PUNJAB AND HARYANA HIGH COURT

Uttam Singh

Vs

Kartar Singh

(Bhandari, C.J. Harnam Singh and Kapur, JJ.)

01.06.1953

JUDGMENT

Harnam Singh, J.

1. 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.

2. Briefly summarised, the facts material to the point under consideration are these. On 29-8-1951, Uttam Singh instituted Civil Suit No. 173 of 1951 for possession by pre-emption of the land sold by defendant 4 to defendants 1 to 3 on 13-9-1950. In para. 4 of the plaint it was stated that compared with defendants 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 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, 126S 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.

3. In the court of first instance defendants 1 to 3 pleaded 'inter alia' that the Act was 'ultra vires' the Constitution of India. In those 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"Let the case be withdrawn and transferred to this Court.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."

4. 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.

5. On 5-12-1952, Civil Original No. 62 of 1952 was placed before Kapur & 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. Inder Singh', AIR 1953 Punj 20 (A), 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 Pull Bench. In that opinion Kapur J. concurred.

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

7. 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 in of the Constitution.

8. 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.

9. 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.

10. In -- 'AIR 1953 Punj 20 (A)', 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 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 & the concluding clause of Section 9 of the Act should be deemed to be non-existent.

For the reasons given in -- 'AIR 1953 Punj 20 (A)', 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 & 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.

11. In -- 'Dr. N. B. Khare v. State of Delhi', AIR 1950 SC 211 (B), the Supreme Court had occasion to define the scope of judicial review under el. 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 necessarily exclude from the consideration of the Court the question of reasonableness of the procedural part of the law."

12. In -- 'State of Madras v. V. G. Row', AIR 1952 SC 196 (C), Patanjali Sastrl 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."

13. 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 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.

14. In construing Sections 4, 12 and 13, Punjab Preemption Act, 1905, in -- 'Sanwal Das v. Gur Parshad', 90 Pun Re. 1909 (FB) (D), Shah Din J. said:

"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."

15. Sections 15 and 16 of the Act re-enact Sections 12 and 13, 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, Punjab Pre-emption Act, 1905.

16. Para No. 127, Punjab Settlement Manual by Sir James Louis, fourth edition, reads 'Inter alia':

"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."

17. In -- 90 Pun-Re. 1909 (FB) (D)', 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 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 laud in strict conformity with customary rules of inheritance."

18. 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 contrasted with mere ownership, it may be pointed put 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 landowners or occupancy tenants in the village.

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 modfications 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."

19. In Rao and Rattigan's Tribunal 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'."

20. In the opinion of Roe and Rattigan, preemption 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.

21. In the Punjab the vast majority of the people are governed by the agnatic theory of succession. In this connection Section 5, Punjab Laws Act. 1872 and the provisions of Punjab Act 2 of 1920 may be seen.

22. Section 6 of Punjab Act 2 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 an appointment of heir to such property shall have the power to contest such alienation or appointment.

23. In para. 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."

24. In the Punjab there are four leading canons governing succession to an estate amongst tribes governed by agricultural custom: 'firstly', that male descendants invariably excluded 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.

25. 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', 73 Ind Cas 855 (Pesh) (E) Pipon J. C. said:

"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 Muhammad an 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 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 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."

26. 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 preemptors and the vendees in respect of sales of agricultural land, village immovable property and urban immovable property. Prom the provisions of Section 15 of the Act, it is plain that the right of pre-emption regarding agricultural land follows the customary tribal theory as to the enjoyment of land by members of village communities. As mentioned in the note 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 para. No. 148, Punjab Settlement Manual by Sir James Douie may be seen.

27. 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.

28. 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.

29. In -- 'A. K. Gopalan v. State of Madras', AIR 1950 SC 27 (F), Kania C. J. said at p. 36:

"In the same way Clause (5) also permits reasonable restrictions in the exercise 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 'ay 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 he 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 Trainers of the Constitution thought were necessary restrictions in the interest of the rest of the citizens'."

30. That avoidance of fragmentation 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.

31. 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 2 of 1920 codifies one branch of the agnatic theory of the law of succession.

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

33. 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.

34. Prom 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.

35. 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 para. 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.

36. 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.

37. 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)(f) of the Constitution of India.

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

39. 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.

Kapur, J.

40. By an application under Article 228 of the Constitution of India the plaintiff Uttam Singh moved this Court on 4-3-1952, 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 7-4-1952, 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 5-12-1952.

41. Defendants Shamsher Singh, Jasmer Kaur and Rajinder Singh (defendants 4 to 6) sold agricultural land to Kartar Singh, Bakhtawar Singh and Salakhan Singh (defendants 1 to 3) by a sale deed dated 13-9-1950, which was registered on 19-9-1950, for a sum of Rs. 20,000/-. The plaintiff Uttam Singh brought a suit for possession by preemption alleging 'inter alia' that he had a preferential and superior right to the land on the grounds (1) that the plaintiff 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.

42. 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 Preemption 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.

43. 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 these 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', 136 Pun-Re. 1894 (G), where at p. 511 he said: "The fundamental Question raised by the argument is whether the customary right of preemption dealt with under the Punjab Laws Act, 1872, is a right to or in immoveable 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 rein 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 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 -- '90 Pun-Re. 1909 (FB) (D), at p. 400, and this is fully exemplified by the entry in the 'Wajib-ul-arz' that formed the basis of the decision in -- 'Dalsukh Ram v. Nathu Singh', 98 Pun-Re. 1894 (FB) (H).

44. 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 4 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 repeal-ed by the Punjab Pre-emption Act 1 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 cf the right to redeem such properly.

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.

45. In a Full Bench judgment 98 Pun-Re. 1894 (H), Plowden S. J. dealing with Customary Law of Pre-emption said at p. 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, * * * 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', 107 Pun-Re. 1887 (FB) (I), said at p. 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 or authority by Shah Din J. in

-- '90 pun-Re. 1909 (PB) at p. 394 (D)', 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 unable to altogether prevent an act of alienation by the holder of the estate."

46. In Ellis's Punjab Pre-emption Act in chap. 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', 7 All 775 (FB) (J), 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 orginates antecedently to the sale in respect of which it 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 -- '98 Pun-Re. 1894 (FB) (H)' and in the majority opinion in -- '90 Pun-Re 1909 (FB) (D)', 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 is possessed by or inheres in the pre-emptor, and imposes a corresponding obligation in 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 that 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."

47. Coming to more recent times Pipon J. C. in -- '73 Ind Cas 855 (Pesh) at p. 859 (E)', 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 Sayeed Khan', AIR 1914 PC 11 at p. 14 (K), 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 preemption, when they exist, are valuable rights."

48. 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 -- '7 All 775 (J)', "it is a case of substitution and not of free sale". No doubt many Judges have called the law of Preemption 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 whichafter 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, (K)', as a means of preventing strangers from becoming sharers in the village. Can it be said that the object underlying the Pre-emptive Act is so opposed to our fundamental rights that the Court must declare it 'ultra vires'?

49. Quito recently a Division Bench of this Court in -- 'AIR 1953 Punj 20 (A), had occasion to deal with the objects of the Law of Pre-emption and Khosla J. at p. 21 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.

(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 p. 814 in --'7 All 775 (J)', even in some of the civilized parts of Germany similar rights (Retractrecht) existed either as a custom or as a rule of law. The object of the Law of Pre-emption has 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.

50. 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 --'AIR 1952 SC 196 at p. 199 (C)', 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 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 p. 200 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 dictate ed 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."

(51) 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 -- 'AIR 1953 Punj 20 (A)', it was hold that terms of Section 15 do not go beyond the object aimed at and the restrictions imposed are just 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.

52. 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.

53. 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.

54. I agree.