FULL BENCH

Before Bhandari, C.J., and Harnam Singh and Kapur, JJ.

UTTAM SINGH,—*Petitioner*

versus

KARTAR SINGH AND OTHERS,—*Respondents*

Civil Original 62 of 1952

1953

June, 15th

Punjab Pre-emption Act (I of 1913)—Section 15—Whether ultra vires *the Constitution of India—Right of pre-emption—Nature of—Whether imposes reasonable restrictions on the right to acquire, hold and dispose of property guaranteed by Article 19(1)(f) of the Constitution of India—Constitutionality of an Act—How to be determined.*

(1) *Held (per Full Bench)*—that the Punjab Pre-emption Act (I of 1913), is not *ultra vires* of the Constitution of India. Sections 3(4), 14, 23, 24, 29 and the concluding clause of section 9 of the said Act, however, should be deemed to be non-existent because of the repeal of the Punjab Alienation of Land Act, 1900. The restrictions imposed by these sections are severable and the deletion of these provisions does not affect the constitutionality of the Act.

(2) that there is no doubt that section 15 of the Act imposes restrictions upon the right of citizens to acquire, hold, and dispose of property but the restrictions being in the interests of the community are reasonable restrictions and are saved by Article 19(5) of the Consitution of India.

(3) that the objects underlying sections 15 and 16 of the Act may be briefly summarised as follows :—

(i) to preserve the integrity of the village and the village community ;

(ii) to avoid fragmentation of holdings ;

(iii) to implement the agnatic theory of the law of succession ;

(iv) to reduce the chances of litigation and friction and to promote public order and domestic comfort ; and

(v) to promote private and public decency and convenience.

An Act which tends to achieve these objects is in the interests of the general public.

Per Harnam Singh, J. (1) that the pre-emptor has been given by the Act a right to control the action of the vendor in selling the property which is the object of the right and can claim the assistance of the Courts in exercising that right. In plain English, the Act displaces ordinary legal rights and places restrictions upon normal rights of conveyance.

(2) that the Constitutional power of the law-making body to legislate in the premises being granted, the wisdom or expediency of the manner in which that power is exercised is not properly subject to judicial review and that there being presumption in favour of the constitutionality of the Act, the Court would not pronounce the Act to be contrary to the Constitution unless the violation of the Constitution is proved beyond all reasonable doubt.

Per Kapur, J. (1) that the right of pre-emption is primary and secondary in nature. It is a primary right which exists before the sale and a secondary one which arises when a sale has been effected.

(2) that there is no doubt that the right of pre-emption operates as a restriction on the principle of free sale and may even tend to diminish the market value of the property, but this restriction is not peculiar to countries where the influence of Muhammadan way of living was introduced.

Punjab State v. *Indar Singh* (1), *Dr. N. B. Khare* v. *State of Delhi* (2), *State of Madras* v. *V. G. Row* (3), *Sanwal Dass* v. *Gur Parshad* (4), *Mohammad Ali Khan* v. *Makhan Singh* (5), *A. K. Gopalan* v. *State of Madras* (6), *Dhani Nath* v. *Budhu* (7), *Dilsukh Ram* v. *Nathu Singh* (8), *Gujjar* v. *Sham Das* (9), *Gobind Dayal v. Inayat Ullah* (10), *Digambar Singh* v. *Ahmed Sayed Khan* (11), relied on.

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(1) 54 P.L.R. 395
(2) 1950 S.C.R. 519
(3) 1952 S.C.R. 597
(4) 90 P.R. 1909
(5) 73 I.C. 855
(6) 1950 S.C.R. 88
(7) 136 P.R. 1894
(8) 98 P.R. 1894 (F.B.)
(9) 107 P.R. 1887 (F.B.)
(10) I.L.R. 7 All. 775
(11) I.L.R. 37 All. 129

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ORDER OF REFERENCE TO THE FULL BENCH

SONI, J. This case was originally instituted in the Court of a Subordinate Judge in Ambala but has been transferred to this Court as a point of great constitutional importance was involved in the case which was whether the Punjab Pre-emption Act, 1913, was now a good law because of the promulgation of the Constitution of India.

This was a suit brought by Uttam Singh for possession of certain area of land on the allegation that S. Shamsher Singh, defendant No. 4, had, on the 13th of September 1950, sold this area of land to Kartar Singh, Bakhtawar Singh and Salakhan Singh, defendants Nos. 1 to 3, for Rs. 20,000. The plaintiff alleged that in reality not more than Rs. 8,000 had been paid but that a fictitious sum of Rs. 20,000 had been entered in the sale-deed. The plaintiff further alleged that the signatures of the vendor's wife, Sardarni Jasmer Kaur, and relation of his, Sardar Rajinder Singh, defendants Nos. 5 to 6, had been obtained in token of their consent and, therefore, they had also been impleaded as *pro forma* defendants. The plaintiff further alleged that from a time previous to the sale he was a proprietor of land together with a share in the Shamlat in the village in which the land in dispute is situate. He alleged that defendants 1 to 3 were not owners of any land in the village. The plaintiff also alleged that he was owner of some land in the village and his land was adjacent to the land in dispute, while defendants Nos. 1 to 3 had no adjoining land. He also alleged that besides possessing this adjoining land he had also acquired another area of land which also adjoined that land. He, therefore, claimed that he had a superior right to get the land in dispute and that a decree to that effect be passed in his favour on payment of Rs. 8,000 or such sum that the court may find to be the sum actually paid by defendants Nos. 1 to 3 to the vendor, defendant No. 4. In reply the vendees admitted that they were not owners in or proprietors of the

village at the time of the sale in their favour; but that they had become owners of land in the village before the institution of the suit, which they had acquired by exchange. They denied that the plaintiff was owner of the contiguous land or of the other land which he later alleged to have purchased. They averred that the price in dispute was Rs. 20,000. They submitted that the plaintiff was not a co-sharer in any portion of the land in suit. This plea was unnecessary as the plaintiff never claimed that he was a co-sharer. These defendants claimed certain sums of money for improvements in case a decree was passed in favour of the plaintiff. But their main contention was that the Punjab Pre-emption Act had become void on account of the Constitution of India as its provisions were inconsistent with the provisions of the Constitution.

In order to determine whether the Pre-emption Act is or is not consistent with the provisions of the Constitution, it would be necessary to give some history of the Pre-emption Law. When the British took over the Punjab in 1849 and Courts began to examine question regarding alienations of property, rules of pre-emption were administered by the Courts under what was then known as the Punjab Code. Regarding the Punjab Code Shah Din, J., in *Sanwal Das* v. *Gur Parshad* (1), said as follows:—

> "The promulgation of the Punjab Civil Code in 1854 was the first attempt at a quasi-legislative enactment on matters of custom. Although the Code was not law in the strict sense of the term, but was simply a Manual embodying in a convenient form certain rules on matters of a civil nature for the guidance of Judicial Officers, yet it was acted upon in practice as though it were substantive law for this Province, *Mussammat Uttar Kaur* v. *Atma Singh* (1), and it is indisputable that in regard to vital questions of custom it was chiefly based

(1) 90 P.R. 1909 at pages 401 and 402
(2) 47 P.R. 1870

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upon, and correctly represented, the feeling of the people concerned. Section XIII of that Code dealt with the right of pre-emption in a manner consonant with contemporary records of custom, and is of some historical interest, so far as the development of statute law on the subject is concerned, as containing the germs which subsequently expanded into the pre-emptive provisions of the Punjab Laws Act of 1872 and the amending Act of 1878. Clause II of section XIII of the Code runs as follows:—

"* * * * *

Whenever any member of such community is desirous of selling his share, he must offer it to the community at large or to individual co-partners. * * * If the price be not agreed upon privately among the parties, it must be referred to the Revenue authorities, who will cause it to be fixed by a calculation committee. If the community, or members thereof, be not willing to accept terms thus determined intending seller may dispose of the property in any manner he pleases. But if he has effected a sale without offering opportunity of pre-emption, then the community, or any members of it, may, within three months from the date of the transaction, bring a suit for rescinding the sale. * * *.

* * In villages and *qasbhas*, the site and ground occupied by the sharer in the estate, will be subject to the right of pre-emption as above described, if the intending seller be a non-proprietary resident, the pre-emption pertains to the landholding community."

In 1872 the Punjab Laws Act (Act IV of 1872) was passed superseding the Code. That Act came into force on 1st June 1872, and one of its relevant provisions was as follows:—

"5. In questions regarding inheritance, special property of females, betrothal, marriage, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be:—

(1) any custom of any body or class of persons, which is not contrary to justice, equity or good conscience, and has not been declared to be void by any competent authority;

(2) the Muhammadan Law, in cases the parties are Muhammadans, and the Hindu Law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is referred to in the preceding clause of this section."

There was a verbal amendment of section 5 of this Act in 1878 and section 5 as amended in 1878 ran as follows:—

"5. In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be:—

(a) Any custom applicable to the parties concerned which is not contrary to justice, equity or good conscience, and has not been, by this or any other enactment, altered or abolished, and has not been declared to be void by any competent authority;

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(b) the Muhammadan Law, in cases where the parties are Muhammadans, and the Hindu Law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is above referred to:"

It is to be noticed that unless pre-emption could come in as a religious usage or institution it did not come in the questions which were to be decided by custom under section 5 of the Punjab Laws Act. As a matter of fact regarding pre-emption the Punjab Laws Act as passed in 1872 had special provisions contained in sections 9 to 20. These were as follows:—

"9. The right of pre-emption is a right on the part of certain persons to purchase immovable property in certain cases in preference to all other persons.

10. The right of pre-emption extends to all permanent dispositions of property, including sales under a decree of Court and foreclosures of mortgages: but it does not affect transfers made in good faith by way of gift, nor temporary dispositions of property.

11. The right of pre-emption shall be presumed to exist, whether recorded in the list of customs at settlement or not, in all village communities however, constituted, unless the existence of any custom or contract to the contrary can be proved. It shall be presumed to extend to the village site, to the houses built upon it, to all lands and shares of lands within the village boundary and to all transferable rights of occupancy affecting such lands.

12. The right of pre-emption shall not be presumed, but may be shown, to exist in any town or city or any sub-division thereof.

13. When any person proposes to sell any property, or to foreclose a mortgage upon any property which is subject to the custom of pre-emption he must give notice to the persons concerned of the price at which he offers to sell such property, or of the amount due in respect of such mortgage, as the case may be.

14. If the property to be sold is situated within, or is a share of, a village, the right to accept such offer or to redeem such mortgage belongs, in the absence of custom to the contrary,

Firstly, to co-shares in the village in order of relationship to the vendor or mortgagor;

Secondly, if no relation of the vendor or mortgagor claims pre-emption, to the land-owners of the *patti* or other sub-division of the village in which the property is situated, jointly;

Thirdly, to any member of the village community;

Fourthly, to tenants with rights of occupancy in the village, if any.

15. If the property to be sold is a share in joint undivided immovable property, other than land, the offer to sell must be made to the co-sharers.

16. When any question arises between persons claiming a right of pre-emption over any immovable property situated in any town or city, such questions shall, in the absence of custom to the contrary, be decided according to vicinity, relationship or the merits of the case.

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17. Any person who claims a right of pre-emption over any property, may bring a suit against the vendor or purchaser on the ground, either that no previous offer of the property sold was made to him, or that any such offer to sell made to him was not made in good faith, and if the Court is of opinion that the plaintiff had a right of pre-emption over such property, and that no such offer was made or that the offer was not made in good faith, it shall make a decree directing the defendant to sell such property to the plaintiff at such a price as appears to the court to be the fair market-value of the property.

18. * * * *

19. * * * *

20. In village in which the Chakdari Tenure prevails, the co-sharers in a well have a right of pre-emption as to sharers in such well in preference to a general proprietor in any such village having no share in the well but merely receiving a *haq zamindari* from the 'chakdars'."

These sections were later amended. The amended sections ran as follows:—

"9. The right of pre-emption is a right of the persons hereinafter mentioned or referred to, to acquire, in the cases hereinafter specified, immovable property in preference to all other persons. It arises in respect of sales (whether under a decree or otherwise) of immovable property and of foreclosures of right to redeem such property.

10. Unless the existence of any custom or contract to the contrary is proved, such

right shall, whether recorded in the Settlement record or not, be presumed

(a) to exist in all village communities, however constituted, and

(b) to extend to the village site, to the houses built upon it, to all lands and shares of lands within the village boundary, and to all transferable rights of occupancy affecting such lands.

11. The right of pre-emption shall not be presumed to exist in any town or city, or any sub-division thereof, but may be shown to exist therein, and to be exercisable therein by such persons and under such circumstances as the local custom prescribes.

12. If the property to be sold or the right to redeem which is to be foreclosed is situate within, or is a share of, a village, the right to buy or redeem such property belongs, in the absence of a custom to the contrary,—

(a) first, in the case of joint undivided immovable property, to the co-sharers;

(b) secondly, in the case of villages held on ancestral shares, to co-sharers in the village, in order of their relationship to the vendor or mortgagor;

(c) thirdly, if no co-sharer or relation of the vendor or mortgagor claims to exercise such right, to the land-owners of the *patti* or other sub-division of the village in which the property is situate, jointly;

(d) fourthly, if the land-owners of the *patti* or other sub-division make no joint claim to exercise such right, to such land-owners severally;

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(e) fifthly, to any landholder of the village;

(f) sixthly, to the tenants (if any) with rights of occupancy in the property;

(g) seventhly, to the tenants (if any) with rights of occupancy in the village :

Provided that when the property is land, to the trees standing on which the Government is entitled, such right belongs to the Lieutenant-Governor of the Punjab in preference to all other persons.

Where two or more persons are equally entitled to such right the vendor or mortgagor may determine which of them shall exercise the same.

Nothing in the former part of this section shall be deemed to affect the Punjab Tenancy Act, 1887, section 53; but if a landlord refuse or neglect to exercise the right conferred on him by that section, such right belongs, first, to the tenants (if any) with rights of occupancy in the property concerned, and, secondly, to the tenants (if any) with right of occupancy in the village in which such property is situate".

It is not necessary to give the rest of the sections. They relate to adjectival and procedural matters. The old section 20 of the Act of 1872 was retained. It will be notified that there were no exceptions and even sales made under a decree of Court were subject to pre-emption.

These amended sections of the Punjab Laws Act continued in force till 1905 when they were repealed by the Punjab Pre-emption Act of 1905. This Act dealt with rights of pre-emption in sections 11 to 15 which ran as follows :—

"11. No person other than a member of an agricultural tribe shall have a right of

pre-emption in respect of agricultural land; provided that, if the vendor is not a member of an agricultural tribe, the right of pre-emption may be exercised also by a member of the same tribe as the vendor who is recorded as the owner or as the occupancy tenant of agricultural land in the estate in which the property is situate and has been so recorded for twenty years previous to the date of sale either in his own name or in that of any agnate who has previously held his agricultural land.

12. Subject to the provisions of section 11, the right of pre-emption in respect of agricultural land and village immovable property shall vest,—

(a) in the case of the sale of such land or property by a sole-owner or occupancy tenant, or, when such land or property is held jointly, by the co-sharers, in the persons who but for such sale, would be entitled to inherit the property in the event of his or their decease, in order of succession ;

(b) in the case of a sale of a share of such land or property held jointly,—

firstly—in the lineal descendants of the vendor in the male line in order of succession ;

secondly—in the co-sharers, if any, who are agnates, in order of succession;

thirdly—in the person described in sub-clause (a) of this subsection and not hereinbefore provided for ;

fourthly—in the co-sharers (i) jointly, (ii) severally ;

(c) If no person having a right of pre-emption under sub-clause (a) or sub-

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clause (b) seeks to exercise the right,—

firstly—when the sale affects the superior or inferior proprietary right and the superior proprietary right is sold, in the inferior proprietors, and when the inferior proprietary right is sold, in the superior proprietors ;

secondly—in the owners of the *patti* or other sub-division of the estate within the limits of which such land or property is situate, (i) jointly, (ii) severally ;

thirdly—in the owners of the estate (i) jointly, (ii) severally ;

fourthly—in the case of a sale of the proprietary right in such land or property, in the tenants (if any) having rights of occupancy in such land or property (i) jointly, (ii) severally ;

fifthly—in any tenant having a right of occupancy in any agricultural land in the estate within the limits of which the property is situate.

Explanation I. In the case of a sale of a right of occupancy, clauses (a), (b) and (c) of this subsection, with the exception of sub-clause *fourthly* of clause (c), shall be applicable.

Explanation II. In the case of sale by a female of property to which she has succeeded through her husband, son, brother or father, the word 'agnates' in this section shall mean the agnates of the person through whom she has so succeeded.

13(I). The right of pre-emption in respect of urban immovable property shall vest—

firstly—in the co-sharers in such property (if any), (i) jointly, (ii) severally ;

secondly—if such property consists of the site of a building or other structure, in the owner of such building or structure ;

thirdly—if such property consists of a floor of a building then to the person or persons to whom the adjoining floor or floors belong ;

fourthly—in such person as has common staircase with the vendor ;

fifthly—in such person as has common entrance from the street with the vendor ;

sixthly—in a neighbour whose property is servient, the property alienated being dominant, and vice versa ;

seventhly—in a person whose immovable property is adjacent to such property.

(2) No right of pre-emption shall exist in respect of the sale of, or the foreclosure of a right to redeem—

(a) a shop, *serai*, or *katra*, or

(b) a *dharamsala*, mosque or other similar building.

14. Where several pre-emptors are found by the Court to be equally entitled to the right of pre-emption, the said right shall be exercised—

(a) if they claim as co-sharers in proportion among themselves to the shares they already held in the property ;

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(b) if they claim as heirs, whether co-sharers or not, in proportion among themselves to the shares in which but for such sale they would inherit the property in the event of the vendor's decease without other heirs ;

(c) if they claim as owners of the *patti* or estate, in proportion among themselves to the shares which they would take if the property were common land in the *patti* or estate ;

(d) if they claim as occupancy tenants, in proportion among themselves to the areas respectively held by them in occupancy right ;

(e) in any other case by such among them as the vendor may determine.

15. In the case of a foreclosure of the right to redeem village immovable property, the provisions of sections 12 and 14 and in the case of a foreclosure of the right to redeem urban immovable property, the provisions of sections 13 and 14 shall be construed by the Court with such alterations, not affecting the substance, as may be necessary or proper to adapt them to the matter before the Court".

Section 4 defined the right of pre-emption which provided as follows :—

"4. The right of pre-emption shall mean the right of a person to acquire agricultural land or village immovable property or urban immovable property in preference to other persons, and it arises in respect of such land only in the case of sales and in respect of such property only in the case of sales, or of foreclosures of the right to redeem such property."

"Nothing in this section shall prevent a Court from holding that an alienation purporting to be other than a sale is in effect a sale".

Under section 6 it was stated that the right of pre-emption shall exist in respect of urban immovable property in any town or sub-division of a town when a custom of pre-emption is proved to have been in existence in such town or sub-division at the time of the commencement of this Act, and not otherwise. There were certain exceptions. No right of pre-emption was recognised in any cantonment. There was no right of pre-emption in respect of sales made by or to Government or by or to any local authority or to any company under the provisions of the Land Acquisition Act.

One of the principal features of the Act of 1905 was the introduction of exceptions. Another feature was that the right was particularised as existing amongst the persons in order of succession. The third feature was to bring the pre-emption law in line with the Alienation of Land Act, which had been passed in 1900. By the latter Act, the Legislature created agricultural tribes and the Pre-emption Act was made to further the object of the Punjab Alienation of Land Act, 1900. (This Alienation of Land Act, 1900, has now been repealed by the President as being at variance with the Constitution). The Pre-emption Act of 1905, was repealed and was replaced by the Punjab Pre-emption Act, 1913.

In the Act of 1913, section 4 of the Act of 1905, was repeated and the exceptions were generally more or less the same. But the rights of persons in whom the right of pre-emption vested were regulated by sections 12 to 18, which were as follows :—

"12. In respect of all sales and foreclosures completed before the commencement of this Act, the right of pre-emption shall be determined by the provisions of this Act; but in respect of all sales and fore-

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closures completed before the commencement of this Act, the right of pre-emption shall be determined by the law in force at the time of such completion.

13. Whenever according to the provisions of this Act, a right of pre-emption vests in any class or group of persons, the right may be exercised by all the members of such class or group, jointly, and, if not exercised by them all jointly, by any two or more of them jointly, and, if not exercised by any two or more of them jointly, by them severally.

14. No person other than a person who was at the date of sale a member of an agricultural tribe in the same group of agricultural tribes as the vendor shall have a right of pre-emption in respect of agricultural land sold by a member of an agricultural tribe.

15. Subject to the provisions of section 14, the right of pre-emption in respect of agricultural land and village immovable property shall vest—

(a) where the sale is by a sole owner or occupancy tenant or in the case of land or property jointly owned or held, is by all the co-sharers jointly, in the persons in order of succession who but for such sale would be entitled, on the death of the vendor or vendors, to inherit the land or property sold ;

(b) where the sale is of a share out of joint land or property and is not made by all the co-sharers jointly,—

firstly—in the lineal descendants of the vendor in order of succession ;

secondly—in the co-sharers, if any, who are agnates, in order of succession ;

thirdly—in the persons not included under *firstly* or *secondly* above, in order of succession, who but for such sale would be entitled on the death of the vendor to inherit the land or property sold ;

fourthly—in the co-sharers ;

(c) if no person having a right of pre-emption under clause (a) or clause (b) seeks to exercise it,—

firstly—when the sale affects the superior or inferior proprietary right and the superior right is sold in the inferior proprietors, and when the inferior right is sold in the superior proprietors ;

secondly—in the owners of the *patti* or other sub-division of the estate within the limits of which such land or property is situate ;

thirdly—in the owners of the estate ;

fourthly—in the case of a sale of the proprietary right in such land or property, in the tenants (if any) having rights of occupancy in such land or property ;

fifthly—in any tenant having a right of occupancy in any agricultural land in the estate within the limits of which the land or property is situated.

Explanation. In the case of sale by a female of land or property to which she has succeeded on a life tenure through her husband, son, brother or father, the word 'agnates' in this section shall mean the agnates of the persons through whom she has so succeeded.

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16. The right of pre-emption in respect of urban immovable property shall vest,—

firstly, in the co-sharers in such property, if any ;

secondly, where the sale is of the site of the building or other structure, in the owners of such building or structure ;

thirdly, where the sale is of a property having a staircase common to other properties in the owners of such properties ;

fourthly, where the sale is of property having a common entrance from the street with other properties, in the owners of such properties ;

fifthly, where the sale is of a servient property, in the owners of the dominant property, and vice versa ;

sixthly, in the persons who own immovable property contiguous to the property sold.

17. Where several pre-emptors are found by the Court to be equally entitled to the right of pre-emption the said right shall be exercised—

(a) if they claim as co-sharers, in proportion among themselves to the shares they already hold in the land or property ;

(b) if they claim as heirs, whether co-sharers or not, in proportion among themselves to the shares in which but for such sale they would inherit the land or property in the event of the vendor's decease with other heirs ;

(c) if they claim as owners of the estate or recognised sub-division thereof, in proportion among themselves to the shares which they would take if the land or property were common land in the estate or the sub-division as the case may be ;

(d) if they claim as occupancy tenants, in proportion among themselves to the areas respectively held by them in occupancy right ;

(e) in any other case, by such pre-emptors in equal shares.

18. In the case of a foreclosure of the right to redeem village immovable property, the provisions of sections 15 and 17 and in the case of a foreclosure of the right to redeem urban immovable property, the provisions of section 16 and 17 shall be construed by the Court with such alteration not affecting the substance, as may be necessary or proper to adapt them to the matter before the Court ".

It will be noticed that no substantial change was made in the Act of 1913, regarding persons who were given the right of pre-emption.

In 1928, a procedural change was effected by Act II of 1928 by enacting section 28-A, which ran as follows :—

" 28-A. (1) If in any suit for pre-emption any person bases a claim or a plea on a right of pre-emption derived from the ownership of agricultural land or other immovable property, and the title to such land or property is liable to be defeated by the enforcement of a right of pre-emption with respect to it, the Court shall not decide the claim or plea until

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the period of limitation for the enforcement of such right of pre-emption has expired and the suits for pre-emption (if any) instituted with respect to the land or property during the period have been finally decided.

(2) If the ownership of agricultural land or other immovable property is lost by the enforcement of a right of pre-emption, the Court shall disallow the claim or plea based upon the right of pre-emption derived therefrom."

In 1944 another procedural change was effected by the enactment of section 21-A, which ran as follows :—

"21-A. Any improvement, otherwise than through inheritance or succession, made in the status of a vendee—defendant after the institution of a suit for pre-emption shall not affect the right of the pre-emptor-plaintiff in such suit".

The Judges of the Punjab Chief Court were really the founders of Punjab custom. Custom in the Punjab is an entirely judge-made law. The Judges were greatly influenced by the works of Sir Henry Mayne on 'Village Communities'. The Judges found that men residing in the Punjab villages had much the same sort of outlook on life as Nietzsche is supposed to have, viz., "Man shall be trained for war and women for the recreation of the warrior; all else is folly". The Judges of the Punjab Chief Court found everything against women and one of them remarked in his judgment that a woman was a mere conduit pipe. That attitude changed in the Lahore High Court which Court came to recognise that statements of custom were made to Settlement Officers in the absence of women and that that fact had to be remembered when their rights were before the Courts for adjudication. The result was that daughters' rights have now come to be recognised; those of a sister are in process of evolution.

Regarding pre-emption, observations of some notable Judges are worth reproduction. Plowden, J., in *Dilsukh Ram* v. *Nathu Singh and Sita Ram* (1), said the following regarding pre-emption at page 354 :—

"No member of the proprietary group is competent to sell his share, or land representing that share, to a stranger to the village, of his own sole will and irrespective of the assent of the remainder of the co-sharers. That is to say, everyone of the co-sharers is under an obligation to all the rest to abstain from selling to a stranger irrespective of their assent. The obligation is due by each to all the rest; and the right viewed generally, is in all the rest against each".

Later he said:—

" What then is the source of the obligation to which the right corresponds? The cause of it is that the subject of sale is part of a thing which is viewed as conjointly held by a group, of which the vendor is a member. It is, in the absence of agreement to the contrary, a necessary consequence of this view that a member of the group should be incompetent to sell part of the thing conjointly owned by the group irrespective of their assent. The view which is commonly taken of the relation betwen a group of proprietors in a village community and the land of the village community in its entirety is that the land is deemed still to belong to the group, notwithstanding it has been, in part, distributed into parcels for separate enjoyment by portions of the group. The unity of the village, and of the proprietary body as an individual local group, is deemed to continue unaffected by the distribution of the land for purposes of enjoyment among the members of the group.

(1) 98 P.R. 1894 at p. 354

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The incapacity of the holder of what is viewed as part of a larger and entire thing to make an effectual disposition of the part he holds, irrespective of the assent of other persons jointly interested in that whole, is now quite familiar to us. We see it in the incapacity of a sonless man to dispose, except for necessity, of portion held by him of land which has devolved from a common ancestor, irrespective of the assent of his near *warisan ek jaddi*. Here the incapacity arises out of the relation existing between them and him as composing a single family group, *qua* all the land descended from the ancestor, which land is deemed to be family land. Similarly in the village community the incapacity arises from the relation between each individual member and the rest of the proprietary body as constituting together a single group, *qua* the land of the village."

Shah Din, J., in *Sanwal Dass* v. *Gur Parshad* (1), said as follows at pages 389 to 391 :—

"The right of pre-emption being connected with the Law of Property it is impossible to understand its true nature and origin without reference to the early history of property in land in this province; in other words, without reference to the history of the genesis and growth of village communities, which are a prominent feature of land tenure in this part of the country. As Sir Henry Mayne has observed in his *Early History of Institutions* 'the collective ownership of the soil by groups of men either in fact united by blood relationship or assuming that they are so united, is now entitled to take rank as an ascertained primitive phenomenon'; and it has been truly remarked that the Punjab affords a conspicuous instance of the general

(1) 90 P.R. 1909

truth of this observation. There can be little doubt that, so far at least as this province is concerned, joint ownership of land by an aggregate of individuals known as a 'tribe' is the really archaic institution which preceded by long steps the institution of separate ownership as known in modern times. The personal relations *inter se* of the members of each tribe were inextricably mixed up which proprietary rights in the land held in joint ownership, and such was the strength of tribal feeling against any outside influence being allowed to break the cohesion, born no doubt of the idea of common descent, of this land holding group that for a long time the very idea of any smaller group of individuals or of any one member of it dealing on their or his own account with any portion of the soil was strenuously excluded. In course of time the inevitable process of tribal disintegration gave rise to 'village communities—within the tribe, which shares in a slightly less intense form all or most of the characteristics of the tribe, and these in their turn gradually split up into joint families'. The transition from joint ownership of the land to individual property therein, as evidenced by successive stages in the development of village communities, is very clearly indicated by the three dominant forms of land tenure which exist side by side up to the present moment in the Punjab, viz., *Zamindari*, *Pattidari* and *Bhaichara* tenures. In the *Zamindari* tenure, undivided proprietary right is its distinguishing characteristic. The land is held as a joint estate, in the whole of which all the sharers have a common right without any separate title to distinct lands forming part of the estate. In the *Pattidari* tenure disintegration has begun; but the communal origin of pro-

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perty still regulates its distribution and the chief public duty connected with it. The lands are divided and held separately but they are divided on shares based either on personal descent or on the proportions of the once common stock which particular families have either held from the outset or appropriated by prescription. The land and revenue are, therefore, said to be divided upon ancestral or Customary shares, subject to succession by the law of inheritance. In a pure *Bhaichara* estate shares have become quite extinct, a certain defined extent of land is in the possession of each proprietor, and neither in fact nor in theory is the holding part of a common stock.

The institution of the right of pre-emption as known to us in the Punjab is intimately associated with the constitution of the 'village community' in its graduated forms as explained above, and the rules originally adopted by custom in regard to that right which have subsequently been embodied in Legislative enactments exhibit in an interesting manner the main lines of the connection between that right in its application to property in land and, the actual, probable or assumed relationship by blood among the members of the proprietary body that constitute a village community. I allude here to the prescribed order in which, according to the entry in a typical *Wajib-ul-arz* or *Rivaj-i-am,* the right of pre-emption vests in the members of a village proprietary body, which order was, in a slightly modified form, adopted in the repealed provisions of the Punjab Laws Act relating to pre-emption, and which has been reproduced, again in an altered form, in section 12 of the Punjab Pre-emption Act. It seems to me, therefore,

that in its nature and origin the right of pre-emption is nothing more nor less than a right conferred upon and exercisable by each member of the proprietary group primarily with the object of preserving the integrity of the village community by preventing any interference with the course of devolution of land in strict conformity with customary rules of inheritance. *That that is not the whole object and effect of the custom of pre-emption at the present day, I freely admit,* but in my humble opinion the existing aspect of this institution, which pre-supposes a power of transfer on the part of the owner of the land, is one which has gradually developed under the inevitable influence of the successful assertion of individual right in property, and is by no means sufficient to destroy or materially modify its original character".

At page 393 Shah Din, J., quoted Roe, J., in *Gujar* v. *Sham Das* (1), as follows :—

"Amongst the villages, some to this day preserve their original form of a joint proprietary body; in others and these are the majority, the common land or a large portion of it has been permanently divided amongst families, and in some cases amongst individuals. But even where the sub-division has proceeded furthest, the power of dealing with the land is not absolutely free. It is always restricted by rules of pre-emption, which enable all members of the community to exclude strangers, and it is universally admitted that a proprietor who has male lineal heirs cannot, except for necessity, alienate without their consent".

(1) 107 P.R. 1887 (F.B.)

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At page 394, Shah Din, J. quoted Roe and Rattigan's Tribal Law as follows :—

> "Pre-emption is merely a corollary of the general principles regulating the succession to and power of disposal of land. In these matters the holder of the estate for the time being is subject, generally speaking, to the control of the group of agnates who would naturally succeed him, his *warisan yak jaddi*. They can, as a general rule, altogether prevent alienations by adoption or gift, or by sale for the holder's own benefit, it would be only a natural rule that, when a proprietor was compelled by necessity to sell, these agnates shou'd be offered the opportunity of advancing the money required and thus saving what is really their own property," (page 83).

Again at page 26, it is said :—

> "Pre-emption is the last means by which the natural heirs can retain ancestral property in the family when they are unable to altogether prevent an act of alienation by the holder of the estate".

At pages 412-413, Shah Din, J., said as follows :—

> "Considered from a slightly different point of law, pre-emption under the Muhammadan Law postulates the existence of a free power of transfer and is intended only to neutralize the evil effects of such power taken in connection with the privacy of family life and with the minute subdivision of property resulting from the unfettered operation of the law of inheritance; while customary pre-emption pre-supposes and springs from a state of society in which the owner's powers of transfer of property is at first absent and in later times very much restricted,

and *represents a convenient compromise between the conservative feeling of the village community struggling to keep intact the nexus of joint ownership and kinship in blood, on the one hand, and the inevitable tendency towards social disintegration and the growth of individual property, on the other.* Pre-emption under the Muhammadan Law is, properly speaking, as evidenced by its actual working in practice, a town institution ; while customary pre-emption, as known to us in the Punjab, is in its inception a village institution, intimately connected with the origin and development of village communities."

I have quoted Shah Din, J., at some length in order to bring out all the arguments that could be urged in favour of the law of pre-emption being valid under the custom of the Punjab.

In the Peshawar Judicial Commissioner's Court in *Mohammad Ali Khan* v. *Makhan Singh* (1), Pipon, J. C., talking of pre-emption took much the same view as Shah Din, J., and said as follows :—

"The Law of Pre-emption may be said to be derived from three sources, Muhammadan Law, the necessities of the existence of the racial communities, and public and private convenience. There is also no doubt that the framers of the Acts of 1905 and 1913 were not guided purely by the principles of pre-emption to be discovered from Muhammadan Law, or from archaic custom, but also by consideration of public policy and convenience as they existed at the time when those Acts were passed. Now, it is very easy to realise that one of the main reasons for the acceptance of a pre-emptive right is the vital necessity felt by every community, when it first becomes homogeneous, to preserve to itself its essential homogeneity. To

(1) 73 I.C. 855

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allow landed estate to pass into the hands of strangers is not only to deprive the community of the valuable asset in which its communal right has not been entirely abandoned, but also to entail the dissolution of its internal organisation by the engrafting of strangers upon the common body. Such a necessity is predominant in the case of transfrontier Pathans outside the strict limits of British India, who are still governed purely by Tribal Law and who are in a continual state of warfare with their neighbours which makes the preservation of their essentially homogeneous character a matter of life and death. But the same considerations even now prevail, though to a limited extent, among tribes actually domiciled within British territory and no longer subject to Tribal Law. The necessity is still felt among them for the rigid exclusion of strangers from among the proprietary and governing body of the tribe. The same consideration may be said to exist, though in a still more limited degree, among nearly all agricultural communities in the north of India. It is also easy to realise how important was the recognition of this principle among the communities for whom the Law of Islam was originally framed in view of their social, religious and military organization. For all these reasons the first right of pre-emption in the case of agricultural land or of the sites of agricultural villages accrues primarily to the relatives of the original owner and after them to other members of the proprietary body. On the other hand pre-emption in towns, though the principles may have originally been evolved from Muhammadan Law, depend at the present time purely on the consideration of public and private decency and convenience. Here it is not relationship

but contiguity which is of prime importance. Apart from the origin of the custom, it is tolerably clear that the framers of the modern Pre-emption Acts were primarily guided by considerations of the kind which I have just enumerated ".

We in India are far removed from the Pathan way of life. Custom apart, the Law of Pre-emption was really introduced into India by the Muslims. As early as 8th August 1867, in a Division Bench Judgment of the Calcutta High Court *Nugrut Reza* v. *Umbul Khyr Bibe* (1), Phear, J., said :—

" The right to pre-emption is very special in its character. It is founded on the supposed necessities of a Muhammadan family, arising out of their minute subdivision and inter-division of ancestral property; and as the result of its exercise is generally adverse to public interest, it certainly will not be recognised by this Court beyond the limits to which those necessities have been judicially decided to extend. "

In a well-known case considered by a Full Bench of the Allahabad High Court in 1885 *Gobind Dayal* v. *Inayatullah* (2), Mahmood, J., when discussing pre-emption said at page 782 that pre-emption was closely connected with Muhammadan Law of inheritance. At page 782 Mahmood, J., elaborated it as follows:—

" Under these circumstances, to allow the Muhammadan Law of inheritance, and to disallow the Muhammadan Law of pre-emption, would be to carry out the law in an imperfect manner; for the latter is in reality the proper complement of the former, and one department of the law cannot be administered without taking cognizance of the other. Among Aryan systems, which favour

(1) 8 W.R 309
(2) I.L.R. 7 All. 775

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the notion of the inchoate rights of heirs, the rules of primogeniture, the *jus representations*, and the exclusion of females from inheritance, except in special cases, the property is not so completely split up on the owner's death; but, under the Muhammadan system, upon a man's death, not only his children are entitled to succeed to his property, but also his wife, mother, father, and other heirs, according to well-defined rules; and I myself know of a case in which after a Muhammadan's death, his property was divided into twenty-three shares, each heir having a separate share in every parcel. If such a law of inheritance were not mitigated by the law of pre-emption, the result would be serious inconvenience, and possibly even disturbance. It is hardly necessary to add that the *zenana* system, which the Muhammadans regard as based upon religious texts, and which emphatically prohibits invasion of the privacy of a domestic habitation, lends an importance to the pre-emptive-right, even when claimed *ex jure vicinitatis*, which it would not perhaps have otherwise possessed".

Mahmood, J. had persuaded himself to come to the conclusion that Muhammadan rule of pre-emption could, at least by a liberal construction, be described as a 'religious usage or institution' within the meaning of the Bengal Civil Courts Act (See page 784). The expression "religious usage or institution" as given in the Bengal Civil Courts Act is identical with that expression as used in section 5 of the Punjab Laws Act. At page 796 Mahmood, J., said :—

"The law of pre-emption is essentially a part of Muhammadan Jurisprudence. It was introduced into India by Muhammadan Judges who were bound to administer the Muhammadan Law.

Under their administration it became, and remained for centuries, the common law of the country, and was applied universally both to Muhammadans and Hindus, because in this respect the Muhammadan Law makes no distinction between persons of different races or creeds. A *Musalman and a Zimmee* being equally affected by principles on which *shafa* or right of pre-emption is established and equally concerned in its operation, are, therefore, on an equal footing in all cases regarding the privilege of '*shafa*'. (*Hamilton's Hedaya*, Vol. III, page 592). What was the effect of this ? In course of time, pre-emption became adopted by the Hindus as a custom ".

Mahmood, J., in his judgment quoted Dr. Jolly of the University of Warzburg in Germany, who has recently acted as the Tagore Professor of Hindu Law at the University of Calcutta. The question is at page 788 and runs as follows :—

"The only trace of pre-emption in the Hindu Law which I am aware of occurs in a text quoted in the *Mitakshara* and other standard law-books. It is as follows :—

Transfers of landed property are effected by six ways : by consent of fellow-villagers, kinsmen, neighbours, and co-parceners, and by gift of gold and water.

This text indicates clearly the existence in the early period of the Hindu Law of a feeling that a transfer of landed property is not valid unless the neighbours, fellow-villagers, and others who are but remotely concerned with it should have given their consent to its being effected. These persons might, therefore, be supposed perhaps to have been invested with a right of pre-emption. Whatever notions may have been prevalent

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on this subject in the early period of Hindu Law, this much is clear, that the compilers of those commentaries and digests of Law on which the modern law is based did not approve of any sort of pre-emption. Thus the *Mitakshara*, in dealing with the above text, deprives it entirely of such legal significance as may have once belonged to it. The consent of fellow-villagers, according to the *Mitakshara*, is required for the publicity of the transaction merely, but the contract is not invalid without their consent. The consent of neighbours tends to obviate future disputes concerning boundaries. The consent of kinsmen and co-parceners (*Dayada*) is indispensable when they are united in interest with the vendor. If they are separate from him, their consent is useful, because it may obviate any future doubt as to whether they are separated or united, but the want of their consent does not invalidate the transaction. The gift of gold and water serves to ratify the transfer of property (see Colebrooke's *Mitakshara*, 1.230-232). This interpretation of the *Mitakshara* may be viewed as an instance of the way in which the Indian commentaries used to dispose of obsolete laws. At the same time, it shows clearly that anything approaching to pre-emption was entirely foreign to the idea of such an eminent authority as Vijnanesvara, the author of the *Mitakshara*. Nor is there any other trace of pre-emption in the Hindu Law books. The *Tankas*, generally speaking, have never been recognized as authoritative law-books in any sense of the word."

Their Lordships of the Privy Council in the advice given by them in 1912 in *Jadu Lal Sahu* v.

Janki Koer (1), said at page 921 that "the law of pre-emption, under which the plaintiff claims the right, was introduced into India with the Muhammadan Government." They quoted Sir Barnes Peacock, C. J., at page 922 from *Fakir Rawot* v. *Emambaksh* (2),

> "Such custom, when it exists, must be presumed to be founded on and co-extensive with the Muhammadan Law upon that subject, unless the contrary be shown."

In another judgment of the Privy Council, *Ram Dulari* v. *Balak Ram* (3), Sir John Edge, who delivered their Lordships' judgment in 1914 said as follows at page 140 :—

> "Pre-emption in village communities in British India had its origin in the Muhammadan Law as to pre-emption, and was apparently unknown in India before the time of the Moghul rulers. In the course of time customs of pre-emption grew up or were adopted among village communities. In some cases the sharers in a village adopted or followed the rules of the Muhammadan law of pre-emption, and in such cases the custom of the village follows the rules of the Muhammadan Law of pre-emption. In other cases, where a custom of pre-emption exists, each village community has a custom of pre-emption which varies from the Muhammadan Law of Pre-emption and is peculiar to the village in its provisions and its incidents. A custom of pre-emption was doubtless in all cases the result of agreement amongst the shareholders of the particular village, and may have been adopted in modern times and in villages which were first constituted in modern times. Rights of pre-emption have in some provinces been given by

(1) I.L.R., 39 Cal. 915.
(2) (1863) B.L.R Sup. Vol. 35 (F.B.)
(3) I.L.R. 37 All. 120.

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Acts of the Indian Legislature. Rights of pre-emption have also been created by contract between the sharers in a village. *But in all cases the object is, as far as is possible, to prevent strangers to a village from becoming sharers in the village.*"

Whatever the origin of pre-emption may have been it became statute law in the Punjab. In *Karam Bux* v. *Nand Lal and others* (1), Howall, J., said as follows at page 361 :—

"It cannot be doubted that the object and purpose for which the right of pre-emption was recognised and enacted in Act IV of 1872 was to protect the compactness of village communities and in towns to respect native feelings as regards caste exclusiveness, the seclusion of private family life, and so forth, not to interfere with private rights of contract or the disposal of property. *It has not, however, been so limited in the Act* that the right can only be exercised when some consideration connected with caste seclusion, re-union of divided tenements, or convenience regarding privacy, joint staircase, access to water-supply, drainage or other such matters, is established. It must often happen that the right is shown to exist, and may be exercised merely in the desire to get a bargain, or by a rich man to increase his property. Although, as in the present case, this object is obvious, still the pre-emptor is entitled, if he really comes under the requisite conditions stated in the law".

Even Shah Din, J., while holding in *Sanwal Das* v. *Gur Parshad* (2), that the right of pre-emption was conferred with the object of preserving the integrity of the village community was constrained to say "That that is not the whole object and effect of the custom of pre-emption at the present day, I freely admit". He, however, said that the

(1) 103 P.R. 1889
(2) 90 P.R. 1909 at pages 390-1

existing aspect of the institution of pre-emption was one which had been gradually developed under the inevitable influence of successful assertion of individual right in property and was by no means sufficient to destroy or materially modify its original character. He was of the view that customary pre-emption represented a convenient compromise between the conservative feeling of the village community struggling to keep intact the nexus of joint ownership and kinship in blood, on the one hand, and the inevitable tendency towards social disintegration and the growth of individual property, on the other". At page 452 of the same ruling Shah Din, J., said that pre-emption had its roots in the early stages of development of property in land and was intimately connected with social sentiments which still retained something of their original vigour. Shah Din, J., was delivering his judgment in 1909. Much water has flown under the bridges since then.

It is well to remember in this connection what that vigorous exponent of village custom, Plowden, J., had to say in 1894. I quote the following from his ruling in *Dil Sukh Ram* v. *Nathu Singh and Sita Ram* (1), a ruling from which I have already quoted. At page 359 Plowden, J., made the following significant observations :—

> "For the purpose of the customary law the village community is, essentially, in its most simple form, a detached group of families, usually kindred families, united by local association. The detached group appropriates a portion, more or less undefined, of the earth's surface to its own use and enjoyment, and thereby this area and this group acquire each an individuality of its own. So long as the conception of the unity of the village community, founded at its inception upon truth, continues to retain its hold on the minds of the landholders, the land is not at the absolutely free disposal of the landholders. Where the power of free disposal of the land does not exist, there in all probability, if not

(1) 98 P.R. 1894

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necessarily, subject to a custom of pre-emption, for the causes of a custom of pre-emption exist. What land is subject to the custom, what kinds of disposition are not free, of what persons the assent is needed, and what is the order of priority among those who have a right—all these are matters which vary from time to time with the development of the community and which may be open to doubt, especially during a period of transition between two well marked stages of development. The existence of the custom, and if I may say so, the dimensions or extent of the custom, in a particular community at a particular time, are always questions of evidence. In earlier stages of development, the power of disposition, generally viewed, is under more restraint relatively than in later stages. This power, like other powers, grows and expands from small beginnings. The cohesion of the family group and the conception of family property (within the community) greatly retard the expansion of the power of disposition and the disintegration of the local group. When the individual has succeeded in detaching himself from both the family group and the local group so completely that he is free to dispose of the land he holds, without assent of either descendant, kinsman or neighbour being needed, individual ownership is established and the right of pre-emption by local custom is obsolete, though an analogous right may exist, created by contract or otherwise than by custom".

These are very important observations coming in 1894 from a Judge of the eminence of Plowden, J. The remaks of Chatterji, J., made in 1906 are even more important. He said that Customary Law, like any other law, is a branch of sociology and must be in a fluid state and take

cognizance of ethical and legal notions in the community in which it is in force. The following is a quotation from his judgment taken from pages 406 and 407 of *Daya Ram* v. *Sohel Singh* (1) :—

> "Doubtless in old times, when there was no strong Central Government, the village owners were often able to prevent men from another village, agnates or non-agnates, from inheriting their kinsmen's land in the village, but this was not law but defiance of law, and could not create a binding custom. Difference of allegiance was an impediment to succession in old times, but this barbarous rule has been abolished in all civilized countries. We should be chary of giving the sanction of judicial authority to practices based on violence and lawlessness by raising them to the dignity of custom.
>
> We must also recognise that Customary Law, like other law, is a branch of sociology and must be in a fluid state and take legal notions in the community in which it is in force".

In *Dhanna Singh* v. *Gurbakhsh Singh and others* (2), Rattigan, J., had said at page 441 that—

> "The right of pre-emption is a right of a most exceptional and burdensome nature, and that as it infringes upon the owner's ordinary rights of dealing with his property, it should not be decreed unless and until the claimant has conclusively established his right thereto".

In Sir Shadi Lal's book on pre-emption it is stated that "the right of pre-emption in its essence is a very weak right. It is a right of a most exceptional and burdensome nature, and as it impinges upon the owner's ordinary rights of dealing with his property, it should not be decreed unless and until the claimant has strictly and conclusively established his right thereto (91 P.R. 1909 at page 441, per Rattigan, J.). With the single

(1) 110 P.R. 1906
(2) 91 P.R. 1909

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exception of Mr. Justice Shah Din, all the learned Judges of the Lahore High Court are unanimous in holding that the right of pre-emption is a very invidious right, which constitutes an invasion of the principle of free contract. Some Judges have gone to the length of describing it as a right of a 'piratical' nature. In towns, at any rate, it is a distressful anachronism and impinges at times very hardly upon the right of an owner to sell his property, to his best possible advantage.

Such remarks continued to be made. In his foreword to the Tenth Edition of Rattigan's Digest of Customary Law, Le Rossignol, J., wrote in 1925—

> "Custom is changing with the change in the circumstances of the people, their standard of education and their material progress, and many items of expenditure which in earlier years would have been regarded as 'unnecessary' now receive the sanction of general approval * * *. Pre-emption still clogs liberty of contract, but has a very exiguous customary basis, being now in the main regulated by statute. In towns, at any rate, it is a distressful anachronism, and it is not extravagant to hope that some patriot at not distant date will introduce a bill for its total abolition".

Rattigan, J., in *Waryam Singh* v. *Mehtab Singh and others* (1), had said that :—

> "A pre-emption is given a very special and peculiar right which overrides the ordinary rights of contract".

In comparatively recent times, Mr. Justice Din Mohammad said as follows in *Zorawar Singh* v. *Jasbir Singh* (2) :—

> "In a case of pre-emption, where artificial rights brought into existence by the Legislature are used to defeat the legal rights of persons dealing with property, no equities are involved".

(1) 21 P.R. 1915
(2) A.I.R. 1938 Lah. 606 at page 608

Mr. Justice Iqbal Ahmad, in *Durga Singh* v. *Girwardutt Joshi and others* (1), said at page 193:—

> "It is to be remembered that the right of pre-emption is a very weak right. It interferes with the freedom of contract and is opposed to a progressive state of society".

Mr. Justice Vivian Bose, in *Keshav Yeshwant Koli* v. *Krishna Balaji Mahar and others* (2), said at page 108:—

> "The right of pre-emption is a very special right. It displaces ordinary legal rights and places restrictions upon normal rights of conveyance".

Let us now consider the changes that have taken place since the last century when Judges of the Chief Court were dealing with pre-emption. It was then the policy of Government and of the Legislature to keep custom intact. The intention was to preserve a static society. Since 1947 vast changes in the population of Punjab have taken place. There are practically no Muslims left in this State except in parts of Gurgaon District or thereabouts. Nearly every village of East Punjab now contains persons who have migrated from West Punjab. The law of pre-emption is an unprogressive medieval law brought into this country by Muhammadans because it was a part of their law and also probably because they wanted to live in seclusion as the governing class of the country. The law of pre-emption prevented admixture of classes and promoted living in water-tight compartments. It is, as I have said before, a static law. It does not allow society to progress. It regards people who are not neighbours or relations as strangers and, therefore, undesirable. In that respect it is fundamentally opposed to the changes which have taken place since the partition in the constitution of the population of this State. It is fundamentally opposed to the preamble of the Constitution of India which requires equality of status and of opportunity to be given to all and to promote amongst everyone fraternity assuring the

(1) A.I.R. 1938 All. 191
(2) A.I.R. 1939 Nag. 107

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dignity of the individual and the unity of the nation. The law of pre-emption cuts at the root of providing the equality of opportunity to every one, and as it looks upon others who are not regarded in a favourable right by the law of pre-emption as strangers it hits on the unity of the nation.

Under clause (1) of Article 13 of the Constitution "all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall to the extent of such inconsistency, be void". Under clause (2), the State cannot make any laws which even abridge the fundamental rights. Under clause (3) of this Article "law" includes custom or usage having in the territory of India the force of law. And "laws in force" include laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas. Under Article 14, the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Under Article 15, the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Under the second clause of this Article, no citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainments; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

The third clause of this Article says that nothing in this Article shall prevent the State from

making any special provision for women and children. The fourth clause, which was added by the First Amendment of the Constitution in 1951, says that nothing in this Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. There is no provision to uphold " distressful anachronisms " and laws of " piratical nature ".

The following sub-clauses of clause (1) of Article 19 have to be borne in mind in deciding whether the Pre-emption Act is or is not repugnant to the Constitution. These sub-clauses are—

Sub-clause (*e*) which states that all citizens shall have the right to reside and settle in any part of the territory of India,

Sub-clause (*f*) which states that all citizens shall have the right to acquire, hold and dispose of property, and

Sub-clause (*g*) which says that all citizens shall have the right to practise any profession, or to carry on any occupation, trade or business.

Right of freedom of religion is guaranteed under Article 25, but clause (2) of that Article states that nothing in that Article shall affect the operation of any existing law or prevent the State from making any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice.

Part IV of the Constitution gives 'Directive Principles of State Policy'. Article 37 says that the provisions of Part IV shall not be enforceable by any Court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws. Under

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Article 38 it is stated that the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. Under clause (b) of Article 39 the State shall, in particular, direct its policy towards securing that the ownership and control of the material resources of the community shall be so distributed as best to subserve the common good. Under Article 44 it is provided that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

Law and custom change with the times. Since the British came here a century ago, the physical changes in the East Punjab brought about by railways, posts and telegraphs, by the opening of roads and canals widened to a degree unknown before the mental outlook of the conservative village communities dealt with by Plowden, J. and his followers. The aeroplane in which soldiers and refugees have travelled had made a further change and the recent migration of the population since the partition in 1947 on a scale unknown in history has revolutionized the ideas of even a villager. There is not a village now in Southern Punjab which does not contain a large portion of its population which has come from West Punjab. All the towns have considerably increased in population on account of the emigress from West Punjab. The population of Delhi (old and new combined) has doubled itself with influx of 500,000 non-Muslims. Before this immigration on such a vast scale, the ideas of town-dwellers and to a great extent those of villagers had been influenced by general education and the study of works of English and European poets and authors. The study of foreign history had imparted the ideas of equality and fraternity. These ideas had been intensified by a study of the French and American revolutions and latterly by the Russian and now by the Chinese revolutions. The impacts of the two World Wars broadened the outlook of every soldier who came from a village. Their attitude towards women has changed. There is hardly any *pardah* left in East Punjab.

Their attitude towards persons hitherto regarded as untouchable is changing fast. The freedom from British control brought about a wide change in the mental outlook which led to the promulgation of the Constitution at the end of 1949. Has not law as a branch of sociology to take cognizance of these new notions in the community in which it is in force? Have not the social sentiments Shah Din, J. wrote about undergone vast changes ? One is tempted to say that revolutionary changes have taken place to make the sentiments almost unrecognisable. If the law of pre-emption conflicts with the new ideas promulgated by the Constitution, this obsolete law must give way to it.

There is not the slightest doubt that the law of pre-emption affects both the sale and the acquisition of property. It prevents owners of properties to dispose of their properties in the best possible manner. If there are any hindrances attached to the sale of property such as that property must be first offered to a particular individual or sets of individuals for sale, the value which the owner would get for his property would be affected. Similarly a person who buys property must first look at certain individuals to whom the property must be offered. The Pre-emption Act militates against persons whether Harijans, members of Scheduled Castes or tribes or modern educated young men or others who desire to practise the profession of agriculture, whether by primitive methods or by tractors or other modern agricultural machinery. It abridges their right to acquire agricultural land if the rules of pre-emption regarding sales of village immovable property are to be applied. It does not allow the provisions of Article 48 of the Constitution to be carried out. This Article enacts that the State shall endeavour to organise agriculture and social husbandry on modern and scientific lines. It thus hinders them from practising the profession of agriculture and conflicts with sub-clause (g) of clause (1) of Article 19 which enacts that all citizens shall have the right to practise any profession or to carry on any occupation or trade or business. It is not saved by clause (6) of Article 19 which says that nothing in this sub-clause shall affect the

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operation of any existing law in so far as it relates to or prevent the State from making any law relating to the carrying on by the State or by a corporation owned or controlled by the State, of any trade, business, industry or service whether to exclusion, complete or partial of citizens or otherwise.

Regarding urban immovable property the custom of pre-emption is to be proved. Where it is not proved no particular inconvenience or harm has been noticed and as I have said before pre-emption is a means of producing a static state of society which is not conducive to progress. It is in the words of Le Rossignol, J., a "distressful anchronism".

In my opinion the pith and substance of the law of pre-emption is fear of danger. This law regards persons whose contractual rights it takes away as undesirable aliens if not as potential enemies of the would be vendees who want to step into their shoes regarding the purchase of the land or other property. It prevents admixture of society and does not allow one citizen to have a feeling that every other citizen of the country is his friend and not his potential enemy or an undesirable alien. It prevents the knitting of all citizens into a united whole.

The pre-emption law progressed from 1878 by the introduction of exceptions, because of progress in trade or in religious sentiment these exceptions have prevented the extension of scope of pre-emption to shops, *serais* or *katras* or to *dharamshalas*, mosques or other similar buildings. No pre-emption is allowed in a Cantonment, nor to a sale by or to Government or by or to any local authority or to any company. Progress in the administration of law by Courts is not to be hindered by the law of pre-emption, and sales in execution of decrees by Civil, Criminal or Revenue Courts are outside the scope of the pre-emption law. The provisions of rule 88 of order XXI of the Code of Civil Procedure, which relate to the sale of a share of undivided immovable property have been protected. The State Government has been given power to exempt

areas or lands or to allow limited pre-emption. Does it all not show that the intention was to move with the times and not merely to subserve static and unprogressive village ideas or customs whether indigenous or imported ?

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I have considered with great care the judgment of my learned brothers Harnam Singh and Khosla, JJ., delivered on the 14th July, 1952, in Civil Original No. 106 of 1951. Khosla, J., who wrote the judgment considered sub-clause (f) of clause (1) of Article 19 and held that the right of the vendee was restricted and also held that it could not be denied that the vendor's right is also subject to some minor restrictions. He quoted Mahmood, J., in *Gobind Dayal* v. *Inayatulla* (1), at page 805, where it was stated that the right of pre-emption amounted to a qualified disability, distinctly operating in derogation of the vendor's absolute right to sell the property, and thus affected his title, which would otherwise amount to absolute dominion. Khosla, J., though conceding that rights of the vendor and also of the vendee are restricted by the law of pre-emption came to the conclusion that these rights were saved by clause (5) of Article 19. Khosla, J., summarised the objects of the law of pre-emption as follows :—

(1) To preserve the integrity of the village and the village community.

(2) To implement the agnatic theory of law.

(3) To avoid fragmentation of holdings.

(4) To reduce the chances of litigation and friction and to promote public order and domestic comfort.

(5) To meet the needs of a particular society at a particular stage of the evolution.

After quoting Pipon, J. C., in *Mohammed Ali Khan* v. *Makhan Singh* (2), Khosla, J., appealed to the interest of the general public as saving the law of pre-emption under

(1) I.L.R. 7 All. 775
(2) 73 I.C. 855

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clause (5) of Article 19 of the Constitution. His attention does not appear to have been drawn to sub-clause (g) of clause (1) of Article 19 at all. The interest of the general public is not a static thing. I have endeavoured in the preceding discussion to show that the state of society with which the Judges of the Punjab Chief Court were dealing has changed since the last century. In my opinion because of the changes brought about by political circumstances, by migration and immigration of population on an unprecedentedly vast scale, in material progress in general outlook on account of education and travel and on account of propagation of the ideas of equality and fraternity which it is the object of the Constitution to promote, it cannot be said that the rules of pre-emption subserve the public interest at the present stage of evolution of society here.

The law of pre-emption is a statute law and has been changing since its acceptance by the Punjab Civil Code in 1854. Its objects have not been solely those enumerated by Khosla, J., above. The exceptions are a vast inroad into that law. Sufficient has been said in the previous discussion regarding the first, second and fifth objects enumerated by Khosla, J. Regarding the fourth, even so long ago as the time of *Mitakshara*, Vijnaneswara, its author (as quoted by Dr. Jolly in the passage already given from *Gobind Dayal* v. *Inayat Ullah* (1), while admitting some usefulness of some of the aspects of what is now called pre-emption, never allowed them to assume the dignity of a law and to give them legal sanction. In towns, the custom of pre-emption is not to be presumed and public order and domestic comfort have not appreciably or at all suffered in those towns or in those parts of towns where the custom of pre-emption does not prevail. There are no signs of increase of friction or increase of litigation there. Le Rossignol, J., said that in towns the right of pre-emption was a distressful anachronism. Fragmentation of holdings

(1) I.L.R. 7 All. 775 at p. 788

has not been prevented in villages by the prevalence of the law of pre-emption since a century. Other steps, like the Consolidation of Holdings Act, have to be taken for this purpose. The law of pre-emption, like any other law, impinges on other laws. It cannot be said to have been passed with the special object of preservation of holdings. It was made use of for the purposes of the Alienation of Land Act. This latter Act has been repealed by the President as inconsistent with the present Constitution. Laws have to move with the times. They must be in accordance with the letter and spirit of the Constitution of the country now.

I have given my best consideration to the judgment of my learned brother Khosla, J., and to the arguments on which it proceeds, but with the greatest respect to him I am not persuaded by that judgment to follow him.

I would, therefore, hold that as the pith and substance of the Pre-emption Act, is directed towards attainment of objects inconsistent with the Constitution, it is now void. Professor Holland (as quoted by Shah Din, J.) defined a legal right "as a capacity residing in one man of controlling, with the assent and assistance of the State, the actions of others". In my opinion the present Constitution forbids the assistance of the State to be given to pre-emptors.

An analysis of sections 15 and 16 of the Pre-emption Act, would show that rights of pre-emption are given on three grounds. One of them is the ground of being co-sharers given under clause (b), secondly and fourthly of section 15 or under clause (e) firstly and fourthly of that section and under certain clauses of section 16. The other is the ground of being persons entitled to succeed. This is under clause (a) and under clause (b), firstly and thirdly, of section 15. The third ground is the ground of being co-villagers who are owners in the *patti*, or in the estate, or being tenants anywhere in the village or on account of contiguity or having a common entrance. These last persons are mentioned in clause (a) secondly, thirdly and fifthly of section 15, and in clauses

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fourthly and fifthly of section 16. Enough has been said in the previous discussion that the evolution of thought, the state of progress in the society and the ideas under the Constitution now do not allow the third category to be taken into consideration at all. Coming to the right given in the second category on the ground of succession, the arguments given in the previous discussion for the rejection of the last category apply for the rejection of this category also. The Constitution regards all persons as equal. That a certain individual is one's own, and another is a stranger is now regarded as a consideration affecting small minds. The broad-mindedness preached by the Constitution regards all citizens of the country as belonging to the same family. It will be noticed that succession is a ground under section 15 only and not under section 16. Its non-applicability to towns is a strong argument for its abolition in villages also. Moreover, the right of pre-emption based on succession under section 15 is given in an unreasonable manner as well as in very wide terms. Section 15 puts the co-sharers in a subordinate position to the lineal descendants and heirs. This does not subserve the general public interest of social convenience which appears to me to be the only ground for upholding the right of pre-emption in favour of co-sharers. This subordination was a change made in the Act of 1905 in order to bring it in line with the Alienation of Land Act, so that a co-sharer who may be a member of a so-called non-agricultural tribe may not be able to get the land of his agricultural co-sharer. As the Alienation of Land Act, has been repealed, there is no basis left for this preference. Again, the right of pre-emption given to persons based on succession is given in the widest possible language. A person related to the vendor even in a very remote degree whether as an agnate or as a cognate is given the right. If the relationship had been determined and limited to very near relations and if these relations had been subordinated to the actual co-sharers it may perhaps have been possible to justify the bestowal of rights in the general public interest. In my opinion the law as it stands imposes restrictions on fundamental rights in an unjustifiable manner and

in the widest possible language making no distinction between relations (agnates or cognates) say of 10th degree and persons not related. In such a case as the imposed restrictions on fundamental rights cover cases which may be both within and without permissible limits of constitutional action by the legislature, and as it is not possible to disentangle the valid from the invalid, the whole law based on succession as enacted has to be declared void. See the observations of the Supreme Court in the cases of *Ramesh Thappar* v. *The State of Madras* (1), and of *Chintaman Rao* v. *The State of Madhya Pradesh* (2).

The only persons now left for consideration are co-sharers whom I have placed in the first category. The giving of the right to co-sharers can be justified—if at all—on the ground of convenience. This right is given under Order XXI, rule 88 of the Civil Procedure Code, and is mentioned in section 2 of the Pre-emption Act. It is also given under the Partition Act, 1893, which is not mentioned in that section. This right is based on the consideration of two or more persons having rights in the very property which is the subject of sale. It applies as much to co-sharers having the same kind of right in a particular piece of property as to others who could also be regarded as co-sharers sharing the bundle of rights in a property like a landlord and his tenant, the owner of a building and the owner of the site under the building, the owner of a dominant tenement and the owner of a servient tenement or persons having rights in a common staircase serving a house or a building. The bestowal of rights on these persons is based on grounds of convenience. Co-sharers are, however, placed in two categories under section 15. One of them, agnates are given preference to the others. See section 15, clause (b), secondly and fourthly. As under the Constitution there is to be equality between men and women, a woman co-sharer cannot be placed on a lower level. I would not, therefore, regard section 15(b) secondly as valid.

Clause (c), firstly of section 15, has become obsolete because of the passing of the Punjab

(1) 1950 S.C.R. 594 at page 603
(2) 1950 S.C.R. 759 at page 765

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Abolition of Ala Malkiyat and Taluqdari Rights Act, 1951 (IX of 1951).

The result of this discussion is that the only portions of sections 15 and 16, which could, in my opinion, be possibly regarded as valid under the Constitution are clause (b), fourthly and clause (c), fourthly of section 15 and clause firstly, secondly, thirdly and fifthly of section 16.

It should, however, be observed that there is a fundamental difference between the bestowal of rights under section 15 and the bestowal under section 16. Section 16 applies to towns only. Under section 7, the right of pre-emption shall exist in respect of urban immovable property in any town or sub-division of a town only when a custom of pre-emption is proved to have been in existence in such town or sub-division at the commencement of the Pre-emption Act in 1913 and not otherwise. Moreover, this right is granted subject to the provisions of section 5 which exempts a shop, *serai*, or *Katra* or a *dharamsala*, mosque or other similar building from the provisions relating to pre-emption. This shows that the legislature was not looking with any favour on the law of pre-emption. It was regarded as a retrograde law even in 1913.

One further point has to be considered. Do considerations of social convenience come in at all when a sale of agricultural lands is to be considered ? If they do, to plots of what size should pre-emption apply ? A co-sharer has an area of 100 acres. He sells 50. Should it apply to this sale, or should it apply only to sales of small plots of a few *kanals* ? If so, of what area ? Only the legislature can determine that.

In these circumstances one last question remains to be considered. I have come to the conclusion that the right of pre-emption could possibly be upheld only in favour of those persons who are actual co-sharers in the property sold, using the word "co-sharers" in an extended sense as also covering the cases of persons falling under

clause (c), fourthly of section 15 and under clauses secondly, thirdly and fifthly of section 16. The question that arises is whether it would be fair to assume that the legislature would have enacted the part which remains without enacting the parts which in my opinion are invalid. A similar matter came up before the Privy Council in *Attorney-General for Alberta* v. *Attorney-General for Canada* (1), where the Privy Council said as follows at page 518 :—

> "There remains the second question, whether when Part II has been struck out from the Act as invalid what is left should be regarded as surviving, or whether, on the contrary, the operation of cutting out Part II involves the consequence that the whole Act is a dead letter. This sort of question arises not infrequently and is often raised (as in the present instance) by asking whether the legislation is *intra vires* 'either in whole or in part' but this does not mean that when Part II is declared invalid what remains of the Act is to be examined bit by bit in order to determine whether the legislature would be acting within its powers if it passed what remains. The real question is whether what remains is so inextricably bound up with the part excluded as invalid that what remains cannot independently survive, or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is *ultra vires* at all".

If the legislature had come to the conclusion to which I have come, can it be said with certainty that the legislature acting as a legislature with the influx of new ideas would after the coming into

(1) (1947) A.C. 503

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force of the Constitution pass the law of Pre-emption in such a truncated form? I am, therefore, inclined to hold that the whole of the Punjab Pre-emption Act, 1913, is invalid now. The matter will, in my opinion, have to be considered afresh by the legislature and "the discussions or extent" of pre-emption fixed by it.

As the plaintiff's suit in the present case does not fall even within the portions of the Act which I have put in my first category I would dismiss his suit leaving the parties to bear their own costs. As, however, I have expressed a view different from the one which has been taken by a Division Bench of this Court I would, if my learned brother agrees, refer the matter to the Chief Justice for the decision of this case by a Full Bench. Before the Full Bench heard this case notice should go to the Advocate-General to represent the views of the State.

Kapur, J.

KAPUR, J.—I agree that the matter should be placed before a Full Bench.

M/S. SHAMAIR CHAND, P. C. JAIN, and H. L. SARIN, Advocates, for Petitioners.

MR. A. N. GROVER, Advocate, MR. H. R. SODHI, Advocate (*Amicus Curiae*).

MR. S. M. SIKRI, Advocate-General with MR. D. K. KAPUR, Advocate, for Respondents.

JUDGMENT OF THE FULL BENCH.

Harnam Singh, J.

HARNAM SINGH, J. In Civil Original No. 62 of 1952, the question that arises for decision is whether the Punjab Pre-emption Act, 1913, hereinafter referred to as the Act, is *ultra vires* the Constitution of India.

Briefly summarised, the facts material to the point under consideration are these. On the 29th of August, 1951, Uttam Singh instituted Civil Suit No. 173 of 1951, for possession by pre-emption of the land sold by defendants Nos. 4 to 6 to defendants Nos. 1 to 3 on the 13th of September, 1950. In

paragraph No. 4 of the plaint it was stated that compared with defendants Nos. 1 to 3, the plaintiff possessed a preferential right to purchase the land in suit for the following reasons :—

(a) that the plaintiff is proprietor with share in the *shamilat* in *mauza* Majri while defendants Nos. 1 to 3, are not proprietors of land in that *mauza* ; and

(b) that out of the land included in *khata* Nos. 207 and 208, *khasra* Nos. 1264, 1265 and 1268, the plaintiff owns land measuring 50 *bighas* 4 *biswas* and that the land in suit was a part of *khata* Nos. 205 and 208, *khasra* Nos. 1265 and 1268.

In the Court of first instance defendants Nos. 1 to 3, pleaded *inter alia* that the Act was *ultra vires* the Constitution of India. In these circumstances Uttam Singh, plaintiff, applied under Article 228 of the Constitution of India for action under that Article. On the application of Uttam Singh, plaintiff, Khosla, J., ordered—

> "Let the case be withdrawn and transferred to this Court. To be heard with similar cases in which the same point arises."

Pursuant to the order passed by Khosla, J., Civil Suit No 173 of 1951, was registered in this Court as Civil Original No. 62 of 1952.

On the 5th of December, 1952, Civil Original No. 62 of 1952, was placed before Kapur and Soni, JJ., for the decision of the point as to the constitutionality of the Act. In an elaborate order Soni, J., found that the Act was *ultra vires* the Constitution but considering that the view expressed by him was different from the one taken by a Division Bench of this Court in *Punjab State* v. *Indar Singh and others* (1), Soni, J., referred the matter to the Chief Justice with a recommendation that for the determination of the question as to the constitutionality of the Act, the case may be placed before a Full Bench. In that opinion Kapur, J., concurred.

(1) 54 P.L.R. 395

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In the circumstances stated above, Civil Original No. 62 of 1952, has been placed before this Bench for the determination of the question of law whether the Act is *ultra vires* the Constitution of India.

That the Legislature was competent to make the Act is not disputed. That being so, the sole point that arises for decision is whether the provisions of the Act are inconsistent with the provisions of Part III of the Constitution.

In approaching the matter, I wish to state that the constitutional power of the law-making body to legislate in the premises being granted, the wisdom or expediency of the manner in which that power is exercised is not properly subject to judicial review and that there being presumption in favour of the constitutionality of the Act, the Court would not pronounce the Act to be contrary to the Constitution unless the violation of the Constitution is proved beyond all reasonable doubt. In the referring order, Soni, J., thought that the Act contravened the provisions of Article 19(1)(f) and (g) of the Constitution of India.

In arguments it is said on behalf of the vendees that the Act is *ultra vires* as its provisions contravene the provisions of Article 19(1)(f) of the Constitution. In other words, it is said that section 15 of the Act imposes restrictions on the right to acquire, hold and dispose of property guaranteed by Article 19(1)(f) of the Constitution and these restrictions not being in the nature of reasonable restrictions the Act cannot be allowed to stand.

In *Punjab State* v. *Indar Singh and others* (1), the validity of the Act was challenged on the ground that section 15 of the Act being dependent on section 14 of the Act must be deemed to have been repealed by the repeal of the Punjab Alienation of Land Act, 1900. In dealing with that point the Court found that the repeal of the Punjab Alienation of Land Act, 1900, does not in any way affect the provisions of section 15 of the Act, as that section is in no way

(1) 54 P.L.R. 395

dependent upon section 14 of the Act. In determining the constitutionality of the Act, in my opinion, the provisions of sections 3(4), 14, 23, 24, 29 and the concluding clause of section 9 of the Act, should be deemed to be non-existent. For the reasons given in *Punjab State* v. *Indar Singh and others* (1), I hold that the repeal of the Punjab Alienation of Land Act, 1900, by the Adaptation of Laws (Third Amendment) Order, 1951, does not render the provisions of sections other than sections 3(4), 14, 23, 24, 29 and the concluding clause of section 9 of the Act to be void. In the Punjab Laws Act, 1872, there were no provisions corresponding to sections 3(4), 14, 23, 24, 29 and the concluding clause of section 9 of the Act. Sections 3(4), 11, 20, 21 and 27 of the Punjab Pre-emption Act, 1905, corresponded to sections 3(4), 14, 23, 24, and 29 of the Act. From a perusal of the Act it is plain that the restrictions imposed by sections 3(4), 14, 23, 24, 29 and the concluding clause of section 9 of the Act are severable and the deletion of those provisions does not affect the constitutionality of the Act.

In *Dr. N. B. Khare* v. *The State of Delhi* (2), the Supreme Court had occasion to define the scope of judicial review under clause 5 of Article 19, where the phrase " imposes reasonable restrictions on the exercise of the right" occurs and four out of the five Judges participating in the decision expressed the view (the fifth Judge leaving the question open) that both the substantive and the procedural aspects of the impugned restrictive law should be examined from the point of view of reasonableness. In that case Kania, C. J., said—

> " The law providing reasonable restrictions on the exercise of the right conferred by Article 19, may contain substantive provisions as well as procedural provisions. While the reasonableness of the restrictions has to be considered with regard to the exercise of the right, it does not

(1) 54 P.L.R. 395
(2) 1950 S.C.R. 519

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necessarily exclude from the consideration of the Court the question of reasonableness of the procedural part of the law".

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In *State of Madras* v. *V. G. Row* (1), Patanjali Sastri; C. J., said—

> "The nature of the right alleged to have been infringed; the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all; and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions considered them to be reasonable."

As stated hereinbefore, the validity of the Act is challenged on the ground that the provisions of section 15 of the Act impose restrictions upon the right of citizens to acquire, hold and dispose of property and these restrictions not being in the nature of reasonable restrictions the Act cannot be allowed to stand. That the Act imposes restrictions upon the right of citizens to acquire, hold and dispose of property is not disputed. Plainly, the

(1) 1952 S.C.R. 597

pre-emptor has been given by the Act a right to control the action of the vendor in selling the property which is the object of the right and can claim the assistance of the Courts in exercising that control. In plain English, the Act displaces ordinary legal rights and places restrictions upon normal rights of conveyance. That being so, the question that arises for decision is whether the Act imposes reasonable restrictions upon the exercise of citizens' right to acquire, hold and dispose of property in the interests of the general public. In these proceedings it is common ground that the Act does not deal with the protection of the interests of any scheduled tribe.

In construing sections 4, 12 and 13 of the Punjab Pre-emption Act, 1905, in *Sanwal Das* v. *Gur Parshad* (1), Shah Din, J., said—

> "The institution of the rights of pre-emption as known to us in the Punjab is intimately associated with the constitution of the 'village community' in its graduated forms as explained above, and the rules originally adopted by custom in regard to that right which have subsequently been embodied in Legislative enactments exhibit in an interesting manner the main lines of the connection between that right in its application to property in land and, the actual, probable or assumed relationship by blood among the members of the proprietary body that constitute a village community."

Sections 15 and 16 of the Act, re-enact sections 12 and 13 of the Punjab Pre-emption Act, 1905, with modifications which have no bearing on the decision of the point before us while section 4 of the Act reproduces section 4 of the Punjab Pre-emption Act, 1905.

Para No. 127, Punjab Settlement Manual by Sir James Douie, fourth edition, reads *inter alia*—

(1) 90 P.R. 1909

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"The members of the proprietary body in a true village community are often united by real or assumed ties of kinship. The admission of strangers was always, in theory at least, a thing to be guarded against, and village customs in the matter of inheritance and pre-emption are founded on this feeling."

In *Sanwal Das* v. *Gur Parshad* (1), Shah Din, J., said—

"It seems to me, therefore, that in its nature and origin the right of pre-emption is nothing more nor less than a right conferred upon and exerciseable by each member of the proprietary group primarily with the object of preserving the integrity of the village community by preventing any interference with the course of devolution of land in strict conformity with customary rules of inheritance."

In the note explaining the clauses of the Bill which became the Punjab Pre-emption Act, 1905, it was said—

"As regards the increased importance assigned in the order of devolution to agnatic relationship, as contracted with mere ownership, it may be pointed out that the assumption underlying all the earlier legislation on the subject was that the co-sharers and the agnatic relations are the same body, but as time went on, this assumption became less and less in accordance with facts, and the result has been that co-sharers who are intruders in the village or property have had superior rights of pre-emption to relatives who were not co-sharers, and that relations, however near, had no pre-emptive rights whatever, unless they were land-owners or occupancy tenants in the village.

(1) 90 P.R. 1909

The law of pre-emption is closely connected with the principles relating to succession in land and it is considered that time has come for the necessary modifications to be made so as to maintain the principle underlying the old custom of the country which it was the object of our earlier legislators to uphold."

In Roe and Rattigan's Tribal Law the nature of the right of pre-emption is thus explained :—

"Pre-emption is merely a corollary of the general principles regulating the succession to and power of disposal of land. In these matters the holder of the estate for the time being is subject, generally speaking, to the control of the group of agnates who would naturally succeed him, his *warisan yak jaddi*. They can, as a general rule, altogether prevent alienation by adoption or gift, or by sale for the holder's own benefit, it would be only a natural rule that, when a proprietor was compelled by necessity to sell, *these agnates should be offered the opportunity of advancing the money required and thus saving what is really their own property.*"

In the opinion of Roe and Rattigan, pre-emption is the last means by which the natural heirs can retain ancestral property in the family when they are unable to prevent an act of alienation by the holder of the estate.

In the Punjab the vast majority of the people are governed by the agnatic theory of succession. In this connection section 5 of the Punjab Laws Act, 1872 and the provisions of Punjab Act II of 1920 may be seen.

Section 6 of Punjab Act No. II of 1920 enacts that a person who is descended from the great-great-grandfather of the person making an alienation of ancestral immovable property or making

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an appointment of heir to such property shall have the power to contest such alienation or appointment.

In paragraph No. 59 of the Customary Law by Sir W. H. Rattigan the law governing the agricultural tribes is thus stated:—

> "Ancestral immovable property is ordinarily inalienable (especially amongst *Jats* residing in the central districts of the Punjab), except for necessity or with the consent of male descendants, or, in the case of a sonless proprietor, of his male collaterals. Provided that a proprietor can alienate ancestral immovable property at pleasure if there is at the date of such alienation neither a male descendant nor a male collateral in existence."

In the Punjab there are four leading canons governing succession to an estate amongst tribes governed by agricultural custom: *firstly*, that male descendants invariably exclude the widow and all other relations; *secondly*, that when the male line of descendants has died out, it is treated as never having existed, the last male who left descendants being regarded as the propositus; *thirdly*, that a right of representation exists, whereby descendants in different degrees from a common ancestor succeed to the shares which their immediate ancestor, if alive, would succeed to; and *fourthly*, that females other than the widow or mother of the deceased are usually excluded by near male collaterals, an exception being occasionally allowed in favour of daughters or their issues, chiefly amongst tribes that are strictly endogamous.

In maintaining the compactness of the village community chances of litigation and friction are reduced and public order and domestic comfort is promoted. In *Mohammad Ali Khan* v. *Makhan Singh*, (1), Pipon, J.C., said:—

> "There is also no doubt that the framers of the Acts of 1905 and 1913 were not

(1) 73 I.C. 855

guided purely by the principles of pre-emption to be discovered from Muhammadan Law, or from archaic custom, but also *by consideration of public policy and convenience as they existed at the time when those Acts were passed.* Now, it is very easy to realise that one of the main reasons for the acceptance of a pre-emptive right is the vital necessity felt by every community, when it first becomes homogeneous, to preserve to itself its essential homogeneity. To allow landed estate to pass into the hands of strangers is not only to deprive the community of the valuable asset in the dissolution of its internal organisation by the engrafting of strangers upon the common body. Such a necessity is predominant in the case of trans-frontier Pathans outside the strict limits of British India, who are still governed by Tribal Law and who are in a continual state of warfare with their neighbours which makes the preservation of their essentially homogeneous character a matter of life and death. But the same considerations even now prevail, though to a limited extent, among tribes actually domiciled within British territory and no longer subject to Tribal Law. The necessity is still felt among them for the rigid exclusion of strangers from among the proprietary and governing body of the tribe. The same consideration may be said to exist, though in a still more limited degree, among nearly all agricultural communities in the north of India."

Section 4 of the Act defines the right of pre-emption as the right of a person to acquire agricultural land or village immovable property or urban immovable property in preference to other persons, and limits its operation in the case of land to sales. Sections 15 and 16 of the Act lay down the rules of priority among the pre-emptors and the vendees in respect of sales of agricultural land,

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village immovable property and urban immovable property. From the provisions of section 15 of the Act it is plain that the right of pre-emption regarding agricultural lands follows the customary tribal theory as to the enjoyment of land by members of village communities. As mentioned in the Act explaining the clauses of the Bill of 1905, the provisions of the Act are closely connected with the principles relating to succession in land. In the plains of Eastern and Central Punjab the existence of well organized village communities is the distinguishing mark. In this connection paragraph No. 148, Punjab Settlement Manual by Sir James Douie, may be seen.

From a perusal of sections 15 and 16 of the Act, it is plain that while section 15 of the Act gives precedence to the heirs of the vendor, the heirs of the vendor have no right of pre-emption under section 16 of the Act, the reason being that pre-emption in towns depends purely on the considerations of private and public decency and convenience.

From what I have said above, it is plain that the objects underlying sections 15 and 16 of the Act may be briefly enumerated as follows :—

(1) to preserve the integrity of the village and the village community ;

(2) to avoid fragmentation of holdings ;

(3) to implement the agnatic theory of the law of succession ;

(4) to reduce the chances of litigation and friction and to promote public order and domestic comfort ; and

(5) to promote private and public decency and convenience.

In *A. K. Gopalan* v. *The State of Madras* (1), Kania, C. J., said at pages 104-105 :—

"In the same way clause (5) also permits reasonable restrictions in the exercise

(1) 1950 S. C. R. 88.

of the right to freedom of movement throughout the territory of India, the right to reside and settle in any part of the territory of India or the right to acquire, hold and dispose of property, being imposed by law provided such reasonable restrictions on the exercise of such right are in the interest of the general public. The Constitution further provides by the same clause that similar reasonable restrictions could be put on the exercise of those rights for the protection of the interest of a Scheduled Tribe. This is obviously to prevent an argument being advanced that while such restriction could be put in the interest of general public, the Constitution did not provide for the imposition of such restriction to protect the interests of a smaller group of people only. Reading Article 19, in that way as a whole the only concept appears to be that the specified *rights of a free citizen are thus controlled by what the framers of the Constitution thought were necessary restrictions in the interest of the rest* of the citizens."

That avoidance of fragmention of holdings is in the interests of the general public is plain from the provisions of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act. 1948.

Again, it is plain that the implementation of the agnatic theory of succession in a State where a very large portion of the population is governed by that theory is in the interests of the general public. Indeed, the Punjab Act, No. II of 1920, codifies one branch of the agnatic theory of the law of succession.

Plainly, an Act which tends to preserve the integrity of the village and the village community,

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implements the agnatic theory of the law of succession, avoids fragmentation of holdings, reduces the chances of litigation, promotes public order, domestic comfort, private and public decency and convenience in the State is in the interests of the general public.

Finding as I do that the restrictions imposed by sections 15 and 16 of the Act, upon the right guaranteed by Article 19(1)(f), are in the interests of the general public of the State, the question that remains for decision is whether the restrictions imposed by the Act, are reasonable within Article 19(5) of the Constitution.

From the provisions of section 19 of the Act it is plain that when any person proposes to sell agricultural land in respect of which any persons have any right of pre-emption he may give notice to all such persons of the price at which he is willing to sell such land. That notice should be given through the Court within the local limits of whose jurisdiction such land or any part of that land is situate. Section 20 of the Act provides that right of pre-emption of any persons to whom notice has been given under section 19 of the Act, shall be *extinguished* unless such person shall, within the period of three months from the date on which notice under section 19 of the Act is duly given or within such further period not exceeding one year from such date, as the Court may allow, present to the Court a notice for service on the vendor of his intention to enforce the right of pre-emption.

Indisputably, the provisions of the Act clog liberty of contract and infringe at times upon the right of owner to sell his property to his best possible advantage. In paragraph No. 127 of Punjab Settlement Manual by Sir James Douie it is stated that the Act was passed because the almost complete freedom of transfer for a long period enjoyed under British rule had a disintegrating effect on the village communities. In my opinion, it cannot be sustained that the restrictions imposed by the Act have no reasonable relation to the object which the legislation seeks to achieve or go in excess of that object.

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For the foregoing reasons I have no doubt that the provisions of the Punjab Pre-emption Act, 1913, as modified by the repeal of the Punjab Alienation of Land Act, 1900, are not open to challenge on the ground that they are inconsistent with the provisions of Article 19(1)(f) of the Constitution of India.

In the referring order it was stated that the case falls to be considered under Article 19(1)(g) of the Constitution. In arguments counsel appearing for the parties conceded that the provisions of the Act do not conflict with Article 19(1)(g) of the Constitution of India.

That being the position of matters, I would answer the question which has been referred to this Bench for decision in the negative.

In these circumstances the case should be sent back to the Senior Subordinate Judge, Ambala, for disposal of Civil Suit No. 173 of 1951, in accordance with the opinion expressed above.

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KAPUR, J. By an application under Article 228 of the Constitution of India the plaintiff, Uttam Singh moved this Court on the 4th of March, 1952, praying that the original suit pending in the Court of the Senior Subordinate Judge, Ambala, be withdrawn into this Court and decided here. My learned brother Khosla, J., on the 7th of April, 1952, ordered the withdrawal of this case and the matter was then placed before a Division Bench and it was referred to a Full Bench by a reference order, dated the 5th of December, 1952.

Defendants Shamsher Singh, Jasmer Kaur and Rajinder Singh (defendants 4 to 6) sold agricultural land to Kartar Singh, Bakhtawar Singh and Solakhan Singh (defendants 1 to 3) by a sale-deed, dated the 13th September, 1950, which was registered on the 19th September, 1950, for a sum of Rs. 20,000. The plaintiff Uttam Singh brought a suit for possession by pre-emption alleging *inter alia* that he had a preferential and superior right to the land on the grounds, (1) that the plaintiff

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was proprietor in the village with a share in *shamilat* which the defendants vendees were not, and (2) that he was a co-sharer in the *khatas* and that his land was adjacent to the land sold.

An objection was taken by the vendees that after the coming into force of the Constitution of India the law of Pre-emption had become "void on account of the Constitution of India as its provisions are inconsistent with the provisions of the Constitution." An issue was framed by the learned Senior Subordinate Judge "whether the Pre-emption Act is *ultra vires* of the Constitution," and in the application Civil Miscellaneous No. 139 of 1952, it was submitted that the issue involves a substantial question of law as to the interpretation of the Constitution of India.

In the order of reference which was written by my learned brother Soni, J., the history of the Law of Pre-emption has been given in very great detail and I do not think it is necessary for me to repeat those details. As far as the Punjab is concerned the nature of the right of pre-emption was very clearly laid down by Sir Meredyth Plowden, as long ago as 1894 in *Dhani Nath* v. *Budhu* (1), where at page 511 he said—

> "The fundamental question raised by the argument is whether the customary right of pre-emption dealt with under the Punjab Laws Act, 1872, is a right to or in immovable property within the meaning of this section, and it appears to me that it is not. A preferential right to acquire land, belonging to another person upon the occasion of a transfer by the latter, does not appear to me to be either a right to or a right in that land. It is *jus ad rem alienem acquirendam* and not *jus in re aliena.*"

This concept of the right of pre-emption was stated to be in conformity with the rules of Customary

(1) 136 P.R. 1894

Law prevailing amongst village communities which was made clearer by the entries relating to *haq-i-shufa* in the *Wajib-ul-arz* of different villages and then in the *Riwaj-i-am* of the tribes; per Shah Din, J., in *Sanwal Das* v. *Gur Parshad* (1), at page 400, and this is fully exemplified by the entry in the *wajib-ul-arz* that formed the basis of the decision in *Dilsukh Ram* v. *Nathu Singh* (2).

The rules relating to the Law of Pre-emption were first indicated in the Punjab Civil Code of 1854, which was replaced by the Punjab Laws Act (Act IV of 1872) and it was amended in 1878. These various sections of the Punjab Laws Act continued in force till 1905, when the first Punjab Pre-emption Act was enacted and sections 11 to 15 dealt with the right of pre-emption. This Act was repealed by the Punjab Pre-emption Act, I of 1913, where the right of pre-emption was defined in section 4 as follows :—

> "The right of pre-emption shall mean the right of a person to acquire agricultural land or village immovable property or urban immovable property in preference to other persons, and it arises in respect of such land only in the case of sales and in respect of such property only in the case of sales or of foreclosures of the right to redeem such property.
>
> Nothing in this section shall prevent a Court from holding that an alienation purporting to be other than a sale is in effect a sale."

And this Act governs the pre-emptive rights of the citizens of the State.

In a Full Bench judgment *Dilsukh Ram* v. *Nathu Singh* (2), Plowden, S. J., dealing with Customary Law of Pre-emption said at page 354—

> "Every one of the co-sharers is under an obligation to all the rest to abstain from selling to a stranger irrespective of their assent. * * * * * *

(1) 90 P.R. 1909
(2) 98 P.R. 1894 (F.B.)

> The incapacity of the holder * * * * * is now quite familiar to us. We see it in the incapacity of a sonless man to dispose, except for necessity, of the portion held by him of land which has devolved from a common ancestor, irrespective of the assent of his near *warisan ek jaddi*. Here the incapacity arises out of the relation existing between them and him as composing a single family group, *qua* all the land descended from the ancestor, which land is deemed to be family land. Similarly in the village community the incapacity arises from the relation between each individual member and the rest of the proprietary body as constituting together a single group, *qua* the land of the village."

Going a little backward we find that Roe, J., in *Gujar* v. *Sham Das* (1), said at page 243—

> "Rules of pre-emption * * * enable all members of the community to exclude strangers."

In Roe and Rattigan's Tribal Law, which is described as a work of authority by Shah Din, J., in *Sanwal Das* v. *Gur Parshad* (2), at page 394, the nature of the right of pre-emption is thus explained—

> "Pre-emption is merely a corollary of the general principles regulating the succession to and power of disposal of land. In these matters the holder of the estate for the time being is subject, generally speaking, to the control of the group of agnates who would naturally succeed him * * * * * * * *
>
> Pre-emption is the last means by which the natural heirs can retain ancestral property in the family, when they are

(1) 107 P. R. 1887 F.B.

(2) 90 P.R. 1909

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unable to altogether prevent an act of alienation by the holder of the estate."

In Ellis's Punjab Pre-emption Act, in Chapter IV, is discussed the nature of the pre-emptive right. It is described—

> "The right is a primary one existing before sale, and a secondary one giving a right to enforce it when a sale has been effected."

Mahmood, J., in *Gobind Dayal* v. *Inayatullah* (1), described the right as being a right of substitution and not a right of repurchase and this would entitle the pre-emptor to stand in the shoes of the vendee. The learned Judge further said—

> "Inasmuch as such conjunction existed before the sale, it follows that the pre-emptive right originates antecedently to the sale in respect of which if may be exercised. The very conception of pre-emption in Muhammadan Law necessarily involves the existence of the right before the sale in respect of which it may be exercised."

I have already given the concept of the nature of pre-emption as given by Plowden, S. J., in *Dilsukh Ram* v. *Nathu Singh* (2), and in the majority opinion in *Sanwal Das's case* (3), Clarke, C. J., said—

> "I agree as to there being a potential right of pre-emption which exists prior to any sale. It is true that there is no cause of action until the sale has taken place, but this does not show that there has been no previous right.

And Chatterji, J., said—

> I consider that the right of pre-emption is a substantive and primary right, which

(1) I.L.R. 7 All. 775
(2) 98 P.R. 1894
(3) 90 P.R. 1909

is possessed by or inheres in the pre-emptor, and imposes a corresponding obligation on the vendor of the property which is the subject of pre-emption.

The limitations of his right are many, and it comes into play or arises only on the happening of a certain contingency."

And Shah Din, J., said—

"It seems clear to my mind the right of pre-emption can only arise because, before the sale, a primary right resided in the person in whose favour the secondary right accrues by reason of the sale."

Coming to more recent times Pipon, J. C., in *Muhammad Ali Khan* v. *Makhan Singh* (1), gave the reason for the right of pre-emption to be—

"The vital necessity felt by every community, when it first becomes homogeneous, to preserve to itself its essential homogeneity. To allow landed estate to pass into the hands of strangers is not only to deprive the community of the valuable asset in which its communal right has not been entirely abandoned, but also to entail the dissolution of its internal organisation by the engrafting of strangers upon the common body."

Sir John Edge delivering the Judgment of the Privy Council in *Digambar Singh* v. *Ahmad Sayad Khan* (2), at page 141 said—

"But in all cases the object is, as far as is possible, to prevent strangers to a village from becoming sharers in the village. Rights of pre-emption, when they exist, are valuable rights."

(1) 73 I.C. 855 at p. 859
(2) I.L.R. 37 All. 129

We thus find that the pre-emptive right is primary and secondary in nature. It is a primary right which exists before the sale and a secondary one which arises when a sale has been effected. As Mahmood, J., said in *Gobind Dayal* v. *Inayatullah* (1), "it is a case of substitution and not of re-sale." No doubt many judges have called the Law of Pre-emption to be archaic and some have called it piratical but in order to find out whether the law is *intra vires* of the Constitution or not we are not concerned with the terms in which this law has been described by various learned judges, but whether it is in conflict with any of the provisions of the Constitution and particularly the fundamental rights which after all represent our concept of natural justice, which was said by the Roman Lawyers to be the basis of all law and thus not to be set aside by the law of the State, and which was based on the theory that civil law must be brought into harmony with natural justice—that which is right in the nature of things. The object of the pre-emptive law has, as I have said before, been laid down by Sir John Edge in *Digambar Singh's case* (2), as a means of preventing strangers from becoming sharers in the village. Can it be said that the object underlying the Pre-emption Act is so opposed to our fundamental rights that the Court must declare it *ultra vires* ?

Quite recently a Division Bench of this Court in *Punjab State* v. *Inder Singh* (3), had occasion to deal with the objects of the Law of Pre-emption and Khosla, J., at page 397, enumerated them as follows :—

" (1) To preserve the integrity of the village and the village community.

(2) To implement the agnatic theory of law.

(3) To avoid fragmentation of holdings.

(1) I.L.R. 7 All. 775
(2) I.L.R. 37 All. 129
(3) 54 P.L.R. 395

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(4) To reduce the chances of litigation and friction and to promote public order and domestic comfort.

(5) To meet the needs of a particular society at particular stage of the evolution."

There is no doubt that the right of pre-emption operates as a restriction on the principle of free sale and may even tend to diminish the market value of the property, but this restriction is not peculiar to countries where the influence of Mohammadan way of living was introduced. As was pointed out by Mahmood, J., at page 814, in *Gobind Dayal* v. *Inayatullah* (1), even in some of the civilized parts of Germany, similar rights (*Retractrecht*) existed either as a custom or as a rule of law. The objects of the Law of Pre-emption have in my opinion been very clearly brought out by Khosla, J., in the Division Bench judgment of this Court which I have referred to above and I am in respectful agreement with the concept as given by him.

The question then is whether a statute the object of which is as has been indicated above and which reduces friction, fragmentation and helps in the maintaining of village communities has become unconstitutional because of the fundamental rights given in the Constitution of India. In *The State of Madras* v. *V. G. Row* (2), Patanjali Sastri, C. J., observed—

> "Our constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution."

And in that judgment it was also laid down that in order to examine the constitutionality of a statute both the substantive and procedural aspects of law have to be examined from the point of view of reasonableness and the test of reasonableness has

(1) I.L.R. 7 All. 775
(2) 1952 S.C.R. 597 at page 605

to be applied to each individual statute but no standard or general pattern of reasonableness can be laid down as applicable to all cases. The test laid down there was stated at page 607, by Patanjali Sastri, C. J., in the following terms :—

> "The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable."

It has not been shown to us in what way the Pre-emption Act is *ultra vires*. It was not sought to be brought under Articles 14 and 15. It is no doubt, as I have said before a restriction over acquisition of property but the question is whether it is an unreasonable restriction within the meaning of Article 19(5), read with Article 19(1)(f). In the Division Bench judgment of this Court in *Punjab State* v. *Inder Singh* (1), it was held that terms of section 15 do not go beyond the object aimed at and the restrictions imposed are just

(1) 54 P.L.R. 395

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sufficient to achieve the interest of general public in the way indicated above. Nothing that has been said at the bar or brought to our notice shows that this view of the law by the Division Bench of this Court was in any way erroneous or requires modification. The objects enumerated above do not in my opinion contravene Article 19(1)(f) read with the fifth clause of that Article. I am, therefore, of the opinion that section 15(b) fourthly and (c) secondly and thirdly do not contravene the provisions of the Constitution and I would answer the question accordingly.

The case shall now be sent back to the trial Court to be tried in accordance with law. The costs will be costs in the cause.

I have now had the advantage of reading the judgment prepared by my learned brother Harnam Singh, J., and for reasons which I have given in this judgment I agree that the statute now assailed is not unconstitutional.

Bhandari, C. J.

BHANDARI, C. J.—I agree.

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