PUNJAB AND HARYANA HIGH COURT

Sardha Ram and Kanhya Lal

Vs

Abdul Majid Mohd

(A Bhandari, C.J. D Falshaw and S Dulat, JJ. B Narain and S Capoor, JJ.)

01.09.1959

JUDGMENT

A Bhandari, C.J.

(1) On 17-9-1951 one Mehraj-ud-Din sold two houses which are situate within the city walls of (sic) to one Sarda Ram for a sum of Rs. 5,990/-. On the 8th August 1952 one Abdul Majid who owned a house adjoining the house in dispute, brought a suit for possession by pre-emption on the ground that he was entitled under the custom of pre-emption prevailing in the locality where these houses are situated to pre-empt the sale of the said houses. The trail Court granted a decree in favour of the pre-emptor, and the vendee has come to this Court in appeal.

(2) When this appeal came up for hearing before a Division Bench of this Court, the attention of the learned Judges was invited to a recent decision of this Court reported as Kesar Devi v. Nanak Singh, AIR 1958 Punj 44 in which a Division Bench of this Court had expressed the view that right of pre-emption on the basis of vicinage or contiguity is repugnant to the provisions of Art. 19(1)(f) of the Constitution. As the view taken by the Division Bench in the said case was in conflict with the view taken by a Full Bench of the is Court in Uttam Singh v. Kartar Singh, AIR 1954 Punj 55 and as the point was likely to arise in a number of other cases, the learned Judges referred the case to a Bench of three Judges and later to a Bench of five Judges. The question which has been referred to us is as follows :

> "Is the provision contained in clause sixthly of S. 16 of the Punjab Pre-emption Act, 1913, (Act No. 1 of 1913) ultra vires of the provisions of Art. 19 of the Constitution of India?"

(3) Section 15 and 16 of the Punjab Pre-emption Act lay down the rules of priority amongst the pre-emptors and the vendees. Section 15 concerns agricultural land and village immovable property, while S. 16 relates to urban immovable property. Section 16 declares that the right of pre-emption in respect of urban immovable property shall vest "..... Sixthly in the persons who

own immovable property contiguous to the property sold." NArticle 19 of the Constitution declares that all citizens shall have the right to acquire, hold and dispose of property and that the State shall have power to make laws imposing reasonable restrictions on the exercise of those rights either in the interests of any schedule Tribe. This article imposes a constitutional obligation on the Court to enquire whether there has been an arbitrary interference with the protected rights of property.

(4) The origin of the right of pre-emption is lost in the mist of time but it appears that in or about the year 1400 B. C. Moses, the great Jewish prophet, propounded the principle that the land should not be sold for ever and that some right should vest in the vendor to redeem his land. According to ancient Jewish custom a Kinsman had a right to redeem the person of aman who was compelled to sell himself as a slave to stranger as well as to rendeem any family property that a man was required to sell. The right to redeem property carried with it the right to the refusal of the property before it was offered the sale in the open market. When the Jews fled to Arabia after the destruction of their country by the Romans they carried their laws with them, including the law of redemption. The Muslim custom prohibits the invasion of the privacy of a domestic habitation and the Muslim law declares that the property belonging to a Muslim shall be inherited not only by his children but also by a myraid of other relations according to well-defined rules and in accordance with well-defined shares. As the Muslims wre anxious to prevent the intrusion of disagreeable strangers and the inconvenience arising out of minute sub-divisions and inter-divisions of ancestral property they readily converted the Jewish right of redemption into the Muslim right of pre-emption. The right arose only on sale of dwelling houses with-in the walls of cites to start with, but was soon extended to the sale of houses and plots of land outside the said walls.

(5) The right of redemption or pre-emption was unknown to the Hindu law, for a law which did not recognise right of partition in favour of a member of the joint family, could scarcely recognise a right of alienation in his favour. But when the Muslims conquered this country many centureis ago the law of pre-emption became the common law of the land and came to apply not only to Muslims but also to Hindus. The Hindus appear to have accepted this law willingly, for the failure on the part of the Hindu law to recognise custom had often led to considerable amount of trouble when, for example, an incorrigible member of the family sold his own share in the dwelling house to an undesirable stranger. The right of pre-emption was soon recognised as prevailing among Hindus in Behar and some other provinces of western India (B. L. R. Supplement Vol. 35). In course of time the genral public in several parts of India adopted the Mohammadan Law of pre-emption as a part of the customary law and this custom exists even in Benares the holiest of the holy cities of the Hindus: *Chakauri Devi v. Sundari Devi*[1],

(6) But when the Muslim custom of pre-emption was endeavouring to gain a foothold in India, a custom very similar to pre-emption had already taken firm root in the soil of this country. In primitive agricultural communities the soil belonged in common to communities of kinsmen and the right of free disposal of land in an individual was never recognised. The power to alienate land which is theory belonged to the tribe or village was limited by the power of the tribe or village, to prohibit it absolutely, or to prohibit certain forms of alienation or to restrict the purposes for which alienation might be effected, or to limit the choice of the alienees to members of the tribe who would have had the first rights to take up the alienation (Ratingan's Digest page 921; *Dilsukh Ram v. Nathu Singh*[2]*,).* This restriction on the power to alientate was placed obviously with the object of preserving the homogeneity of group, for one of the main reasons for the acceptance of a preemptive right is the vital necessity felt by every community when it first becomes homogeneous to preserve to itself, its essential homogeneity *: Muhammed Ali Khan v. Makhan Singh,*[3] *No* member of the proprietary group was competent to sell his share of the land to a stranger to the village, for every co-sharer was under an obligation to all the rest to abstain from selling to a stranger without their assent : 98 Pun Re 1894 (FB). In this Settlement Report of the Jullundur district Sir Richard Temple described the popular notion of proprietary right in that district as follows :

> "196. Strangers were jealously excluded from cultivating communities, and what is known as the right of pre-emption was closely watched. Transfers among members of the community by gift, bequest, mortgage or sale were not infrequent.
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> "197. Estates might be held jointly by several castes, who, while they might be apt to quarrel amongst themselves about their respective division yet would not betray the general interests of the whole community.
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> "198. In Musalman communities the formularies of the Shara were observe. In Hindu fraternity the forms and deeds were rude. But on no account was a member permitted to transfer his property to the residents of another village even though he might belong to the same caste.
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> "199. Fathers contracted alliances for their daughters in other villages, but the father could not reside with, or scarcely pay a visit to his son-in-law. But the latter might come and live with the former, and become an adopted son. He might succeed to the property in default of male issue, even in preference of blood-relations, provided he took up his residence in this village. But unless he fulfilled this condition he was permitted to inherit.
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> "200. I mention this to show how great an aversion they had to even a kinsman becoming

a shareholder unless he resided in the village. In other aspects the common rules of inheritance were thoroughly understood, and frequently appealed to".

(7) After the annexation of the Punjab the British Government endeavoured to give effect so much to indigeneous custom as it was thought politic to uphold. The Punjab Civil Code was the first attempt in the Punjab to codify the rules and orders applicable to this province on its annexation and it assumed the force of law under S. 25 of the Indian Councils Act of 1861. The right of preemption was declared in S. 13 of the said Code and then found its way into the Punjab Law Act. The commentary explained that the rule was not defended on economic considerations, but as an ancient one, endeared to the rustic population; and it was said, "for social and political reasons for the sake of preserving the integrity of the village communities, it is thought fit to place in their hands a power of checking intrusion of strangers".The Punjab Pre-emption Act was enacted in the year 1905, amended in the year 1913 and further amended in the year 1928.

(8) Before I proceed to deal with the question which has been referred to us, it would perhaps be desirable to examine the scope of judicial review. The Constitution of India has set up three great departments of Government, namely the legislature, the executive and the Judiciary. Although separation is imperfect and incomplete, it is well known that the legislature makes the laws, the executive executes them and the Judiciary construes and enforces them. Subject to the provisions of the Constitution, the legislature has full power to make, alter and repeal laws in respect of mattes within its legislative competence. It has power to decide what laws should be enacted for the protection and welfare of the people, what restrictions should be imposed on the fundamental rights of citizens and how and when the law-making powers vested in it should be exercised. The discretion of the legislature to decide what the interests of the public require and what measures are necessary for the protection of those interests is as unlimited as it is absolute. When the legislature enacts a measure which is not repugnant to the provisions of the Constitution the legislative will is Supreme and its policy is not subject to review by the Courts. If an Act has been regularly passed by a legislature and if it does not infringe upon the inherent right of life, liberty or property, its determination as to the reasonableness of the legislation is conclusive on the Courts. Courts have no power to declare it to be void on the ground that it is opposed to the spirit supposed to pervade the Constitution or is contrary to the general principles of liberty of a free people, or is opposed to the principles of natural justice, or that it conflicts with the Courts' notions of natural, social or political rights of the citizen not guaranteed by the Constitution. They have no power to strike down a law, otherwise within constitutional bounds, on the ground that it is unreasonable, arbitrary or capricious, or that it is harsh or unfair, or that it is capable of being misapplied or misused. They have no power to enquire into the motives which impel a legislature to enact a particular measure, or to pronounce upon the propriety, wisdom, necessity,

utility or expediency of legislation, or to substitute their own judgment for the judgment of the legislature. They have no power to interfere with what are exclusively legislative functions. They have no power to make law; they have power only to declare it, construe it and to enforce it. They can annul or pronounce and Act to be void only if the provisions of the Constitution in express terms or by necessary and proper implication forbid the enactment of the measure. Courts can protect a citizen against the high-hand, endness of a fellow citizen or even that of the State, but they have no weapon in their armoury which would enable them to protect the rights of a citizen against opproessive or unjust legislation. They cannot review or revise the action of the legislature within the constitutional limits of the legislature.

(9) But although the Constitution has granted legislative powers to Central and State legislatures, it has guaranteed certain fundamental rights to the citizen of India.

> "The true view is that both of these provisions of the fundamental law (one granting legislative power and one reserving individual rights) are to be considered together as inter-dependent, the one qualifying and limiting the other; otherwise it would result that due effect could not be given to both at the same time. Neither is supreme in a sense that would deprive the other of its effectiveness as a part of the fundamental law" (*State v. Ramsever*[4],). If therefore, the legislature travels beyond the limits set by the Constitution, or if it abridges some fundamental right guaranteed to a citizen, or if it assumes jurisdiction over subjects not within its legislative cognizance, it is open to the Court to determine the constitutional validity of legislative acts. I must, however, proceed on the assumption that every Act is constitutional unless its repugnancy to the Constitution is made to appeal clearly, plainly, palpably and by irrefutable evidence.

(10) Now, what exactly is the meaning of the expression "reasonable restrictions" appearing in Art. 19 of the Constitution ? It is not easy to define the expression "reasonable" and the Courts are usually reluctant to define it, but it may be said that a thing is reasonable when it is conformable to reason, when it is rational, fitting or proper, when it is sensible. The expression is sometimes used to express that which is appropriate and necessary, that which is ordinary and usual under the circumstances of the case. There is a close relation between the words "customary," "usual" and "reasonable". In determining whether a particular thing is reasonable the Court is called upon to consider the question of right and wrong, justice and fairness. What is reasonable is not necessarily the best but what is fairly appropriate to the purpose under all the circumstacnes of the case. An Act is reasonable when it is comformable or agreeable to reason, that is when common sense is applied to the whole situation it is not illegitimate in view of the end to be attained. An Act is unreasonable when it is plainly and grossly oppressive and contrary to reason. "Reasonableness is not what extremist on one side and the other would deem fit and

fair, but is what from the calm sea level of common sense applied to the whole situation is not illegitimate in view of the end to be attained." (Ex parte Hall, 195 p. 975, 976 (U. S.)).

> "By the term "reasonable is not meant expedient, nor that the conditions must be such as the Court would impose if it were called on to prescribe what should be the conditions. They are to be deemed reasonable where although perhaps not the wisest and best that might be adopted, they are fit and appropriate to the and in view, to wit, the protection of the public, and are manifestly adopted in good faith for the purpose. If the condition should be clearly arbitrary and capricious; if no reason with reference to the end in view could be assigned for it, and especially if it appeared that it must have been adopted for some other purpose--such, for instance, as to favour or benefit some persons or class of persons--it certainly would not be reasonable, and would be beyond the power of the Legislature to impose (State v. Vandersluis, 6 Lawyers Rep Anno. 119).

Our own Supreme Court has expressed views more or less on the same lines. In *Chintamanrao v. State of Madhya Pradesh*[5], Mahajan J. held that the phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should be arbitrary or of an excessive nature beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation that is the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Art. 19(1)(g) and the social control permitted by clause (6) of Art. 19, it must be held to be wanting in that quality. *In State of Madras v. V. G. Row,*[6] Patanjali Sastri C. J., observed that the test of reasonableness wherever prescribed should be applied to each individual statute impugned, no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions placed, 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.

(11) What is reasonable is primarily for the decision of the legislature and ultimately for that of

the Court. If the Court is satisfied that the restriction is reasonable it should have no difficulty in upholding the validity of the statute. If it is in doubt whether the restriction is or is not reasonable the Court must defer to the legislative wisdom and resolve the doubt in favour of the validity of the statute. If, however, the Court comes to entertain the view that the restriction is unreasonable beyond a reasonable doubt or if it is satisfied that the statute is manifestly in contravention of the Constitution it would plainly be the duty of the Court to interfere.

(12) There can be little doubt that the law of pre-emption imposes restrictions on the right of the vendee to acquire and hold property and the right of the vendor to dispose of property. It limits the power of the vendor to sell his property to whomsoever he may please or prevents him from showing preference to anyone to whom he may wish to sell, (*Atma Ram v. Devi Dayal,*[7] *Abdullah Shah v. Hussain Jahana*[8]*,* It is a clog on the freedom of sale and tends to diminish the market value of the property. The trails and tribulations of a vendor whose property is governed by the law of pre-emption have been graphically described in Raja Ram v. Bansi, ILR 1 All 207. The learned Judges observed :

> "Except under the pressure of necessity, land-owners rarely part with their landed property. It is therefore of the utmost moment to them to obtain its fair value and without unreasonable delay. Now, in a village held by a number of co-shares it is almost impossible to obtain within reasonable time from every co-sharer an explicity refusal of an offer of sale or such evidence of the refusal as will thereby be incontrovertible. Not frequently when co-sharer desires to sell his share and in fulfilment of the stipulation offers it to his co-sharer, some one or more of them will neither explicity accept nor decline the offer, but haggle to obtain it at a price far below its value. When the patience of the seller is exhausted or the urgency of his need no longer permits delay, he is driven to effect a sale with a stranger, which is followed after the longest delay allowed by lay by the institution of one or more suits to enforce the right of pre-emption. The stranger, aware of the risk to which his purchase is exposed either at once takes account of it by offering less than the property ought to fetch if it could be so free from the risk, or retains a portion of the purchase money until it be seen whether the sale is contested, or if contested, the result be known. Fictitious considerations are entered in sale deed, fictitious payments made before the registering officers, fictitious receipts executed, and wholesale perjury committed on the one side or the other when the Courts come to enquire into the prices actually paid".

(13) Mr. D. N. Aggarwal who appears for the appellants challenges the validity of the whole of the pre-emption Act, or in any case, of clause Sixthly of S. 16 of the said Act. Many and various are the reasons given by him in support of this contention. He contends that the conditions of

society which gave rise to the right of pre-emption have changed beyond recognition and that although this right may have served a useful purpose when the pre-emption Act was enacted or amended, it has outlived its usefulness and must now be declared to be repugnant to the provisions of the Constitution. The complexion of life has changed enormously during the last few decades and joint living has now almost completely disappeared from the present-day society. Owing to the communal disturbances which broke out in the year 1947 there has been a large influx of population all over the sate and numerous people have come to and settled down in Delhi as a result of this upheaval. If the law of pre-emption is enforced in this town it would be impossible for thousands of prospective purchasers to find accommodation for themselves. A street may at one time have been occupied by members of the same family, but the changes which have taken placed in the wake of partition have altered the entire aspect and streets have now been occupied not by members of the same family but by a large number of strangers. The pre-emption Act restricts the right of the vendor to transfer his property by way of sale, but imposes no restrictions on his right to transfer it by way of gift. It is unreasonable that restrictions should be imposed on the exercise of one kind of right and not on the exercise of another and analogous kind of right. The law of pre-emption applies only to houses but it does not apply to shops. If it is desirable that the adjoining house should be occupied by a good neighbour, it is equally desirable that the adjoining shop should be occupied by a friendly neighbour. There is no reason why restriction should be imposed on the sale of one kind of property and not on the sale of the other kinds of property. People exercise the right of pre-emption in the city of Delhi no with the object of preventing the intrusion of disagreeable strangers or with the object of preserving their privacy but with the object of passing the property on to others for motives of gain.

(14) Only one authority has been cited in support of the contention that the law of pre-emption imposes unreasonable restrictions on the right of a person to acquire, hold and dispose of property. In *Moti Bai v. Kand Kari Channaya*[9], it was held that the Mohammadan law of preemption which was the law of the State of Hyderabad before the commencement of the Constitution, was repugnant to the provisions of Art. 19(1)(f). The learned Judges expressed the view that the law of pre-emption may have been advantageous and beneficial to village communities in that it ensured homogeneity, and prevented the coming in of unwanted neighbours but the said law was not suitable to conditions of life in a city. Moreover, it was difficult to reconcile such a law with the modern view regarding the desirability of a free disposition of immovable property. In that case the Judges were not dealing with statutory law but with the Mohammadan law of pre-emption although it is somewhat doubtful whether their conclusion would have been different if they had been dealing with statutory law.

(15) A number of decisions have however, been brought to our notice in which the consitutionality of clause "sixthly" of S. 16 has been doubted. In *Panch Gujar Gaur Brahmans v. Amarsingh*[10], it was held that the custom of pre-emption which allows an owner of adjoining property to claim possession of property sold only on the ground of being the owner of the adjoining property is invalid as being contrary to the provisions of Art. 19(1)(f) of the Constitution. In paragraph 10 Bapna J. observed as follows : In a society where certain classes were privileged and preferred to live in groups and there were discriminations, on grounds of religion, race and caste, there may have been some utility in allowing persons to prevent a stranger form acquiring property in an area which had been populated by a particular fraternity or class of people and in those time a right of pre-emption to oust a stranger from the neighbourhood may have been tolerable or even beneficial.... On these principles the enforcement of the right of pre-emption of the third class i.e. as based on ownership of adjoining property is in our opinion not a reasonable restriction on the right to acquire and hold property. It may be pointed out that such a right is only recognised in Hanafi Law but not under the Shai Law and even according to Hanafi Law the claim does not lie in respect of sale of large estates, so that among the Muhammadans Jurists also there was a difference of opinion as to the validity of the right of pre-emption based on vicinity". This decision was followed in *Siremal v. Kantilal,*[11] *and Shankerlal v. Poonamchand*[12]

(16) In Ranganath v. Babu Rajasthan, AIR 1956 Hyd. 120 it was held that :

> "since shafi Jar mulasiq apart from the fact that he happens to be the owner of the adjoining property, has nothing in common with the property sold, restrictions on the freedom of transfer or freedom of contract imposed by the law of pre-empting in such cases can in no manner be deemed to be necessary, reasonable or calculated to advance the cause of the general public or for the protection of the interest of he scheduled tribes".

The learned Judges were not dealing with statutory law but with the Mohammadan law of pre-emption, although their conclusion could scarcely have been different if they had been dealing with statutory law.

(17) In *Babulal v. Goverdhandas,*[13] it was held by the Full Bench that preemption by vicinage infringes the fundamental rights of the vendor and the vendee under Art. 19(1)(f). The learned Judges observed :

> "The learned Advocate-General argued that the conditions and the society which gave birth to the right of pre-emption no longer existed; that the right of pre-emption based on contiguity or easement was altogether out of keeping with the needs, objects and aims of

the present day dynamic society, that though there might be some justification for allowing a co-sharer to pre-empt the property, there could be none whatsoever for permitting a person to purchase property in preference to others merely because he happened to be an owner of a property contiguous to the property sold or the owner of a property having a right of easement in relation to the property sold".

In a later paragraph Dixit J. observed as follows :

"The state of society which necessitated the introduction of a right of pre-emption as a part of law was thus archaic. That society no longer exits in our cities, towns or urban areas. The isolated and the politically, economically, and socially independent village community has disappeared from our village. The characteristic of the modern structure of society is not isolation but interdependence no stagnation but movement. The rational basis and justification for the rule of pre-emption by vicinage has thus entirely disappeared at least so far as immovable property other than agricultural land is concerned. The right has outlived the conditions or things which gave it birth and in which it found a footing. It is an anachronism and the reason why it originally came to be recognised can hardly be any ground for the continuation of a law of pre-emption recognising the right with regard to immovable property other than agricultural land. There is nothing in the Gwalior Pre-emption Act to show the object with which it was thought necessary to continue the customary law of pre-emption after giving it a statutory form".

In still another paragraph the learned Judge stated :

"It is not disputed that in other parts of Madhya Bharat there is no law of pre-emption of any kind in respect of property other than agricultual land. There is thus discrimination as between the owners of property of the above type in one part of Madhya Bharat and owners in other parts. In some cases the discrimination works out between the owners of property separated by a distance of even less than a mile".

(18) In *Chhedi v. Kirra*[14], it was held :

"The clause Regarding vicinage puts a unreasonable restriction which deprives a purchaser of property on claim by a neighbour on the sole ground that his property stood adjoining the one sold, interferes with the free play of economic forces and thereby retards the economic development of the community. It does not confer any comparable benefit as in the case of the right of pre-emption based on co-sharing. On the contrary it held to increase disparity in wealth. Those who are already possessed of more land are

> able to buy all the land that is put up for sale and those who are landless are unable to buy land except at an unduly high price. The right of pre-emption the ground of vicinage is in my opinion arbitrary and is of an excessive nature beyond what is required in the interest of public".

(19) In AIR 1958 Punj. 44 it was held :

> "If property contiguous to them is sold then that does not directly or immediately interfere with their quiet enjoyment of their own property or their privacy. In such a case apparently there is no basis for any breach of the peace. Thus the right of pre-emption in their favour cannot be said to secure public order and to be in the interest of general public. In so far as this class of persons are concerned the restriction imposed by the right of pre-emption in their favour cannot be described reasonable restriction".

On the contrary there are a number of authorities which propound the proposition that the restrictions imposed by the law of pre-emption are reasonable and in the interest of the public. In Abdul Hakim v. Jan Mohammad, AIR 1951 All. 247 it was held that the law of pre-emption is for the welfare of the people because it avoids litigation, consolidates property and tends to increase the production of wealth. In *Punjab State v. Indersingh*[15], the Court expressed the view that the sole object of the legislation is to preserve the homogeneity of the community and to prevent the fragmentation of holding. In AIR 1954 Punj 55 a Full Bench of this Court, of which I was a member, held that the restrictions imposed by Ss. 15 and 16 of the Punjab Pre-emption Act are in the interest of the general public of the State. A similar view was taken in *Ramchandra Krishnaji v. Janardan Krishnappa*[16] A perusal of these authorities appears to indicate that the principal objects of the law of pre-emption appear to be (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 evolution (AIR 1953 Punj 20; AIR 1954 Punj 55).

(20) Certain Judges have undoubtedly taken the view that right of pre-emption on the ground of vicinage is arbitrary and capricious, but they appear to have overlooked certain fundamental principles. They have not taken into consideration the fact that what is reasonable in any particular case is difficult of ascertainment; that the choice of measures if for the legislature; that the legislatures are presumed to have investigated the subject and to have acted with reason, that an Act of the legislature should be sustained unless it violates constitutional limitations beyond reasonable question and that a law will not be declared unconstitutional unless unconstitutionality is clear. They have ignored the objects which the framers of the Pre-emption Act had in mind and

have assigned no reason for taking a view contrary to that taken in AIR 1954 Punj 55. They have completely ignored the historical aspect and have failed to take notice of the fact that the right of pre-emption was recognised not only by Mohammadan Law but also by customary law in village communities; that it was recognised in Burma, Ceylon, China, Germany and certain other European countries. They have refrained from considering that the people of India are accustomed to restrictions such as have been imposed by the Pre-emption Act. At page 28 of Kathalay's Law of Pre-emption the learned author observes as follows :

> "Here the restriction on transfer is the rule, and the freedom of alienation is the exception. A father governed by the Mitakashara law cannot generally transfer ancestral property without the consent of his sons; a Hindu widow requires the consent of her husband's reversioners validating her alienations for consideration, when they are not supported by legal necessity. The Tenancy Acts have made it necessary for the tenant to obtain the consent of his landlord for the transfer of his holding. The Land Alienation Acts in the various provinces have also restricted the powers of transfer, and so on. All these restrictions served a particular purpose for which they are intended. Now the primary object of the law of pre-emption is to prevent the intrusion of strangers into the community and avoiding the presence of disagreeable persons. And were it not for this law, much of the land in Punjab in the possession of the agriculturists would have passed into the hands of professional money-lenders and the person who was once a tenant of the land would have worked upon it as a mere labourer. Besides in "a country like India, where distinctions of race, caste or creed prevail so numerously, the right is of special utility, because the intrusion of the strangers, does not only give rise to inconvenience but disturbs domestic comfort, if not as in some cases lead to a breach of the public peace. Amongst the Mohamedans the Zanana System, which they regard as based upon religious texts which emphatically prohibit the invasion of the privacy of a domestic habitation, has lent an additional importance to the pre-emptive right, which when claimed on the ground of vicinage it would not perhaps have otherwise possessed (Govind *Dayal v. Inayatullah*[17]*,)* ".

Can it be stated, in the circumstances that the restrictions imposed by the law of pre-emption are unreasonable? The answer is, in my opinion, clearly in the negative. This was the answer returned by the Full Bench in AIR 1954 Punj 55. It is fully in accord with the facts of the case and accepted legal principles.

(21) Quite apart from the merits of the Full Bench decision recorded by this Court in the year 1954, I am extremely doubtful in regard to the propriety of the Court's setting aside and overruling the judgment delivered by us in a similar case as recently as the year 1954. I find

myself in complete agreement with the views expressed by an American Jurist :

> "To be sure, a tribunal such as our highest bench should not slavishly adhere to the doctrine of stare decisis. Our constitutional law cannot be treated as though it were fixed as irrevocably as the laws of the Medes and Persians. Even basic decisions that are grounded upon premises rendered obsolete by changed external conditions must be treated as deadwood to be pruned from the constitutional tree when the opportunity presents itself. But a decision rendered by the same Court less than twelve months previously is hardly a derelict on the stream of the law. Such a decision is scarcely outmoded one eroded by time. Whatever else might be said about stare deisis, it surely requires a tribunal to follow its own recent jurisprudence. Justice Frankfurter put it in dissent, in a case where the Court discarded an important holding made only two years earlier, 'Especially ought the Court not re-enforce needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance-for instance, or unexpected changes in the Court's composition and the contingencies in the choice of successors'." (United States of America v. Rabinowitz, (1950) 339 US 56, 86).

(22) For these reasons I am of the opinion that the provisions contained in clause sixthly of Section 16 of the Punjab Pre-emption Act, 1913, are not ultra vires the provision of article 19 of the Constitution of India.

Dulat, J.

(23) I agree.

Falshaw, J.

(24) I agree.

Bishan Narain, J.

(25) I agree.

Capoor, J.

(26) I agree.

(27) Answer accordingly.

Cases Referred.

298 Pun Re 1894
373 Ind Cas 855 (Pesh)
458A. 958 (US)
5AIR 1951 S. C. 118
6 AIR 1952 SC 196
749 Pun Re 1901 p. 159 at p. 160
8 250 Pun L. R. 1913 p. 844, 845 : (AIR 1914 Lah 537)
9AIR 1954 Hyd. 161
10AIR 1954 Raj 100
11AIR 1954 Raj 195
12AIR 1954 Raj 231
13AIR 1956, Madh. B. 1
14AIR 1956 Vindh, Pra. 8
15AIR 1953 Punj 20
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