **AIR 1939 Nag 107**; *Umrao Singh vs. Kanmal*, **AIR 1933 All 113.**

[2] An appeal in pre-emption suit does not become infructuous by reason of his failing to deposit the price – *Mojiram vs. Shivlal*, **1945 Marwar Law Report 43.**

5. Set off costs. [1] The payment is not complete and valid unless the full decietal amount is paid. - *Bankcy Bihari vs. Abdul Rehman*, **AIR 1932 Oudh 63.**

[2] The pre-emptor can claim set off the amount of costsi in the decree-*Ramchandra vs. Jialal,***1950 RAW 34.**

6. Violation of decretal terms : *Payment of stamp duty is different from payment of purchase price-stamp duty not paid within 15 days held, terms of decree have not being violated*

The law provides only for the payment of purchase price under section 13, and it dose not provide for the payment of stamp duty expenses and Registration expenses. The payment of the stamp duty and the registration expenses is a part of the execution proceedings and the say deed can only be executed if the pre-emptor decree holder pays the amount in such circumstances it can not be said that the terms of the decree have been violated by the decree –holder by not making the full payment. *Babulal vs Madadeen* , **1988 (1) wln 17=1988 (1) RLW 113 = 1988 (1) RLR 131.**

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14. Effect of non payment. - If the purchase money or account is not paid into the court before it rises on the day fixed by it under section 13, the Plaintiff's suits shall stand dismissed and he shall show far as relates to such sale or mortgage, lose his right of pre-emption over the property to which the decree relates and shall also bear the cost of the defendants unless the court, for reasons to be recorded at the time of passing the decree, otherwise directs.

COMMENTARY

1. Consequences of non payment –

[1] The decree in favour of the pre-emptor is a conditional decree where in the decree holder pre-emptor becomes entitled to substitution for vendor only on payment for the decretal amount by the specified date- *Bishansing vs. Khazansing*, **AIR 1958 SC 838.**

[2] By mere passing of a decree, it does not confer any title on the pre-emptor. The title accrues to him only on payment.- *Anurupmisri vs. Ram Harak,* **AIR 1929 All. 953.**

[3] The operation of the provision cannot be prevented by act agreement of the parties such agreement to deal of express provisions of law under sec. 28 of Contract Act hence void.- *Choklingam vs. Narayan*, **AIR 1938 Rangoon 328.**

[4] The default in payment of price is fatal which extinguishes the very right of pre-

emption.

[5] The decree in favour of the pre-emptor stands dismissed.- *Sukhramdas vs. Nazar Mohd.*, **AIR 1925 Lah. 380**; *Bhagwandin. vs. Radhar*, **AIR 1926 Oudh 98**; *Ajodhya Prasad vs. Govind Pd.*, **AIR 1923 All. 250.**

[6] It renders the appeal incompetent also - *Imandrfn. vs. Adbul Satar*, **AIR 1924 Oudh.102.**

[7] The costs of the defendant also automatically fall on the plaintiff pre-emptor. Unless the defendant is guilty of misconduct. *Umaid Singh vs. Kalulal*, **1950 RLW 102**; *Kishanji vs. Raghunath*, **AIR 1954 Born 125.**

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15. Effect of loss of right of pre-emption prior to decree. - No decree for pre-emption shall be passed in favour of any person unless he has a subsisting right of pre--emption at the time of the decree. But where a decree for pre-emption has been passed in favour of a plaintiff, whether by a court of the first instance or of appeal. the right of such plaintiff shall not be affected by any transfer or loss of his interest occurring after the date of such decree :

Provided that no voluntary transfer made in favour of the purchaser after the institute of a suit for pre-emption shall defeat any right which the plaintiff had at the date of such institution.

COMMENTARY

SYNOPSIS

1. Object of section.
2. Relevant dates for pre-emption shall be passed.
3. 'No decree for pre-emption shall be passed'.
4. 'Has a subsisting right'.
5. At the time of decree.
6. Loss of the right of pre-emption.
7. Extent of applicability of the doctrine of lis pendence
8. Doctrine of lis pendence in pre-emption cases.
9. Limitations to the doctrine.

1. Object of the section.- Firstly the nature of such right is piratical which tends to interfere another's fundamental right to acquire, hold and dispose of property.- *Ratiram. vs. Mamchand*, **AIR 1959 Punj. 117**; *Jotiram vs. Molar*, **AIR 1945 Lahore 104.**

Secondly it is a very weak right of term fades away during the pending trial by operation of law or act and conduct of parties. To safeguard the interest of defendants,

the law is very strict to see that the right remains alive and subsisting till the date of decree. - *Gopichand vs Meena Lal*, **AIR 1952 Raj. 5 = ILR 1951 Raj. 329**; *Shankarlal vs. Poonamchand*, 1954 RLW 292.

2. Relevant dates for pre-emption. There are three relevant dates on which the plaintiff must have a subsisting right of pre- emption, viz:-

(1) The claimant pre-emptor must have a subsisting right of pre-emption in an immovable property on the date of transfer.

(2) The same right must continue to exist in the plaintiff on the day when such suit is instituted under section 11 of this Act.

(3) The same right must continue to exist on the date of the decree in such suit.- *Gopichand vs. Meenalal,* **AIR 1952 Raj. 5 = ILR 1951 Raj. 329**; *Narayan vs. Karthtayam*, **AIR 1962 Kerala 122**; *Hazarilal vs. Kundan Lal*, **AIR 1954 MB 5.**

3. No decree for pre-emption shall be passed. - Where the plaintiff fails to prove the subsisting claim on any of the three dates, the suit is bound to be dismiss. The right must accrue to the claimant on the date of transfer and without which he can not have a cause of action to sue. Likewise he must hold the same on the date of suit till the date the decree is passed in his favour.- *Dhaniram vs. Bairo Pd.*, **ILR 1959 Raj. 156 = 1959 RLW 91 = AIR 1959 Raj 78.**

It is a prohibitory mandate of law to the court not to pass a decree in favour of a pre-emptor if he fails to keep alive his right on any one of the three dates. It prohibits courts to pass a decree, does not mean that the courts precluded from the trail of the suits.

4. Has a subsisting right-meaning of. - [1] 'A subsisting right' means continuously existing right of pre-emption, living right i.e. which has been lost on any day before a day of the decree either be the act of the party operation of law or upon intervention of the strangers.

It is well settled that in the absence of statutory safe-guard to the contrary, the pre-emptor in order to succeed in a suit should prove his subsisting right against the vendee not only on the date of the sale but on the date of the suit and of the date of trial court's decree. Therefore before the decree is passed by the trail court vendee acquires property where after the sale but before the suit for pre-emption is instituted or which gives him equal or superior right pre-emption to that of the plaintiff pre-emptor, the suit must fail. - *Gopichand vs Meenalal,* **AIR 1952 raj 5 = ILR 329** *Nathuram vs Patram 1960***RLW162** *Champabharti vs Jaganath* **1964 RLW 136.**

[2] Where before a pre-emption suit is decided by the court of the first instance the vendee improves his title and becomes a co-sharer with an indefeasible title pre-emption suit has to be dismissed *Jainarayan vs. Phalnarayan,***AIR 1949 All. 192.**

[3] It is well settled principle of law that the vendee can improve his title by any lawful means so as to defeat the suit of the pre-emptor at any time before the passing of the decree — *Madhosingh vs. Jamesskinner.***AIR 194 Lah 433 (FB).**

[4] In case a resale of the property by vendee to the vendor, the pre-emptor's right will be defeated only if the vendor possessed a superior or an equal right to that of the pre-emptor plaintiff. If the right of the vendor is inferior to that of the plaintiff pre-emptor, the latter must succeed - *Poosaram vs. Sadanand*, **1949 Mar L.R. 65 (civil).**

[5] The pre-emptor in order to succeed in his claim must not only possess a superior right at the stage of transfer or the suit but he must retain the superiority on the basis of which he claims to pre-empt also at the stage of the decree. - *Pt Har Bhagwan vs. Pratapsingh*; **1938 Lab 242**; *Tafzul Hussan. vs. Thansingh*, **6 IC 426.**

5. At the time of decree. - [1] The word 'decree' in this expression means any decree either the decree of the trial court or of the appellant court which first of all recognise the claim of the plaintiff. Thus, it is not always necessary that a decree passed by the trial court in the suit is the decree. The trial court has dismissed the suit and on appeal the appellate court has given a decree for pre-emption, it is also a decree but the right must subsist upto the date of the appellate court's decree. — *Shankerlal vs. Punamchand*, **1954 RLW 292** - See also *Parbati vs. Isar*, **1959 RLW 267.**

[2] The trial court passed a decree in favour of the plaintiff in 1948 but in appeal it was found that statute recognising the right of pre-emption was ultra vires to the Constitution. The decree cannot be set aside. *Kanayalal vs. Gourilal*, **1966 RLW 390;** *Parbati vs. Issar*, **1959 RLW 297.**

[3] The general principle is that the pre-emptor is not entitled to a decree of pre-emption if his right is lost before the date of passing such decree. This principle is applicable also to cases where the right of pre-emption is lost by reason of the law becoming ultra vires to the Constitution - *Shankarlal vs. Poonamchand*, **1954 RLW 292;** *Govindrao vs. Erbhadrappa*, **AIR 1956 Hyd. 50**; *Madhosingh vs Jamesskinner*, **AIR 1941 LAH 433.**

6. Loss of the right of pre-emption. - The loss of right means the extinction of the right of pre-emption which may be either by the acts of the parties or operation of law. The right of pre-emption is lost in the following circumstances.

(1) The right is lost when the pre-emptor fails to make payment or tender the money within two months from the date of service of the notice (see sections 9 & 10). (act of parties).

(2) The right is lost when barred by the law of limitation (see section 21 of this Act read with article 97 of the Limitation Act, 1963), (by operation of Law).

(3) The plaintiff fails to pay the purchase money on or before the specified (late in the decree, (see section 14) (act of parties).

(4) The plaintiffs suit is dismissed or where no decree for pre-emption in favour of the plaintiff is passed (section 14). (by operation of law).

(5) The plaintiff fails to maintain his right on the date of the suit till the date of the decree in the suit (section 15). (by operation of law).

(6) Plaintiff sues jointly with the person having no such right at all (see section 16), (act of parties).

(7) The superior pre-emptor plaintiff sues jointly with a pre-emptor of inferior class, his right of pre-emption is reduced to that of the inferior class, (see section 16), (act of parties.)

(8) The plaintiff pre-emptor dies pending the suit and the right to sue does not survive (section 17). (by operation of law).

The plaintiffs right does not ceases even though he ceases to be a co-sharer after passing of the first court's decree. His right could not be lost merely because the defendant acquires share and puts himself on the same footing as the pre-emptor had after passing of the first courts decree.- *Khedan Ahir vs. Ra, Rekha*. **AIR 1934 All 934.**

The reason is that when the claim is recognised by decree thus it becomes a vested right of the decree holder.

7. Extent of applicability of the doctrine of lis pendens. –

[1] The proviso shall not apply where the suit is not in respect to the right of pre-emption in an immovable property. The doctrine affects only that immovable property which is the subject matter of the suit and none else. So where the identity of the property is different, the doctrine would not apply. The transfer is valid as between the parties to voluntary transfer and the title operates to vest in the transferee but subject to the rights declared under the decree. *Bhupnaranyansingh vs. Nawabsingh*, **AIR 1957 Pat 729.**

[2] The effect of the rule of lis pendens is only to bind the transferee If he happens to be a third person with any decree that is made in the suit, even if he is no party to it. The effect of this doctrine is not to annul the transfer but only to render it subservient to the rights of the parties in the litigation. *Madhosingh vs. Jamesskiner,* **AIR 1941 Lab. 433.**

[3] No doubt the doctrine applies to pre-emption suits but it does not affect the validity of the sale effected by the vendee during the pendency of the suit to a person having the claim of pre-emption equal to or superior to the plaintiff.— *Mool Chand vs. Gangalal,* **AIR 1930 Lah. 356(FB).**

[4] The doctrine is a statutory creature which cannot be prevented to operate by the act, omission or agreements of the parties. It would tend to affect all those parties to the suit whether arrayed on the same side or opposite side provided they have a point of contention.—*Raj Kishore vs. Sultana,* **AIR 1953 Pat. 58.**

[5] It requires that the litigation in respect to the immovable property must be pending. Where the transfer takes place before institution of the suit, such transfer will not be affect by the doctrine. Where the decree has been passed but the period of limitation for preferring an appeal has not expired, a transfer during such period shall be treated as litigation is pending.

A transfer by a legal representative of the deceased litigant before he is substituted in the suit is hit by the doctrine.- *Nallakumara vs. Pappayi Amal*, **AIR 1945 Mad. 249**; see also *Rangaswamiji vs. Uppariga*, **AIR 1962 Mys 18.**

[6] Where a transfer was made by a person who was not the legal representative of any of the litigant before he was actually brought on the record, the doctrine would not apply.

[7] The doctrine does not apply to involuntary transfer viz. transfer by succession and forfeiture.- *Indian Cotton. Co. vs. Ramcharanlal*, **AIR 1939 Nag. 128**; See also *Nagendranath. vs. Ramkrishna*, **AIR 1960 Cal. 299.**

[8] In an insolvency case, sale of the property vested in the receiver is a private sale and not a sale by operation of law, therefore, the doctrine applies.- *Kulandalvelu vs. Sowbhagmal*, **AIR 1945 Mad. 350.**

8. Doctrine of lis pendens in pre-eruption cases.-

[1] The doctrine of lis pendens applies to pre-emption suits like any other suit in respect of an immovable property -*Bhikhimal vs. Debisabai,* **AIR 1926 All. 180**; *Madhosingh vs. Jamesskinner,* **AIR 1926 Lah 433 (FB).**

[2] The vendor during the pendency of a suit for pre-emption sold the suit property to one having the equal right of pre-emption to the pre-emptor. The doctrine would apply because the proper procedure in such cases would be to divide the property among the plaintiff and the vendee.- *Bachan Singh. vs. Bijaisingh,* AIR 1926 All. 180.

[3] The doctrine of lis pendens does not cease to operate where pending the suit for pre-emption, the vendee retransfers the property to the vendor. The right of pre-emption does not cease. *Bhikimal vs. Debisahai*, **AIR 1926 All 179**; *Keharsingh vs. Jahangirsingh,***AIR 1925 All 487.**

[4] Sir Sulaiman, J. was of the opinion that the pre-emptor need not necessarily bring a suit for pre-emption but he may acquire the property direct from the vendee by a private sale. It was further observed that although the doctrine of lis pendens governs vendeés in pre-emption suits, still the purchaser having the superior right of pre-emption is entitled to retain the property purchased by him.

It was further pointed out that a person having a superior right or pre-emption may either bring a suit for pre-emption or he may avoid a suit by including the vendee to

transfer the property directly to him.-*Malik Singh vs. Shziamlal*, **AIR 1929 All 440**; *Moolchand vs. Gangajal*, AIR 1930 Lahore 356 (FB).

[5] Thus, the doctrine of lis pendens applies and the voluntary transfer by a party to the pending suit for pre-emption can not effect adversely the claim of the plaintiff. *Gasitey vs. Govind*, **ILR 30 All 467**; *Bhagirath vs. Rajkishore,* **AIR 1926 All 180**, *Bhagirath vs. Rajkishore*, **AIR 1930 All 354**, *Salamatali vs. Noor Mohd*, **AIR 1934 Oudh 303**; *Mohd. Sadiq vs. Ghansiram*, **AIR 1946 Lab 322 (FB).**

[6] But a transfer pending the suit in favour of a person having the equal or superior right of pre-emption to that of the plaintiff shall not be affected by the doctrine.- *Sant Kuer vs. Tejasingh,* **AIR 1946 Lah. 142 (FB)**; *Harkeshi vs. Mewaram*, **AIR 1923 All 294**; *Maliksingh vs. Shiammlal*, **AIR 1929 All. 440**; *Bachansingh vs. Bijaisingh,* **AIR 1929 All. 180.**

[7] The doctrine was not applied in the undermentioned cases.- *Moolchand vs. Gangajal*, **AIR 1930 Lah 356(FB)**, Hansnath vs. Raghoprashadsingh, **AIR 1932 PC 57.**

[8] But the view held in the above cases was disapproved in a later judgment of the Lahore High Court.- *Santkuer vs. Tejasingh*, **AIR 1946 Lab 142(FB).**

[9] It was observed that the transferee, having the right of pre-emption have lost the right at the time of transfer by lapse of time or otherwise, the transfer is affected by the doctrine of lis pendens.-*Santkuer vs. Tejasingh*, **AIR 1946 Lab l42(FB)**; *Asa Singh. vs. Naubat*, **AIR 1921 All. 105. 2**

[10] It is settled law that unless a transfer pendent lite can be held to be a transfer in recognition of subsisting pre-emptive right, the doctrine of lis pendens applies and the transferee takes the property subject to the result of the suit.- *Waziralt vs. Zahir Ahmad*, **AIR 1949 EP l93(FB).**

[11] The acquisitions based on the transfer pendente lite can arm the vendee with an effective weapon to destroy the pre-emptor's superior claim.- *Madhosingh vs. Jamesskinner*, **AIR 1941 Lab. 433 (FB);***Moolchand vs. Gangajal*, **AIR 1930 Lah. 356 (FB).**

[12] The rights of the transferee in the property shall follow the lis i.e. subject to the rights recognised in such decree. The pre-emptor's right to pre-empt is founded on the sale of the house by the vendor to the vendee and is not affected by the subsequent sale of the same house by the vendee to another person.- *Mishrilal vs. Laxminarayan,* **AIR 1958 MP 412.**

9. Limitations to the doctrine - [1] Where the suit property is transferred to a person having the right of pre-emption equal or superior to that of the plaintiff the doctrsine shall not apply. *Nabirganj vs. Mohd. Ismail,* **AIR 1962 J & K 112.**

See also:

[2] *Moolchand vs. Gangajal*, **AIR 1932 PC 57;**
[3] *Madhosingh vs. James Skinner,* **AIR 1941 Lah 433 (FB);**
[4] *Mohd. Afzal vs. Gulam Mohd.*, **AIR 1944 Lah 463;**
[5] Sharif Hussein. vs. Nurshath, **AIR 1929 Lah. 589;**
[6] *See also Santkuer vs. Tejasigh.*, AIR 1946 Lahore 142.
Thus the doctrine of 'lis' operates subject to section 19 of the Act.

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16. Association in suit co-plaintiff with inferior rights. - Where a person having a right of pre-emption sues jointly with a person not having such right. He shall lose his right: and, where a pre-emptor of a higher class sues jointly with a pre-emptor of a lower class. He shall have no right higher class sues jointly with a pre-emptor with a pre-emptor of a lower class. He shall have no right higher than that such pre-emptor of the lower class.

COMMENTARY

1. Conditions for complete loss of right. - [1] The property sued for pre-emption;
(a) with a person having no such right, and
(b) such person is made co-plaintiff in the suit with the pre-emptor.
[2] If all the three conditions are existed, the pre-emptor also loses the right of pre-emption and his suit must be dismissed. This is called the complete loss of the right.
It is a weak and piratical right and any infringement of the provisions of law either takes away or reduces the claim.- *Badridatta vs. Shri Kishan,* **AIR 1954 All 94.**

2. Conditions for reduction in right of pre-emption. –

[1] (i) The plaintiff having a superior claim for pre-emption institutes such suit;
(ii) with a person who has inferior right to the former; and
(iii) such person is made co-plaintiff in such suit by the superior pre-emptor.
[2] If all the above three conditions are existed, the superior right of the superior pre-emptor shall be reduced to the degrees of right of which his other co-plaintiff is legally entitled to. It is a mere loss in degrees in a right. the principle is that the superior pre-emptor shall not have a better claim than that of this co-plaintiff.
[3] We may assume the cases of two or more co-plaintiffs having the different degree of claim for pre-emption in such cases, the lowest class of right of pre-emption existing in any such co-plaintiff shall be recognised accordingly. In a suit for pre-emption where it is instituted by three co-plaintiffs, one of which is having a superior right to that of the second but the third co-plaintiff has no right at all, in such case, the whole suit shall be dismissed for complete loss of right, on the ground that the pre-emptors have instituted the suit with a person who has no right of all. This is a case of complete loss

of right instead of a degradation in the right of pre-emption.

[4] A pre-emptor loses his right by joining with persons who are strangers and the fact that their names (stranger's) have been removed from the plaint by an amendment, it does not make any difference.

In a suit for pre-emption by several plaintiffs the mere fact that one of the co-plaintiffs was disqualified to claim right because he had made no demands would not make the suit defective *Shamshudin vs. Alladin,* **AIR 1932 All 138.**

17. Joint purchase by persons one of whom is liable to pre-emption - Where property is jointly purchased or foreclosed by two or more, persons against one of whom only there is right of pre-emption such right may be claimed as against all of them.

Explanation - This section does not apply where such person acquires a defined interest.

18. Survival of right of suit on death of plaintlff. If the plaintiff in a pre-emption suit dies at any time before the decree has become final the suit shall not abate if the cause of action is subsisting.

C O M E N T A R Y

1. Death of plaintiff - Effect.

The section provides that if in a pre-emption suit the plaintiff dies at any time before the decree has become final, the suit shall not abate if the cause of action is subsisting. This section is very clear and it does not provide that the suit shall abate. On the contrary it provides that the suit shall not abate as the legal representatives of the deceased will be brought on record under the provisions of O. 22.

Once a plaintiff succeeds and obtains a decree the decree is in all cases is for possession on payment of the purchase money etc. It is true that the nature of the possession in which the pre-emptor is entitled to obtain is however, to be determined by the executing court at the time of its execution. Vendee has obtained the 'possession on account of the sale effected by the vendor. Vendee is having no independent right of possession. In such circumstances, it cannot be said that it is a case of deemed rejection of the prayer of the plaintiff pre-emptor regarding the possession. On the contrary, taking note of the prescribed form as well as the word used in the decree it is a case of deemed acceptance and the court directed that as soon as the amount is deposited the pre-emptor decree all rights which were acquired by the vendee including the right of holders is substitute in place of the vendee and so substituted pre-emptor gets all rights which were acquired by the vendee including the right of possession. — *Babulal vs. Madadeen*, **AIR 1988 Raj. 143 = 1988 RLW 113 = 1988(1) RLR 131 = 1988 (1) WLN 70.**

2. Right is inheritable.

The Rajasthan Act is practically similar to the Punjab Pre-emption Act and the Supreme Court in AIR 1968 SC 1205 has also taken the view in the above case that the right of pre-emption is on inheritable right and it is not a personal right. The section itself is also very clear *Babulal vs. Madadeen* **(1988) 1 RLR 131= air 1988 Raj. 143 = 1988 RLW 113 = 1988 (1) WLN 70.**

3. Right survives on the death of plaintiff -

[1] The construction of the expression "at any time before the decree has become final" does not mean that there should have been a decree already passed. The language of the section is plain and unambiguous and survives the right to continue the suit for pre-emption by the legal representatives of deceased plaintiff - *Kewalchand vs. Kunjbeharilal,* **1985 RLR 824 (829).**

[2] Where the plaintiff in a suit for pre-emption dies, it is just and equitable that his legal representatives should be permitted to continue the suit. *Sarfaraz Khan. vs. Mohd. Yakubkhan*, **AIR 1942 Peshawar 23**; *Omraosingh vs. Mst Mohankumar,* **AIR 1927 All 699;***Mahadevosingh vs. Talibali,* **AIR 1928 All. 345 (FB).**

[3] According to the Chamber's 20th Century Dictionary the term 'abates' means "to put an end to, to do away with, to render null an action". It amounts to quash of any writ or action. It does not amount to rejection of the suit but may amount to dismissal of the suit for want of necessary parties.

[4] Abatement is of two kinds, viz :-

(1) total abatement; and

(2) partial abatement

The total abatement occurs in two ways; firstly, whereupon the death of the plaintiff, rights to sue does not survive, the suit abates. Secondly, the legal representatives of the deceased plaintiff are not brought on record, within the prescribed period of limitation, then the suits abates. This is total abatement.

A partial abatement also occurs in two ways; firstly, the suit partially abates so far as the deceased person is concerned, and secondly, the suit remains abated so long as the names of the legal representatives are not brought on record within the prescribed period. As soon as the names of the legal representative are brought to record; the suit comes to life and the proceedings commence.

The 'suit shall not abate' merely means it shall not be subject to total abatement. It may abate partially till the names of the legal representatives of the deceased plaintiff are brought to the record.

Where out of the several co-plaintiffs, one of them dies and his legal representatives are not brought on record; only the suit to his extent shall abate. It cannot affect adversely the right of the other plaintiffs who are alive. - *Mahadcosingh vs. Talib Ali,* **AIR 1928 All 345 (FB).**

CHAPTER IV

Miscellaneous provisions

19. Transfer of property to pre-emptor or acquisition of right by original transferee prior to suit.— No suit for pre-emption shall lie where prior to the institution of such suit, the transferee the property in dispute to a person, having a right of pre-emption equal or superior to that of the plaintiff. or has acquired an indefeasible interest in the property which, if existing at the date of the transfer, would have barred the suit.

[2] A resale by the vendee in favour of a person possessing equal rights with the plaintiff pre-emptor, thus the fate leading to a dismissal of the plaintiffs suit is valid.— *Madhosingh vs. James,* **AIR 1941 Lah. 433 (FB).**

[3] To sum up, where the suit property was transferred to a person having the right of pre-emption equal to or superior to that of the plaintiff pending the suit for pre-emption but before the expiry of the period of limitation within which his right is said to have legally subsisted and one can legally enforce his right, shall not be affected by the doctrine of lis pendens because such transfer would be deemed tohave made in his favour in recognition of his such claim.

The right to sue extinguishes as soon as the period of limitation expires and, thus, he loses the use of coercive machinery of law to compel the other to surrender the property in recognition of his right. - *Mohd Saddiq vs. Ghasiram,* **AIR 1946 Lah. 322 (FB).**

[4] Where, therefore, during the pendency of a pre-emption suit, the suit property is sold by the vendee to a person claiming the right of pre-emption equal to the plaintiff, the plaintiff cannot share the property with the second vendee.- *Moolchand vs. Gangajal,***AIR 1930 Lah 356 (FB).**

[5] Though the doctrine of lis pendens governs vendee is pre- emption suits, still the purchaser having the preferential right of pre-emption is entitled to retain property purchased by him. He need not necessarily bring a suit but he may acquire the property direct from the vendee by a private sale. *Maliksingh vs. Shyamlal,* **AIR 1929 All 440.**

[6] After the filing of the suit not before the service of the summons in suit for pre-emption, the defendant-vendee resold the property to another having right of pre-emption. It was held that the doctrine of lis pendens applied and the plaintiff was entitled to a decree.-*Ghasitey vs. Govinddas.***ILR 30 All. 467.**

[7] In such cases, the suit shall proceed and the court shall determine the extent of the right of pre-emptor plaintiff to obtain the decree. In other words, the extent of the applicability of the doctrine of lis pendens shall determine the rights of the plaintiff in such suits.

3. 'Indefeasible interest in the property'. - It means that an interest in the suit

property, which cannot be defeated or made void by any amount of effort made by the plaintiff under any law for the time being in force.

The word “indefensible” can not to taken to have the restricted meaning of not being liable to pre-emption but has its ordinary thought wider meaning of ’incapable of being defeated or not liable to be defeated’.- *Tarachand vs Radhaswami*, **AIR 1934 All. 343 (FB).**

The burden of proving that an indefensible title is acquired under a deed of exchange lies upon the vendee and he must discharge it.

20. Date on which pre-emptor’s right accrues - A person who has obtained a decree for pre-emption in respect of any property shall acquire no title to that property until he pays into court the sum of money required to be paid in accordance with the pre-emption decree but upon such payment being made, in alienation of the property made by the original transferee or by any person claiming through him shall be voidable at the option of the decree holder with effect from the date of such payment.

COMMENTARY

SYNOPSIS

1. Decree when becomes effective.
2. Consequences of payment —
   (a) Primary right.
   (b) Secondary or remedial right.
3. Disabilities of the decree holder.
4. Nature of the right of decree holder.
5. Subsequent events; how decree holder is affected therefrom.
6. Grant of temporary injunction.

1. Decree when becomes effective. - [1] Mere obtaining of a decree in favour of the plaintiff pre-emptor alone is not sufficient. The decree does not begin to operate in favour of the plaintiff decree holder unless he deposit into the court the full amount of price as is determined by the court in such decree in accordance with section 11(4) of the Act. In order to avoid the transfer favouring the defendant and the decree holder plaintiff seeks to be substituted for the original vendee; he must make payment of deposit the entire amount of price into the court as the decree directs. Before the payment is made into the court the decree holder is not entitled to avoid the prior transfer. The decree in favour of the decree holder plaintiff stands conditional till the payment of the whole price is not made. The part payment would not give any benefit to the decree holder nor it amount of decree into the court is the condition precedent to be complied with first by a plaintiff. *Nasirali vs. Wali,* **AIR 1925 Lah. 202;** *Deokinandan vs. Shriram,* **ILR 12 (1889) All. 234 (FB).**

[2] To make the payment is not imperative for the decree-holder, he may choose to make payment or refuse to make payment, but the result under the decree favouring the decree-holder would only follow when he complies with the conditions of the decree i.e. direction as to the payment of the amount on or before the specified date in the decree in the court.

Till such payment is not made the acts of the pre-emptor in instituting the suit for pre-emption amounts to no more than a mere assertion of the right, which becomes a successful when the culminates in a decree. There can be no enforcement of the right pre-emptive except by complete divestiture of the vendee's title and the vesting of the same in the pre-emptor - *Mohd. Saddiq vs. Ghasi ram,* **AIR 1946 Lah. 322 (FB).**

[3] The conditional decree becomes absolute upon payment of the amount of price. The moment, pre-emptor pays the amount; he is said to have complied with the decree and becomes absolute valid holder of the decree. The payment of money was the condition precedent and, thus, follows its natural consequences.- Kisan Dewallo vs. Ganga Bat, AIR 1939 Nag. 279; **Puttusingh vs. Baldeosingh**, **AIR 1928 All 667**; *Akramkhan vs. Azimkhan*, **AIR 1923** Lab 451; *Bapu vs. Vithoba*, **AIR 1925 Nag. 327;** *Mohd. Sadiq vs. Ghasiram*, **AIR 1946 Lab 322 (FB).**

[4] The pre-emptor can not be regarded in the same light as an ordinary purchaser. His right to possession of the suit property and the consequential right to mesne profits accrues only on the date when he pays the purchase price finally decreed. *Deonandan. Pd. vs. Ramdhari*, **39 IC 958 (PC).**

[5] The right of pre-emption fructifies, after the decree on payment in accordance with the decree into a title to the property, though that title may be subject to the result of an appeal which may be filed by an unsuccessful party.-*Ramsahay vs. Jagdambasingh*, **37 IC 163.**

[6] A mere passing of a decree in pre-emption suit does not confer any title on the plaintiff. The title to property shall be deemed to have accrued from the date of the payment of the amount of price. - *Anrup Misri vs. Ram Harakh*, **AIR 1729 II 953;** *Gangaram vs. Shivlal*, **AIR 1964 Punj 260 (FB)**; *Ramsingh vs. Gaindaram*, **AIR 1953 Punj. 163**; *Surrtj Karon vs. Maclan Mohan*, **AIR 1955 NUC 5747**; *Madhosingh vs. James Skinner*, **AIR 1942 Lah 243.**

[7] Thus the pre-emptor decree holder's right accrues on the date of the payment and not on the date of the sale or immediately on the date of the decree - *Ramsinglz. vs. Gaindaram*, **AIR 1953 Punj. 163**; *Bajirao vs. Abdul Gafoor*, **AIR 1949 Nag. 338**; *Madhosmgh vs. James Skinner*, **AIR 1942 Lab 243**; Fatehchand vs. Motisingh, **AIR 1933 Lab 523**; *Nathasingh vs. Fatehkhan*, **AIR 1933 Lab. 791**; *Nasirali vs. Wali*, **AIR 1925 lah 202.**

[8] It is not necessary that the deep should be registered to pass a valid titles *Bajirao vs. Abdul Gaffor*, **AIR 1949 Nag. 338**; *Ramlal vs. Harpal,* **AIR 1929 All 237.**

[9] The pre-emptor can recover possession under section 114 of CPC - *Nathusingh.*

vs. Fatehkahan, **AIR 1933 Lahore 791.**

2. Consequences of Payment.—[1] When the pre-emptor deposits the purchase money in time in the court, he is said to have complied with the decree. The pre-emptor henceforth automatically is substituted in place of the vendee and, thus, becomes entitled to recover possession. The vendee on the other side becomes entitle to withdraw the money so deposited. The decree becomes absolute - *Suraj Koran vs. Madan Mohan*, **AIR 1955 NUC (Raj) 5747.**

[2] Upon payment being made the conditional decree automatically becomes absolute and the pre-emptor plaintiff becomes the true decree holder of the decree for pre-emption. It means two things - (a) the rights which accrue to the decree holder (primary rights) and (b) remedial rights to prevent encroachment upon his rights (secondary rights).

[3] *Primary rights which accrue to the decree holder-* (1) It becomes operative as a decree entitling the plaintiff to claim possession of the suit property. -*Kishan vs. Gangabai*, **AIR 1939 Nag. 279.**

(2) The pre-emptor plaintiff holds the title and the vendee defendant is divested of the title.

(3) The pre-emptor becomes the owner of the suit property. — *Bapur vs. Vithoba*, **AIR 1923 Nag 327.**

(4) It tends to divest all the rights of vendee in the suit property. There can be no enforcement of the pre-emptive right except by complete divestiture of the vendee's title and vesting o the same in the pre-emptor. - *Mohd. Saddiq vs. Ghasiram*, **AIR 1946 Lab 322 (FB).**

(5) The right to seek remedy by the execution of the decree also accrues to the decree-holder.

(6) The decree-holder is entitled to other ancillary rights to the suit property attached to it, e.g.

(i) He becomes entitled to the rights of rents and profits in the suit property from the date of payment. He is not required to wait till delivery of possession. - *Mst. Akbar Sultan. vs. Taj Mohd.*, **AIR 1944 Peshawar 11.**

(ii) All accretions and diminutions in the suit property also pass to the decree holder pre-emptor.

(iii) If on the date of the payment, the crop was standing on the suit property that too passes to the decree-holder. - *Bapur vs. Vithoba*, **AIR 1923 Nag. 327.**

(7) The pre-emptor enters into the shoes of the vendee-defendant.The vendee thus becomes vender and the pre-emptor becomes the purchaser.

(8) As the decree-holder is substituted for the vendee, so all the defects in the title of a vendee passes to the pre-emptor in the same from also the pre-emptor can not ask the vendee to make good the defects in the title or alter the conditions. - *Tawakkul Rai vs. Lachman Rai*, **ILR 6 All 344**; *Nihalsingh vs. Kokalesingh*, **ILR 8 All. 29.**

[4] *Secondary or the remedial right*- On the basis of the decree in favour of the pre-emptor, he can request the court which passed the decree to compel the vendee to deliver the possession under Rule 35 of Order 21 of CPC.

Where the suit property is in possession of an usufractuary mortgagee or a tenant, Order 21, Rule 35 shall not apply.

The vendee can be asked to deliver the document of the suit property with the delivery of the possession.

The pre-emptor is entitled to obtain possession under section 144, ACPC from the vendee.- *Natha Singh. vs. Fatehkhan*, **AIR 1933 Lab 791.**

3. Disabilities of the decree-holder-(1) The decree for pre- emption is not capable of transfer, so as to enable the transferee to obtain possession of the suit or property in execution of such decree. - *Meharkhan vs. Gulam Rasool*, **AIR 1922 Lahore 300;** Nasirali vs. Wali, **AIR 1925 Lab 202.**

(2) The pre-emptor decree-holder has the mere right to be substituted for the vendee. Thus any defect in title in vendee is also passed to the pre-emptor. Under the decree, pre-emptor cannot as the vendee to remove the defects or alter the conditions - *Tawakkulrai vs. Lachman Rai,* **ILR 6 All 344** (at page 350); *Nathalsingh vs. Kokalesingh,***ILR 8 All 29**; *Afzal Hussain vs. Huranbibi,***AIR 1929 All. 298.**

(3) The pre-emptor decree-holder is liable to pay price for the bonafide improvements made by the vendee in the addition to the value of the suit property - *Fatah. Mohd.vs. Hakim Khan*, **AIR 1926 Lab 629**; *Arshadali vs. Zorawarszlngh*, **AIR 1926 Lab 346.**

But where the vendee caused the improvements in bad faith, vendee was refused for compensation for such improvements - *Mst Shubratan. vs. Shabbiraj.* **AIR 1940 Oudh 266**; *Ghanshyam vs. Shrinath*, **AIR 1945 Mar. LR (Civil) 54.**

The decree-holder is not entitled to profits prior to the deposit of money of directed by the decree - *Puttusingh. vs. Baldeo*, **AIR 1928 All. 667.**

4. Nature of the right of decree holder.- The right of pre-emption is one of substitution and it can not, therefore, be said that the successful pre-emptors are the representatives of or claim under, the original vendee. The pre-emptor cannot thus be bound by the decree against that vendee.-*Sharif Hassain. vs. Nurshah*, **AIR 1929 Lab 589.**

5. Subsequent events land fair decree-holder is affected therefrom.

[1] Where the pre-emptor decree holder dies after the decree and pending the appeal, and the original vendor himself is his legal representative, the suit cannot be dismissed on appeal. A pre-emption decree cannot be affected by any thing which happens after it is made.- *Gandasingh. vs. Bhan*, **AIR 1923 Lab 310**; *Jagannaths Singh vs. Mataprasad*, **50 IC 190**; *Niazali vs. Mohd. ramzan,* **37 IC 227.**

[2] The fact that the wrong person is allowed to be withdrawn the deposited sum into the court will not affect the pre-emptor. It is the duty of the court to recover back the money from the person who has wrongly withdrawn.-Mohd Hayat vs. Narsingh. Dass, 25 IC 712.

[3] An appeal against a decree for pre-emption can not be dismissed merely on the ground that it was preferred after the expiry of the period fixed for payment of the pre-emption money.- *Sadhosaran vs. Bani Madho*, **AIR 1940 All 511.**
See also *Sheogopal vs. Najib Khan*, **ILR 36 All. 393 = 23 IC 869.**

[4] The decree holder depositing the money into the court is entitled to the refund of the same on the reversal of the decree in appeal.- *Murtzabibi vs. Jammanbibi*, **ILR 13 All 261.**

[5] But pre-emptor is not entitled to an interest thereupon. - Bahalsingh vs. Nait Ram **19 IC**; *Aritrao vs. Sitaram*, **1958 Nag LJ 276.**

[6] The withdrawal of money by the vendee does not preclude him to an appeal.

Where in a suit for pre-emption, suit property is sold subject to encumbrances, after the sale the vendee pays off the encumbrances on the property, this payment ought to be added in the purchase price as specified in the decree for pre-emption. The decree may be amended accordingly, *Baldeosingh vs. Dy. Comm. Kheri*, **AIR 1924 Oudh 1.**

6. Grant of temporary injunction:

Effect of provision - Grant of temporary injunction. - The section does not lay down that the theory of lis pendent will not be applicable at all for pre-emption. All that it says is that the person, who has obtained the decree for pre-emption in respect of any property shall acquire no title to that property until he pays to the court, the sum of money required to be paid in accordance with the pre-emption decree, but upon such payment having been made, any alienation of the property made by the original transferee or by any person claiming through him shall be voidable at the option of the decree-holder with effect from the date of such payment. Accordingly the right of pre-emption has retrospective effect and the alienation made by the original transferee shall be rendered voidable at the option of the pre- emptor after he has acquired a right to the property under section 20.

When a plaintiff is shown to be a person who can claim pre-emption under any of the clauses of section 6, he has a prima facie case in his favour for grant of temporary injunction and the question of balance of convenience and irreparable injury are also in his favour. - 1980 WLN (UC) 401 Rel-. *Jugalkishore vs. Shantilal*, **1986(2) WLN 764.**

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21. Special provision for limitation.- (1) Subject to the provisions contained in the proviso to sub-section (I) of section 5, the period of limitation, in any case not provided for by article 97 of the First Schedule to the Limitation Act. 1963 (Central Act 36 of 1963) for a suit to enforce the right of pre- eruption under this Act shall, notwithstanding

anything contained in article 1 13 of the said schedule of the said Act, be one year from the date on which,-

(a) in the case of sale made without a registered sale deed. The purchaser takes under the sale physical possession of any part of the property sold, and

(b) in the case of a foreclosure, the final decree for foreclosure is passed.

(2) The period of limitation for a suit to enforce the right of pre-emption which has accrued before the commencement of this Act shall, notwithstanding anything contained in thesaid Limitation Act, in no case exceed one year from the commencement of this Act.

COMMENTARY

SYNOPSIS

1. Computation of period of limitation under the Act -
   (a) Physical possession
   (b) is registered
   (c) When article 113 of the Limitation Act, 1963, shall apply
2. Exceptions to this section
3. Extension of period of limitation
   (a) Under the present Act
   (b) Under the Limitation Act, 1963
      (i) Under section 4
      (ii) Under section 8
      (iii) Under section 17 - Fraud
         Proof of fraud
         Plea of fraud
         Starting point in plea of fraud
4. Plea of pre-emption set up as defence

1. Computation of period of limitation under the Act.- The section 21 is confined to following two sets of cases :—

(i) The disputed property is capable of delivery of physical possession; and

(ii) Where the property is one covered by a decree for foreclosure legally passed by a competent court of civil jurisdiction.

This section is silent as to a property which is not capable of delivery of physical possession but pertaining which a transfer deed is only executed and registered. To such cases article 97 shall apply.

While giving the combined application of this section and article 97 of the **Limitation Act, 1963**, the period of limitation shall be computed according to the third column of the table given below.

	Nature of transfer 1	Period of imitation 2	Time from which period begins to run. 3
(1)	In case of sale made without a registered sale deed	One year	From the date of purchaser takes under the sale physical possession of whole or any part of the property sold;
(2)	In case of a final decree for foreclosure, One year	From the date on which the final decree for foreclosure is passed.	
(3)	Where instrument of sale is registered	One year	(i) When the purchaser takes under the sale sought to be impeached, physical possession of the whole or part of the property sold, or (ii) Where the subject matter of the sale does not admit of physical possession of whole or part of the property, when the instrument of sale is registered.

Item (3) is the production from article 97 of the Limitation Act. Item (1) and (2) are reproduction of clauses (a) and (b) of sub- section (1) of Section 21 of this act, this table includes the total law of limitation as provided, under section 21 read with article 97 of the Limitation Act, 1963.

(a) Physical possession.-[1] the taking of physical possession means the immediate and actual physical possession of the property. - *Batul Begum vs. Mansur Ali Khan*, **28 IA 248 = ILR 24 All 117 (PC)** [affirming, **ILR 20 All 315 (FB)**].

Thus, it necessarily excludes symbolical possession or attornment of lease by the tenant in favour of the transferee. The constructive possession by receipt of rent from the tenant does not amount to taking of physical possession for the purpose either of this section or under article 97 of the Limitation Act, 1963 - *Achutanmida vs. Biki Bibi,***AIR 1922 Pat 601**, *Batul Begum vs. Ansur Ali Khan*, **ILR 20 All 315 (FB).**

[2] The nature of taking physical possession must be such so as to be visible to other people that gives them the notice of change of possession in the property, which is only contemplated by the words "taking of physical possession - *Ramchand vs. Tulsi Ram* **AIR 1964 Punj 328;** Kaluram vs. Bastimal**, AIR 1955 Ajmer 50**; *Ganpat Ishmaji vs. Chandrabhagabai*, **AIR 1943 Nag 90.**

[3] Therefore, symbolic possession is not covered by the term physical possession - *Phulwanti vs. Kashmirilal*, **AIR 1956 Pepsu 17.**

[4] The physical possession of the suit property must have been delivered under the transfer as contemplated by sub-section (vii) of section 2 of this Act and not otherwise - *Misri Khan vs. Shahji*, **1924 Lah 394**; *Sheo Ram. vs. Indra*, **AIR 1925 Lah 152**; *Gyansingh vs. Gyansingh*; **AIR 1923 Lab 654**; *Bai Chander Mani vs. Bhagirath*, **AIR 1961 Punj 296.**

[5] So where the suit property is capable of taking actual physical possession and actual possession has been taken, the date of such taking over of actual physical possession would be the date from which the period for limitation would start.

It is neither necessary nor article 97 of the limitation Act requires that the sale deed should be registered before the vendee is actually put in possession to enable that vendee to claim that he was put into possession under the document. Where the vendee was put into possession after the execution of sale deed but before the registration of the same, in a suits for pre-emption time ran from the date of the delivery of possession and not from the date of registration.- Ramgopal vs. Baikunth Nath, **AIR 1950 All 290;** See also *Bai Chander Mani vs. Bhagirath*, **AIR 1961 Punj. 296.**

[6] Where the purchaser took possession under a sale but has subsequently dispossessed, and thereupon he filed a suit for possession, and got the possession again under the decree, it was held that the time ran from the date on which he first obtained the possession under the sale - *Ramsookh vs. Nanoo* 6 (1871) P.R. Civil Judgment No. 34 (page 75,).

[7] Under an oral sale, the delivery of possession, was made over to the vendee and thereafter the vendee applied for mutation to the Patwari. Patwari's report can not be considered as an evidence of the date on which the possession of the property took place. The true date would be one on which the possession was actually delivered - *Ramchand vs. Tulsi Ram***AIR 1964 Punj 323**; *Bai Chandcr Mani vs. Bhgirath*, **AIR 1961 Punj. 296**; *Sheonandan Prasad vs. Kanhaiyalal*, **AIR 1956 Nag 243**; *Mst. Phalwanti vs. Kashimirilal*, **AIR 1956 Pepsu 17.**

[8] Where the subject matter of the transfer does not admit the delivery of physical possession at the date of the sale, that the second part of Article 97 of the Limitation Act, 1963 i.e. the dateof registration of the deed shall apply and the time shall run from the date of registration - *Barf Chander Mani vs. Bhagirath*, **AIR 1961 Punj 296;** *Sheonandan Prashad vs. Kanhaiyalal*, **AIR 1956 Nag 243**; *Phulwanti vs. Kashmirilal*, **AIR 1956 Pepsu 17.**

[9] Where the property on the day of sale is in possession of the tenant or mortgagee etc. the property is not capable of immediate possession by the vendee.- *Balkrrishan vs. Narayanif* Amma, **AIR 1961 Kerala 40;**

Shahadeo Singh vs. Kubcrnath, AIR 1950 All 632; *Darabalri vs. Huskm,* **AIR 1932 Lah 98.**

[10] The property consisting of joint share is not capable of actual physical possession of the share sold until partition takes place. - *Sardarali vs. Fazal*, **68 IC 895.**

[11] Thus, in case of sale of the property which is incapable of delivery of actual physical possession on the date of sale, the date of registration of such sale deed would be the date when the transfer is deemed to have taken place - *Wasakha us, Mohd*., **AIR 1942 Lab 118**; *Kaluram vs. Bastimal*, **AIR 1955 Ajm. 50.**

[12] Where the vendee is already in the possession of the suit property and the sale deed is not registered though executed but applies simply for the mutation. In such cases the period of limitation to sure for pre-emption shall start from the date of the mutation - *Totaram vs. Lormdaram*. **AIR 1922 Lab 210**; *Gayansingh vs. Gyansingh*, **AIR 1923 Lab 654**; *Gurdasamal vs. Qadir Bakhsli*, **AIR 1927 Lab 388**; *Bel Chander Mam vs. Bhagirath*, **AIR 1961 Punj 296.**

(b) Is registered. - [1] The deeds of transfer are registered under section 60 of the Indian Registration Act, 1908 which runs as under:-

> **"60. Certificate of registration.**- (1) After such of the provisions of 34, 35, 58 and 59 as apply to and document presented for registration have been complied with, the registering officer shall endorse thereon a certificate containing the word 'registered' together with number and page of the Book in which the document has been copied.
>
> (2) Such certificate shall be signed, sealed and dated by the registering officer, and shall then be admissible for the purpose of proving that the document has been duly registered in manner provided by this Act, and that the facts mentioned in the endorsements referred to in section 59 have occurred as therein mentioned."

Thus it is abundantly clear that when the certificate as, 'registered' under section 60 of the Indian Registration is endorsed and dated on the document, it is deemed registered.-*Baal Chander Mam vs. Bhagirath*, **AIR 1961 Punj [296]** *Sardar Begum vs. Masoomsoah*, **AIR 1945 Peshawar 9** (Art. 97 would apply irrespective of the fact whether the deed is conipulsorily registerable or not).

[2] As between transferor and transferee, the registered document may take effect of from the date of its execution but as regards third party, the point of time at which the deed is to be effectiveis when endorsement of registration is made thereon. Therefore, limitation for a suit for pre-emption starts from the date on which the sale deed was actually entered in the register. - *Keharsingh vs. Jangirsingh,***. AIR 1952 Pepsu 68.**

(c) **When articles 113 of the Limitation Act shall apply.**- [1] Article 113 of the

Limitation Act, 1963 is a residuary article which would apply to a pre-emption suit only when section 21 of this - Act or article 9 of the said Act does not apply. – *Basheshwar-dass vs. Diwanchand*, **AIR 1933 Lab. 615** *Kheratiram vs. Ramlal*, **AIR 1951 Punj 45 (FB).**

[2] Where the property sold is neither capable of delivery of actual physical possession to the transferee not the sale deed was registered, then a period of limitations of pre-emption in such cases shall be governed by the art. 113 of the Limitation Act. - *Batul Begum vs. Mansur Ali Khan*, **ILR 20 All 315** (affirmed in ILR 24 All 17 (PC); *Gurudass vs. Qadir*, **AIR 1927 Lah 383; Nag 295** See also *Tolaram vs. Bai Chandar Mani* vs. *Bhagirath*, **AIR 1961 Punj 296**; *Sheonandan vs. Kanhaiyala*, **AIR 1956 Nag 243**; *Mst. Phulwanti vs. Kashmirilal*, **AIR 1956 Pepsu 17**; *Kheratiram vs. Ram Lal*, **AIR 1951 Punj. 45 (FB)**; *Keharsingh vs. Jangirsingh*, **1952 Pepsu 68.**

Thus, a suit for pre-emption against the transferee of the vendor fall under article 113 of thesaid Act, - *Karamdad vs. Ali Mohd.***48 (1913) Civil Judgment No. 31 (page 1 10) (FB);** *Razawandsingh vs. Dukchhor*, **24 IC 116.**

2. Exception to this section. - Subject to the provisions contained in the proviso to sub-section (1) of section 5 of this Act, the general period of limitation for suits to enfoce the right of pre-emption is one year only as mentioned in the table given above but the said proviso supplies on except to this rule which is explained as under :—

Upon a sale for the purpose of a manufacturing industry:-

(i)	Where such sale took place by a registered sale deed	On the expiry of one year from the date of the registration the sale deed.	If such property has not been used in good faith for the purpose for which it was osten-sibly purchased.
(ii)	When such sale is without a registered sale deed	On the expiry of one year from the date of taking physical possession of the property sold.	-do-

In such cases the period of limitation shall start after the expiry of one year as given above.

3. Extension of the period of limitation.- [1] The period of limitation may be extended under the two circumstances, namely:-

(a) under the present Act; and

(b) under the provision of the Limitation Act,1963.

(a) Under the present Act. The period of limitation under the present Act has been extended under proviso to subsection (1) of section 5 of the Act. (Please refer to synopsis 4 of this section).

(b) Under the provisions of the Limitation Act, l963.- (1) Section 4 of the Limitation act. - Where the period of limitation expires on a day when the court is closed, the suit, appeal or an application may be instituted, preferred or made on the day when the court reopens.

[2] (2) Section 8 of the Limitation Act.- Section 8 of the Limitation Act, 1963 runs as under:- .

"8. Special exceptions.- Nothing in section 6 or in section 7 applies to suits to enforce rights of pre-emption, or shall be deemed to extend for more than three years from the cessation of the of the disability or the death of the person affected thereby, the period of limitation for any suit or application."

The section 8 as stated above is an exception to sections 6 and 7 of the said Act.

The object of this section is to complete the pre-emption to institute such suits as early as possible, thus, secs, 6 and 7 of the said act do not apply to pre-emption suits - *Biradraj vs. Dhingarmal.* **ILR 1954 R3J-990**; *Vishwanathan Chetty vs. Enthirajulu Chetty*, **AIR 1924 Mad 57**; *Hussambibi vs. Aakim*, **AIR 1919 Lah 25**

[3] Section 17 of the. Limitation Act. - The period of limitation cannot be extended unless 112.18 proved that a person was to kept out of knowledge by an act amounting to fraud on plaintiff – *Jibanchandra vs Sukhram Katila*, **AIR 1966 Assam 56.**

[4] Where the vendor or the vendee plays fraud and thereby actively concealed the fact of sale and thereby the pre-emptor is kept away to enforce his right, section 17 shall apply and the period of limitation shall begin form the date the pre-eniptor becomes aware of the fact of the sale - *Mst. Phulwanti vs. Kashniirilal*, **AIR 1956 Pepsu 17**; *Jagddishrai vs. Surajkumar*, **AIR 1939 All**. **113**, *Ganeha vs. Sadiq*. **AIR 1937 Lah 97**; *Sheoshankar vs. Pratap Narain*, **AIR 1929 All. 213**; *Radharam vs. Atuchandra*, **AIR 1952 Cal. 75.**

This section would apply where the transaction giving rise to the Right of pre-emption is given a false appearance -*Hariram vs Asharam,***1950 Nag LJ 396.**

[5] Mere silence on the part of the vendor and vendeeis no fraud when he is not under legal duty to inform the other. An omission to give notice to the pre-emptor as required under section 8 of this Act amounts to fraud.

[6] There must be an active fraud. Mere silence is not sufficient — *Dwarka Prashad vs. Shyam Charam*, **AIR 1964 MP 57.**

[7] Either 'suggestio falsi' or 'suppressio veri' with intent to deceive and the must have known to be false or not believed to be true; by the market must be proved,

Section 17 of the Indian Contract Act, 1872 defines the term fraud. - *S.Row's Contract Act*, *7th Edn at page 905-907*; See 3150 *Mathen Simon vs. Ouseph Lookka*, **AIR 1964 Kerala 88.**

[8] Proof of fraud.- Fraud is a secret in its origin and inception, thus, there can not be clear proof as based on perceptions. It can at most be inferred from the circumstances of the case before the court. The whole bundle of circumstances when taken together may reveal a fraud. - *Thangachi vs. Ahmed Hussain*, **AIR 1957 Mad. 194;** *Mst Phulwani vs. Kashmirilal*, **AIR 1959 Pepsu 17;**

[9] An inference as to fraud must not be speculative but the conclusion as fraud must be arrived at from the material is on record - Arbindra vs. Chandrakanta, **AIR 1954 Assam 94.**

For the purposes of limitation, the plaintiff must allege and prove the fact of fraud which kept him away from the knowledge of his right to seek relief. - *Chintamoni vs. Krushnaphrsad Singh*, **AIR 1960 Orissa 75;** *Jagdish Lal vs. Madan Lal*, **ILR1960 Raj. 1324.**

[10] The plaintiff must specifically state the date and circumstances as to the knowledge for first time - *Shrikishan vs. Ghanannand Joshi*. **AIR 1929 All. 721.**

[11] A fraud must be proved by facts or inference from facts only. Mere suspicious, or surmises or conjectures are no substitution for fraud. - *Satishchandra vs. Satishkantha,* **AIR 1923, PC 73.**

[12] Where fraud is established, the burden shifts to the opposite party either to disprove it or to prove that the plaintiff had the knowledge of the transaction beyond the period of limitation. - *Rahindhoy vs. C.A. Turner*, **ILR 17 Bom. 341 (PC)**; *Chintamoni vs. Krushnaprasad Singh*, **AIR 1960Orissa 75**; *Phulwanti vs. Kashmirilal* **AIR 1956 Pepsu 17**; *Giribala vs. UshanginiDebi*, **AIR 1955 Assam 177**; *Kala vs. Javaramma*, **AIR 1952 Mysore 47**; *Masior Rahaman vs. Samsannessa Bibi*, **AIR 1949 Cal 307**; *Sridhar Prasad vs. Haraprasad*, **AIR 1943 Pat 377.**

[13] **Plea of fraud.** Rule 6 of Order 7 of CPC provides that the plaintiff shall state the grounds of exemption where the suit is instituted after the expiration of the period as limitation.- *Shivdayal vs. Ramrikh*, **AIR 1955 Raj 118 = ILR 1955 Raj 671;***Bojjanna vs. Kristappa*, AIR 1947 Mad 268; See also *Udcypalsringh vs. Laxmichand*, AIR 1935 All 946 (FB) *Panchain vs . Ansar Hushan*, **AIR 1926 PC 85;** *Mangli vs. Gaya Prashad*, **AIR 1947 235.**

[14] If the facts on records are such which established the case of fraud within the meaning of section 17 of the Limitation Act, the point of fraud may be raised at any stage, even in the court of appeal.- *Yeshwant vs. Walchand*, **1951 AIR SC 16.**

[15] **Starting point.-** The starting point of limitation under a plea of fraud is computed from the time when the fraud first becomes known to the personcinjuriously

affected by the fraud.- *Jibanchandra vs. Sukram Kalit*, **AIR 1966 Assam 56**; *Khadimbibi vs. Burekhan*, **AIR 1943 Lab 215**, *Giribala vs. Ushanginilbebi*, **AIR 1955 Assam 177**; *Abdul Rahman vs. Paraotamdass*, **1931 PC 12.**

[16] The knowledge means the clear and definite knowledge different from mere suspicion - *Mst Phulwanti vs. Kashmilal*, **AIR 1956 Pepsu 17;** *Shridharprasad vs. Har Prashad*, **AIR 1943 Pat, 377**; *Bhagwan vs. Shadi,* **AIR 1934 Lah. 878.**

[17] The exemption shall prevail against a person who is guilty of fraud or the associate person - *Dhirendranath vs. Charuchandra*, **AIR 1940 Cal. 207**; *Ghulamkadir vs. Negapattinam*, **AIR 1950 Mad. 460;** *Prasanna Kadhari vs. Garjanali*, **AIR 1955 Assam 56**; *Kamalkumar vs. Drabti Charon*, **AIR 1961 Cal 8**; *Mahipati vs. Atulkrishna,* **AIR 1949 Cal. 212**; *Veerappa vs. Bangarappa*, **AIR 1960 Mysore 297**; *Sailendranath vs. Sudhanyacharan*, **AIR 1950 Cal. 166.**

4. Plea of pre-emption set up as defence. - A defendant may plead his right of pre-emption by way of defence; though is positive right to sue for pre-ernption is time barred. - *Kanharan Kutti vs. Uthotti*, **ILR 13 Mad 490**; *Krishan Menon vs. Kesavan*, **ILR 20 Mad 306**; See also *Visvanathan vs. Ethirajulu*, **AIR 1924 Mad. 57.**

This right of pre-emption is an inchoate right and in order to be completed it must be exercised. If that is not still enforceable it cannot be a ground of a valid defence. - **Sabed Ali vs. Sahatulla**, 42 CWN 1029.

22. Saving of rights previously accrued - Except as provided in sub-section (2) of section 21, nothing in this Act shall affect any right, privilege, obligation or liability acquired, accrued or incurred in respect of any transfer made before the commencement of this Act.

23. Abolition of other right of pre-emption-No right of pre-emption shall be enforced in respect of any transfer made after the commencement of this Act except in accordance with the provisions of this Act.

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