

Pre-emption

(Shufa)

Shufa means conjunction; here it denotes the right of the owner of a property which is in conjunction-that is adjacent-to another property. *Haq* means right. So, *haq-shufa* means right to subsequent purchase of a property adjacent to own from another fresh purchaser. In practice it means a right to dislodge a fresh purchaser and step in his shoes in respect of an adjacent property. It is a right to dislodge stranger from entering into ones neighborhood. These simplified statements are subject to legal technicalities as would be unfolded in the following discussion. The Roman legal system also recognized such system, but with certain difference. The vendor was obliged to sell his immovable property to a determined person if he (the latter) offered to purchase it on the same conditions as the intended vendee had offered. This was based on terms of contract and also of positive law. It was a relationship governing the vendor and the determined person; if the property was already sold to a vendee, the determined person had no right to disturb the former. In India, on the other hand, it is not confined to a "perspective purchaser" only; in fact it originates after the sale is complete and affects the fresh purchaser and runs up to the passing of the decree in the suit for the right. It is sort of acquisition by compulsory purchase.

The origin of the law on pre-emption may be traced back to the traditions of the Prophet. The Prophet is reported to have said: "A neighbor of a house has a superior right to the house and the neighbor of lands has superior right to those lands, and if he be absent, the seller must wait his return..."

Muslim jurist have put forward different categories of persons having the right of pre-emption.

Hanafi Law recognizes three categories: (i) a co-sharer in the property sold, (ii) a participator in the amenities and appendages of the property, (iii) a neighbor owning an adjoining immovable property.

Definition

Mulla: The right of *shufa* or pre-emption is a right which the owner of an immovable property possess to acquire by purchase of another immovable property which has been sold to another person

Nature of the Right of Pre-emption

The basis of the right of pre-emption is the peaceful enjoyment of an immovable property by its owner. The right is available against any person who purchases the property adjacent to that of the claimant. Once it is established that the claimant, i.e., the pre-emptor, possess this right, it is irrelevant as to who is the purchaser. As such, it may be said that the right of pre-emption has been a subject of some judicial controversy. Formerly, it was held by certain courts that pre-emption was a personal right of the claimant. Another view was that it was a proprietary right, i.e. incident of property. Now the controversy has been resolved by the Supreme Court by holding that a right of pre-emption is purely a personal right (*Bhoop v. Matadin Bhardwaj* AIR (1991) S.C. 373). However, these two divergent views are stated below because of academic value.

Personal Right

The Calcutta and Bombay High Courts have held that right of pre-emption is a personal right of the pre-emptor. These High Courts have held that it is merely a *right of repurchase from* the vendee who is treated as the full owner for all practical purposes till the right of pre-emption is exercised. The right comes into existence only when ownership of the adjacent property has completely passed on to the vendee, i.e. when the sale is complete. Therefore, it is a personal right against the owner of another property. Similarly, the Bombay High Court had also held that the right was not an incident relating to property but an option which is exercised by a Muslim owner after the completion of a sale by owner of another property (*Sheikh Kadratulla v. Mohini Mohan Saha* (1869) 4. Beng. L.R, cited in Fyzee's Outlines Ed iv p. 337; *Hamedmiya v. Benjamin*, AIR (1929) Bom. 206 ; But in a later case, *Dashrathlal Chhaganlal v. Bai Dhondubai*, (1940) 43 Bom. L.R, the court changed its view and held that it is a proprietary right).

Proprietary Right

According to Allahabad and Patna High Courts the right of pre-emption is a proprietary right, i.e. right attached to property. In other words, it has been held that pre-emption is an incident of property rather than personality. In the leading case, *Gobind Dayal v. Inayatullah* [(1885) 7 All 775,] the Allahabad High Court held that pre-emption is not a right of repurchase; it is a *right of substitution*. In the exercise of this right, the pre-emptor is entitled to be substituted in the property, i.e. he is entitled to stand in the shoes of the vendee in respect of all the rights and obligations pertaining to the property sold.

It was held by the court that right of pre-emption is a right which exists because of the vicinage (neighborhood) of a property. It does not exist only because that property has been purchased by some person. The Court further observed that the right of pre-emption creates a legal servitude running with the land. Accordingly, it was held that as the right was not a personal right, it could be claimed even if the purchaser of the adjacent property was a Hindu. The reasoning was followed by other High Courts, as well. The High Courts of Patna and Madhya Bharat have held that right of pre-emption is a proprietary right and goes with the land as being annexed to it.

However, now this controversy has been resolved. The settled law on the nature of the right of pre-emption is that it is *purely a personal right*. Earlier in *Bishan Singh v. Khazan Singh*, the Supreme Court had approved the view taken in *Gobind Dayal's* case and has held that the right is proprietary rather than personal. But subsequently in *Bhoop v. Matadin Bhardwaj*, the Supreme Court has held that the right of pre-emption is a purely a personal right. According to the Apex Court this right may be founded in a statue or custom or personal law but in every case the sole object of this right is to keep away an objectionable stranger from the neighborhood.