

## **NAGPUR HIGH COURT**

Ramchandra Krishnaji Dhagale

Vs

Janardan Krishnappa Marwar

S.A. No.501 of 1952 and Misc. Civil Cases Nos.48 and 39 of 1953

(Sinha, C.J., Deo, Hidayatullah and R. Kaushalendra Rao, JJ.)

27.01.1953. 08.11.1954

### **JUDGMENT**

#### **Deo, J.**

1. The appellant challenges the validity of the provisions of the Berar Land Revenue Code conferring rights of pre-emption. According to the learned Counsel these provisions are void in view of Article 19 read with Article 13 of the Constitution. Rule 9(2) (a), Chap. 1, Part I of the Rules of this Court requires a Judge sitting alone to refer any proceeding, other than the original proceeding including a suit pending before him, to the Chief Justice with a recommendation that it be placed before a Bench of two Judges, when it involves a substantial question of law as to the interpretation of the Government of India Act or of any Order in Council made thereunder. No doubt, this rule does not refer to a substantial question of law as to the interpretation of the Constitution as the necessary adaptations were not made in these rules. However, I am of the opinion that the rule contemplates hearing of a proceeding by a Bench of two Judges when it involves substantial questions of law regarding the interpretation of the Constitution. The decision of the question raised by the appellant is of general importance and may affect the law of pre-emption in force in Berar. It is therefore necessary that the case should be heard by at least a Bench of two Judges if not by a Full Bench. Let this case be, therefore, placed before my Lord the Chief Justice for orders. (OPINION OF THE FULL BENCH)

#### **Sinha, C.J**

(26-3-1954):-

The question which this Full Bench is called upon to determine in these cases is whether the law of pre-emption as contained in Chap.14, Berar Land Revenue Code is void as being inconsistent with the provisions of Article 19 (1) (f) read with Articles 13 and 14 of the Constitution.

2. Before its incorporation into the Berar Land Revenue Code of 1896 and later into that of 1928 by the Consolidating Act which came into force on 1-11-1928, this law was recognised as the common law of that part of the territory which had been, since the 14th century, under

Mahomedan rule. When Berar was ceded by the Nizam of Hyderabad to the British Government in 1853, the Muslim law of pre-emption continued to be in force. The first Berar Land Revenue Code of 1896 was put into operation with effect from 1-1-1897. The right of pre-emption owes its origin to Muslim jurisprudence and was, with or without modifications, applicable as local custom, as would appear from the following observations of their Lordships of the Judicial Committee of the Privy Council:

"Pre-emption in village communities in British India had its origin in the Mahomedan 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 Mahomedan law of pre-emption and in such cases the custom of the village follows the rules of the Mahomedan 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 Mahomedan 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 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. Rights of pre-emption when they exist are valuable rights ....."

See '*Kumar Digamber Singh v. Ahmad Sayeed Khan*',

3. But the law of pre-emption with which we are here concerned is a law different from the orthodox Muslim law of pre-emption in material particulars. As will presently appear from the short summary of the provisions of Chap.14, Berar Land Revenue Code, the rights of pre-emption contained in this Chapter arise only in respect of unalienated lands held for agricultural purposes. Except for such class of alienated villages as the State Government by notification may specify, the right is conferred upon occupants in a survey number in respect of-

- (i) a proposed sale of the whole or any portion of a survey number (S.176):
- (ii) a final decree for foreclosure in favour of a mortgagee by conditional sale (S.177):
- (iii) a usufructuary mortgage or a long lease for a total period of 15 years or more (S.17.8): and
- (iv) exchange "where an occupant in a survey number transfers his interest or any part thereof for a consideration which consists in whole or in part of land" (S.184).

4. When a transfer of any of the categories stated above is proposed, the transferor is required by law to give notice of the proposed transaction to all other occupants in that particular survey number stating the amount of the consideration and the extent of the

property proposed to be transferred. It is open to any co-occupant to deposit the amount with the Tahsildar and thus buy the interest of the transferor in exercise of his right of pre-emption, within two months from the date of the service of the notice required by the law. If an intending pre-emptor challenges the good faith of the transaction stated in the notice, that is to say, if he considers that it was not for a "fair consideration" or that the amount fixed by the final decree for foreclosure exceeded the market value of the interest foreclosed, it is open to him to bring a suit within two months of the notice aforesaid without there being any necessity for the deposit of any amount. In such a suit, it is open to the Court to fix a "fair consideration". In case of a competition between several intending pre-emptors, Section 179 provides the mode of determining priority amongst them, and that person is declared to have the first right who is most nearly related to the transferor or who has the largest interest in the property a portion of which is proposed to be transferred, or in the survey number. In case of a tie, that is to say, where two or more occupants are found to be equally entitled to the right, a lot has to be drawn to determine the preferential right. Such, in barest outline, are the provisions of Chap. 14, Berar Land Revenue Code containing the law of pre-emption, which is under challenge.

5. It will thus be noticed that the provisions aforesaid very much differ from the Mahomedan law of pre-emption in so far as the statute in question is not limited to a transfer of full proprietary interests even a lease hold of sufficiently long term is within the purview of the law of pre-emption. The statute law has very much simplified the conditions which must be fulfilled in order to exercise the right of pre-emption, because it has done away with the traditional demands of 'talab-i-mowasibat and talab-i-ishhad' which are very essential parts of the formalities required under the Mahomedan Law. It would thus appear that though in its origin the law of pre-emption may be rooted in Muslim jurisprudence, the statute law has made it more comprehensive in its content and application. The supporters of this law claim as its virtues that it leads to consolidation of holdings and keeps them within a family or a group of families or within a village group, so as to strengthen the corporate life of the village. Its opponents have also much to say about its evils, namely, that it has opened the door to a good deal of litigation and to perjury on a very large scale. A large proportion of the litigation in Berar districts relates to pre-emption suits. The intending purchaser knowing as he does that he may have to face a litigation of this kind naturally is not prepared to pay the full price of the property and has the temptation of overstating the price paid, so much so that even though the burden of proof lies on the pre-emptor to show that the consideration of the transaction sought to be pre-empted had not been fixed in good faith or was in excess of the market value see - '*Namdeo v. Kesheo*<sup>2</sup>', in actual practice, the Courts start with a lurking suspicion that the price may have been overstated. In some cases where the entire consideration or the major portion of it has been paid before the registering officer, the plea has often been raised by the pre-emptor and accepted by the Courts that some portion of the amount so paid to the vendor has found its way back into the pocket of the vendee. The plaintiff naturally starts with the case that the real consideration was one-third or one-fourth of the amount stated in the document evidencing the transfer and his opponent naturally is interested in insisting upon the price stated in the document. Witnesses are examined on both sides supporting the opposing versions and the Court is left in the very unenviable position of doing its best to find out where the truth lay. In other words, it becomes a game of hide-and-seek, and very often the result actually arrived at by the Court may not represent the real truth. Sometimes the price thus determined by the Court may turn out to be too little or too much with reference to the price actually paid by the vendee. It thus becomes a gamble in litigation leading to speculation. Again, it has been pointed out that the law of pre-

emption is a clog on the right of free transfer and to that extent has a depressing effect on prices generally of agricultural land. But these are considerations bearing on the policy of legislation with which Courts are not concerned. It is for the Legislature in its wisdom to lay down such rules as would obviate these apparent evils of litigation.

6. We have heard counsel at considerable length on behalf of either party in the cases in which this question has been referred. On behalf of the parties challenging the constitutionality of the law it has been argued that it infringes the freedom which has been guaranteed under Article 19 (1) (f) of the Constitution, that the right of pre-emption is a clog on the right of free contract and is a hindrance to free commerce, that the law of pre-emption cannot be enforced even as a rule of justice, equity, and good conscience (vide - '*Mahomed Beg Amin Beg v. Narayan Meghaji*<sup>3</sup>'), that the law is discriminatory against genuine purchasers of rights of occupants of lands in Berar, and that it denies the equal protection of the laws in so far as it interferes with the right of free contract to purchase property in a competitive market.

7. On behalf of the parties supporting the law as valid it has been contended that the law is protected by Article 31 (1) of the Constitution, even if it is taken to be a deprivation of property, because it is by authority of law. Article 31 (2) also was prayed in aid of the law because it was said the law provides for compensation to the vendee whose rights are pre-empted. It has also been contended that the Constitution has not guaranteed absolute right to property, and that property has always been subject to many restrictions in the interest of the State or of the general public or of a particular section of the community.

8. Shri T.P. Naik appearing on behalf of the State (not on behalf of any of the parties to the litigation) contended that pre-emption was one of the incidents of the particular kind of property owned by occupants in Berar. Such property was the creature of the State, which has carved out of its own property limited interests in favour of occupants or tenants of different classes. Hence, there was no question of infringement of any right to property. Anyone who deals in lands held by occupants is bound by the law regulating that kind of property. Reliance was placed on the recent decisions of their Lordships of the Supreme Court in - '*State of West Bengal V. Subodh Gopal*<sup>4</sup>', and - '*Dwarkadas Shrinivas v. Sholapur Spinning and Weaving Co., Ltd.*<sup>5</sup>', in support of the contention that Article 19 (1) (f) of the Constitution has no reference to particular kinds of property but has only conserved the institution of private property as distinguished from State ownership. It was further contended that the right in land vests in the State, which in the interest of the public and of general

well-being has created certain tenures of limited interest, and anyone who takes a transfer of such a limited interest is bound by the law governing the transfer of such interests. In other words, he contended that an occupant's interest is not an absolute right to property but only a bundle of rights circumscribed by a number of limitations on those rights, and whoever deals with such a kind of property takes those bundles subject to those limitations. Hence, it was contended, there was no occasion for involving the aid of Article 19 (1) (f) of the Constitution against the right of pre-emption claimed in these cases. Alternatively, it was contended that if Article 19 (1) (f) could be applied to the transactions in question, Article 19 (5) is a complete answer to the contentions raised against the validity of the law, because, it was further argued, the law is intended to foster consolidation of holdings and to prevent minute sub-divisions of the interest of occupants in land. Consolidation, it was claimed, in its turn is calculated to promote better agriculture, whereas minute sub-divisions of interest in agriculturists' holdings would lead to uneconomic and

inefficient agricultural operations.

9. Whether the law of pre-emption is an ancient of land tenure in India is a question which has been differently answered by different High Courts. In Bengal the leading case is that of - '*Sheikh Kudratullah v. Mahani Mohan Shaha*<sup>6</sup>', (FB), decided by a Special Bench of 5 Judges, the majority of whom took the view that the law of pre-emption would not apply to a Hindu purchaser at the instance of a Mahomedan coparcener as the law was not inherent in the quality of title held by the copartner from whom the purchase had been made. The other Judges took the contrary view and held that simply because the vendee was a Hindu he could not defeat the right of pre-emption inherent in the co-partner who claimed pre-emption. Mitter J., who wrote the leading judgment of the majority view, also observed that:

"a right of pre-emption is nothing more than a mere right of re-purchase, not from the vendor but from the vendee, who is treated, for all intents and purposes, as the full legal owner of the property which is the subject-matter of that right". In that case their Lordships were dealing with the Mahomedan law of pre-emption, which during the Muslim rule was the common law of the land. They were not dealing with any statute incorporating that branch of the law.

10. A Full Bench of the Allahabad High Court in - '*Gobind Dayal v. Inayatullah*<sup>7</sup>', did not agree with the decision aforesaid of the Calcutta High Court. Mahmood J., whose judgment has always been treated as classical on that branch of the law, has observed that the right of pre-emption is not a right of re-purchase either from the vendor or from the vendee involving any new contract of sale but is simply a right of substitution, entitling the pre-emptor to stand in the shoes of the vendee in respect of the rights and obligations arising from the transaction. In effect, the learned Judge held that the law of pre-emption, though in its inception a rule of Mahomedan law, had become the customary law of the land applicable to all, irrespective of their creed.

11. A Division Bench of the Madras High Court in - '*Ibrahim Saib v. Munni Mir Udin Saib*<sup>8</sup>', appears to have taken a view more in consonance with the Calcutta view and held that the Mahomedan law of pre-emption was not the law in the Madras Presidency. In that case the learned Judges appear to have been inclined to the view that this law was opposed to equity and good conscience.

12. In this Court the Allahabad view referred to above appears to have found favour, and one of us (Hidayatullah J.) in - '*Abdul Ajj v. Khairunnisa Begum*<sup>9</sup>', followed the 'Allahabad case (supra)' and not the 'Madras decision (supra)'.  
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13. The Mahomedan law of pre-emption has been recognised and applied to Mahomedans as a matter of justice, equity, and good conscience; but where all the parties concerned are not Muslims the law has been applied in some parts of India as a part of the customary law: see for example - '*Jadu Lal Sahu v. Janki Koer*<sup>10</sup>', where the Mahomedan law of pre-emption was applied to Hindus of Bihar as a part of the customary law. Other parts of India like some districts of Bengal and of Gujerat have been held to have adopted that law as a part of the customary law. But in other parts of India like the Punjab, the North-West Frontier Province, and the State of Uttar Pradesh statute law has displaced the customary law as regulating the law of pre-emption in

those parts, subject to certain exceptions not material to our present purposes. In this State also the law in question, as already indicated, has been the subject of legislation and has very much amplified, and in some respects simplified, the Mahomedan law of pre-emption. Even in other parts of this State besides Berar there are certain statutory provisions enabling lambardars and landlords to exercise rights of pre-emption in certain circumstances. With the coming into effect of the Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act (I of 1951), those rights have practically disappeared because the State has publicly abjured such rights.

14. The statutory rules regulating the right of pre-emption as contained in Chap. 14, Berar Land Revenue Code have laid down those rules as a part of the law of the land tenure in Berar. Every person holding such a kind of tenure in land has equally been subjected to those limitations whenever a transfer within the meaning of the law is to take place. Hence, there is no difficulty in dismissing outright the contention based on Article 14 of the Constitution. The law has not discriminated against any particular caste or community, and irrespective of any denominations the law universally governs the rights and liabilities of persons dealing in such property.

15. In my opinion the following observations of Patanjali Sastri C.J., who delivered the judgment of the majority of the Court in ' AIR 1954 Supreme Court 92 at p.95, are sufficient to dispose of the argument based on Article 19 (1) (f) of the Constitution:

"Sub-clause (f) of Clause (1) of Article 19 has, in my opinion, no application to the case. That article enumerates certain freedoms under the caption 'right to freedom' and deals with those great and basic rights which are recognised and guaranteed as the natural rights inherent in the status of a citizen of a free country.. The freedoms declared in sub-cl. (a) to (e) and (g) are clearly of that description and in such context sub-Clause (f) should, I think, also be understood as declaring the freedom appertaining to the citizen of free India in the matter of acquisition, possession and disposal of private property. In other words, it declared the citizen's right to own property and has no reference to the right to the property owned by him, which is dealt with in Article 31."

The observations in that case are particularly apposite because their Lordships of the Supreme Court were dealing with a legislation by the Bengal legislature amending Section 37, Bengal Land Revenue Sales Act of 1859 placing further restrictions on the rights of purchasers of revenue-paying estates to annul certain kinds of encumbrances. It is not worthy that the Judges constituting the Bench were unanimous in upholding the constitutionality of that provision, though not for exactly the same reasons. Their Lordships have further examined the amendments impugned in that case with a view to judging whether they infringed the fundamental rights guaranteed under Article 31 of the Constitution. In that connexion they observed that each case had to be determined with reference to its facts and circumstances as to whether there was any deprivation within the meaning of Article 31. They overruled the Calcutta High Court in so far as that Court had applied the provisions of Article 19 to the legislation in question and held that Article 31 of the Constitution was the more appropriate provision of the Constitution with reference to which the constitutionality of the law impugned had to be determined. Viewed in that context their Lordships held that the abridgement of the right effected by that legislation was

not so substantial as to amount to a deprivation of property. Similarly, their Lordships examined the provisions of the legislation impugned in other case decided almost at the same time by them on appeal from the judgment of the Bombay High Court in AIR 1954 Supreme Court 119. In that case their Lordships after examining the provisions of the impugned legislation came to the conclusion that it had the effect of depriving the company of its property without compensation, and as it was not covered by the provisions of Clause 5 (b) (2) of that Article the law was invalid.

16. In the cases before us it has not been contended that the State has acquired any property without compensation or that there has been a deprivation within the meaning of Article 31 of the Constitution. That being so, we have not to consider the question whether Clause 5 of Article 31 applies to the law impugned. Their Lordships of the Supreme Court in the two cases discussed above have pointed out that Article 31 of the Constitution covers a ground quite different from that covered by the provisions of Article 19 of the Constitution and that Clause (1) of Article 31 has got to be read along with Clause (2) of the same Article.

17. In support of the argument that the law impugned was unconstitutional our attention was invited to the decision of the Full Bench of the Hyderabad High Court in - '*Moti Bai v. Kand Kari Channaya*<sup>11</sup>', (FB). In that case it has been held that the Mahomedan law of pre-emption which was the law of the State of Hyderabad before the inauguration of the Constitution was after that event unconstitutional as it was a clog on the fundamental right of disposing of property guaranteed by Article 19 (1)(f) of the Constitution. That decision, though unanimous, is supported by reasons on which the learned Judges who constituted the Bench differ. But it is not necessary for

us to go into those reasons because in that case the learned Judges were dealing with not a statutory law but the Mahomedan law of pre-emption. It has already been pointed out that Courts in India are not agreed about the Mahomedan law of pre-emption being a part of the land tenure in those parts of India where that law is administered as a part of the customary law. But in the cases before us we are concerned with the statutory law of pre-emption to which different considerations apply. Chapter 14, Berar Land Revenue Code has engrafted the rules of pre-emption on the land tenures in Berar covered by that chapter. Hence, the property covered by that legislation is a peculiar kind of land tenure which has been created by the State. Such tenure with its peculiar limitations is property capable of being held and disposed of like any other property with its own limitations. Such a property does not, as already indicated, infringe the provisions of Article 19 (1) (f) of the Constitution. Hence, the decision of the Hyderabad High Court 'supra' is not a precedent governing the facts and circumstances of this case.

18. Assuming for the sake of argument that the provisions of Article 19 of the Constitution are attracted to the law impugned before us, the further question arises whether such a law cannot be brought within the purview of the exceptions contemplated in Clause 5 of Article 19; in other words may it not be said that the rules of pre-emption are reasonable restrictions on the exercise of the right to hold and dispose of property in the interest of the general public? Section 54, Berar Land Revenue Code provides that all persons coming within the category of occupants within the meaning of the Code shall hold the land in accordance with the provisions of the law laid down in the Code, including Chap.14. The provisions of Sections 179 and 184 in that chapter clearly indicate that the rules of pre-emption laid down in that chapter are mainly and primarily intended for the benefit of such occupants or co-occupants, with a view to consolidation of holdings. Thus, there are unmistakable indications in the law itself that it was intended for the benefit of the class

of persons coming within the category of 'occupants' and for ensuring that the land held by them did not by divisions and sub-divisions become uneconomic holdings to the detriment of the interest of the community as a whole. Hence, those provisions viewed even as restrictions on the exercise of the right to acquire hold and dispose of property must be adjudged to be reasonable.

19. A large number of decisions was called to our attention bearing on the question of what are and what are not reasonable restrictions within the meaning of Article 19 (5). But, as pointed out by their Lordships of the Supreme Court in the two cases discussed above, the provisions of the law impugned in a particular case have to be examined in the context of the circumstances leading up to that legislation in order to determine that question. Hence, observations made with reference to a particular piece of legislation may not be quite a safe guide with reference to the facts and circumstances leading up to another piece of legislation. In my opinion therefore it is not necessary to refer to or discuss those cases in detail. It is enough to point out that in those parts of India where the statute law has largely, if not entirely, displaced the Mahomedan law of pre-emption, for example, the Punjab or Uttar Pradesh, the High Courts of those States have upheld similar legislation on the ground that they were reasonable restrictions within the meaning of Article 19 (5) of the Constitution: see –

'*Punjab State v. Inder Singh*<sup>12</sup>', and the unreported decision of the same Court in - '*Uttam Singh v. Kartar Singh*', since reported in<sup>13</sup> (FB); and - '*Abdul Hakim v. Jan Mohammad*<sup>14</sup>', No decision has been called to our attention holding that the rules of pre-emption embodied in a statute in any part of this country have become void as a result of the provisions of Article 19 (1) (f) of the Constitution. It must, therefore, be held that there is neither authority nor principle in support of the contention that the law impugned in these cases is void.

20. For the reasons aforesaid the references must be answered accordingly. Let the second appeal and the other cases involving the consideration of this question be dealt with in accordance with this opinion. R. Kaushalendra Rao, J. (28-3-1954):- I am in respectful agreement with My Lord. The right of pre-emption enacted in the Berar Land Revenue Code is not abrogated by reason of Article 13(1) or the Constitution. I should normally have been content to express my formal concurrence with the opinion of My Lord. But the question involved is of considerable importance in litigation arising from Berar. I would like to say a few words of my own. As the exigencies of the business of the Court do not permit me to do so before My Lord goes on tour, I propose to record the opinion shortly.

**Hidayatullah, J.**

21. (26-3-1954):- I agree but would express my opinion, if need be, after perusing also the opinion of my brother Rao.

**R. Kaushalendra Rao, J.**

22. (4-5-1954):- I could not record earlier my reasons for concurring with My Lord. I propose to do so now and there is precedent for such a course. See - '*Queen Empress v. Ramzan*<sup>15</sup>', (FB) .

24. The question before the Court is whether the right of pre-emption as given in Chap. 14, Berar Land Revenue Code is void by reason of Article 13(1) of the Constitution. That Article provides that all laws in force in the territory of India immediately before the commencement of the

Constitution are void to the extent they are inconsistent with the provisions of Part III relating to fundamental rights. The right of pre-emption as given by the Code is impugned as being inconsistent with Article 19(1)(f) and Article 14 of the Constitution.

25. It was contended that the right of pre-emption infringed the fundamental right of the vendor to dispose of the property to whom he liked and the right of the vendee to acquire and hold property without any restriction. In two of the cases viz., second appeal No.501 of 1952 and Misc. Civil Case No.48 of 1953, the sale in question took place prior to the Constitution. In the third case, Misc. Civil Case No.39 of 1953, the sale was after the Constitution came into force. The sale which took place prior to the Constitution was subject to the right of pre-emption. Neither the vendor nor the vendee could on the date of the sale lay claim to any fundamental right guaranteed by

Article 19 or Article 14. The Constitution is prospective and cannot be construed so as to retrospectively free a sale from the incident to which it was subject on the date it was effected.

As observed by Das J. in - '*Keshavan Madhava Menon v. State of Bombay*'<sup>16</sup> ,

"These rights are given, for the first time, by and under our Constitution. Before the Constitution came into force there was no such thing as fundamental right. What Article 13(1) provides is that all existing laws which clash with the exercise of the fundamental rights (which are for the first time created by the Constitution) shall to that extent be void. As the fundamental rights became operative only on and from the date of the Constitution the question of the inconsistency of the existing laws with those rights must necessarily arise on and from the date those rights came into being. It must follow, therefore, that Article 13(1) can have no retrospective effect but is wholly prospective in its operation. After this first point is noted, it should further be seen that Article 13(1) does not in terms make the existing laws which are inconsistent with the fundamental rights void 'ab initio' or for all purposes.

On the contrary, it provides that all existing laws, in so far as they are inconsistent with the fundamental rights, shall be void to the extent of their inconsistency. They are not void for all purposes but they are void only to the extent they come into conflict with the fundamental rights. In other words, on and after the commencement of the Constitution no existing law will be permitted to stand in the way of the exercise of any of the fundamental rights. Therefore, the voidness of the existing law is limited to the future exercise of the fundamental rights. Article 13(1) cannot be read as obliterating the entire operation of the inconsistent laws, or to wipe them out altogether from the statute book, for to do so will be to give them retrospective effect, which, we have said, they do not possess. Such laws exist for all past transactions and for enforcing all rights and liabilities accrued before the date of the Constitution."

To the same effect are the observations of Mahajan J. (as he then was) at pp. 135-136:

"This article (Art 13(1)) does not declare any law void independently of the existence of the freedoms guaranteed by Part III. A citizen must be possessed of a fundamental right

before he can ask the Court to declare a law which is inconsistent with it void; but if a citizen is not possessed of the right, he cannot claim this relief."

26. The view expressed in 'Keshavan Madhava Menon's case' (supra) was affirmed and acted upon in a later decision reported in - '*D.K. Nabhirajiah v. State of Mysore*<sup>17</sup>,

27. It follows therefore that in a case where the sale took place prior to the Constitution, the rights and liabilities of the parties have to be determined by reference to the law existing on the date of the sale and no question of infringement of any fundamental right arises. Chapter 14 of the Land Revenue Code cannot be said to be rendered void because of Article 13(1) of the Constitution so far as the sales prior to the Constitution are concerned.

28. As the third case concerns a sale subsequent to the Constitution, the question remains whether the right of pre-emption is in derogation of the rights guaranteed by the Constitution under Article 19 (1)(f) and Article 14.

29. The learned Additional Government Advocate contended that the impugners could not invoke Article 19(1)(f). According to the contention, that provision does not guarantee any right to acquire, hold or dispose of any concrete property but only deals with property in the abstract. Reliance was placed on the pronouncement of Patanjali Sastri C.J. in AIR 1954 Supreme Court 92. The contention has found favour with My Lord. But Das and Jagannadhadas JJ. were not prepared to subscribe to the view of the learned Chief Justice (pp. 108 and 117). I am not quite sure, if I may say with due respect, whether it would be right to take the pronouncement of the learned Chief Justice, without further consideration, as the final opinion of the Court on Article 19(1)(f). A Full Bench of the Hyderabad High Court ruled that the right of pre-emption was a clog on the fundamental right of disposing of property as given by Article 19(1)(f). The Court was no doubt concerned with the right of pre-emption founded on custom. That, however, affected the question of the applicability of only clause (5) and not clause (1)(f) of the Article. In the circumstances, I would not like to rest my opinion on the ground that Article 19(1)(f) is not attracted to these cases. I proceed on the footing that Article 19(1)(f) applies. On that basis I agree that the impugned legislation is saved by clause (5) of that Article.

30. We are not here concerned with a claim to pre-emption under the personal or customary law. We are concerned with pre-emption as a statutory right. The right of pre-emption is said to have had its origin in the Mahomedan law and in some parts of the country customs of pre-emption grew up or were adopted among village communities. See AIR 1914 PC 11 at p.14 (A) and - '*Jadu Lal Sahu v. Janki Koer*<sup>18</sup>, (PC) (R). In the Punjab the view is held that the right of pre-emption arose independently of the Mahomedan law. See - '*Kadir Bakhsh v. Imam Bakhsh*<sup>19</sup>', (S). Pre-emption is now viewed as a fetter on the power of free disposal which is taken as inherent in the individual ownership of property. But the historical and comparative school of jurists seems to deny that pre-emption came to be imposed as a clog on a pre-existing right of free disposal. According to Maine, Ancient Law was concerned not with individuals but with families, not with single human beings but groups. Private property in the shape in which we know it was chiefly formed by the gradual disentanglement of the separate rights of individuals from the blended rights of a community: Ancient Law, 1930, pp.280 and 290. In some parts of the country like the

Punjab pre-emption is thus regarded as a stage in the evolution of the individual's right of free disposal of property which he did not originally possess as a member of a tribe or village community. - '*Sanwal Das v. Gur Parshad*<sup>20</sup>', at pp.389-90 (FB) (T). It is also viewed as a mere corollary to the general principles regulating succession and the power of disposal of land. It is the last means by which the natural heirs can retain ancestral property in the family when they are unable altogether to prevent an act of alienation by the holder of the estate. - '*Master v. Pohlo*<sup>21</sup>',

31. Berar came under Mahomedan dominance since the second decade of the 14th century. See Berar Gazetteer, p.113 and - '*Mt. Raijai v. Irbhan*<sup>22</sup>', (V). Berar became subject to the Nizam in 1724. The districts were assigned to the British in 1853, and the formal sovereignty of the Nizam continued under Section 47, Government of India Act, 1935, until the last vestiges of it vanished with the commencement of the Constitution. Whether the Mahomedan rule merely made the people familiar with the right of pre-emption and view it with favour or it actually became the common law in Berar as in the rest of the territories under the Nizam is not clear. See AIR 1954 Hyderabad 161 (supra, at pp. 161-162). Hirurkar is, however, of the view that the right did not exist in Berar prior to the Settlement Rules and the Sub-Tenancy Rules of 1866. He states that those who drafted the rules might have brought with them their ideas of land-laws either from the Punjab or from the Northwest Provinces. See Hirurkar, A Treatise on Berar Land Revenue Code, 1928, p.126. However that may be, pre-emption gained statutory recognition under the Code of 1896. Batten A.J.C. observed:

"It is the territorial law in Berar under the Land Revenue Code, but the principles on which it is based are the same under the territorial law of Berar as under the personal law of Muhammadans. 'The right of 'shufa' or pre-emption owes its origin to motives of expediency and a desire to prevent the introduction of a stranger among co-sharers and neighbours likely to cause inconvenience or vexation'." (Op. cit., p.596 (Ameer Ali's Muhammadan Law, 3rd Edition).

Strachey C.J. in the first of the cases cited, - '*Janki Prasad v. Ishar Das*<sup>23</sup>', gave similar reasons for the provisions in the *wajib-ul-arz* and the reasons for the introduction of the law into Berar may be taken to be the same." - '*Ganpatsa Mahadsa v. Joomabhai*<sup>24</sup>',

32. It may be more appropriate to regard the right of pre-emption in Berar as a condition or an incident of the occupancy tenure rather than as the law of the territory. The right is found enacted in the Land Revenue Code and not as a distinct law applicable to the territory: c.f. the Oudh Laws Act (18 of 1876).

33. In the Mahomedan jurisprudence the right of pre-emption functions as a salutary corrective to the minute division of property brought about by the rigorous operation of the law of inheritance. Further, according to Mahamood J., the 'zenana' system, which the Mahomedans 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. See 7 All 775 at p.783 (FB) (G). But the right of pre-emption under the Code of 1928 is available to all citizens irrespective of religious persuasions but not in respect of houses. Whatever be the speculation about the history of the

right in Berar or the reason for its enactment in the Code of 1896, we are left in no doubt as to why the Code of 1928 sanctioned its continuance. The Statement of Objects and Reasons appended to the Draft Code in 1925 which was later enacted as the Code of 1928 is very illuminating on the factors which operated on the mind of the framers of the Code. Though the statement is not admissible as an aid to the construction of the Code, it may be referred to for the limited purpose of ascertaining the condition prevailing at the time which actuated the sponsor of the Bill to introduce the same and the extent and urgency of the evil which he sought to remedy. (Per Das J. in AIR 1954 Supreme Court 92 at p.104 . The following is an extract concerning Chapter 14 from the Statement of Objects and Reasons:

"General- The device of the pre-emption of agricultural lands is one which admittedly leads to much litigation, but it has several powerful arguments in support of it. It has the effect of placing an agriculturist in a favourable position for the acquisition of lands contiguous to, or in the immediate neighbourhood of his own holding. It has the effect of saving him to some extent from being outbid by the absentee and by the moneylender. It encourages a competent and thrifty cultivator to extend his holding, and it tends to keep agricultural lands within a family, or group of families or within a village group. It has a tendency to strengthen the corporate life of a village. It also has the effect of, consolidating holdings and thereby facilitating cultivation and it is with these objects in view that the present Draft Law proposes to strengthen and to extend the existing rights of pre-emption.

The existing law is not free from ambiguity and is easily evaded. Many cases have been noticed of leases for a term of 100 years and over, which are virtually sales and yet are not subject to the law of pre-emption. The present law extends only to transfers by private sale, by foreclosure and by court sale for arrears of land revenue. In order to make the right of pre-emption on sale or mortgage effective in practice, it is deemed necessary to extend the rights to cover long leases and usufructuary mortgages ....." (vide Central Provinces Gazette, Part I, dated 17-1-1925, p.129 at p.132).

34. It is well known that our agricultural economy suffers from excessive fragmentation of holdings and various measures have been taken to check the evil by encouraging consolidation or holdings. That the evil has not abated is clear from the direction in the First Five-Year Plan that "in all States programmers for the consolidation of holdings should be expanded and pursued with vigour." (vide Chap.12, para 20, p.191). The Royal Commission on Agriculture noted that fragmentation was not acute in Berar, though no adequate reason was given, (vide Chap. V, para 121, p.134). But in view of the Statement of Objects and Reasons given with the Draft Code in 1925, it is not unreasonable to infer that the right of pre-emption prevalent in that territory had something to do with the absence of much fragmentation. Otherwise, the right would not have been strengthened and extended as an aid to consolidation, with knowledge of the results of the working of the right for over 60 years under the Settlement Rules and the Sub-Tenancy Rules of 1866 and the Code of 1896. It is not without significance that while in a part of the State - the Central Provinces - special legislation had to be undertaken for checking the evil of fragmentation by enacting a measure like the Central Provinces Consolidation of Holdings Act (Act 8 of 1928), no such necessity has so far been felt in Berar, presumably because of the

operation of the law of pre-emption.

35. The right of pre-emption enacted in the Code is in its essential nature the same as under the Mahomedan jurisprudence. The primary right of an occupant in a survey number is to have in effect an offer made of an intended or resulting transfer except when it is under Section 184 or to another occupant in a survey number. The secondary right is to be substituted in a transfer in contravention of the primary right. But the right given by the Code differs in its many features and incidents from that arising under the Mahomedan law.

36. The Mahomedan law recognises three classes of pre-emptors in the following order: (i) shafi-sharik (co-sharer), (ii) shafi-i-khaleet (participator in easements), and (iii) shafi-i-jar (neighbour). See Hedaya, p.549, and - '*Gopal Sahi v. Ojoodhea Pershad*<sup>25</sup>', (Y). Under the Code the right is given only to a person having the right of an occupant, whether in his sole right or jointly with others in the survey-number or in any portion of it, which is the subject of transfer. See Section 173. The right is thus excluded on the ground of vicinage or on the ground of being a mere participator in the easements or appendages of the property. The law takes the survey number as the unit and proceeds to bring about consolidation within it. Under the Code of 1896, it was held that an occupant of a recognized division of a survey number had no right of pre-emption with reference to another recognized division of the same survey number. See - '*Mt. Gangu v. Chandu*<sup>26</sup>', By the definition of a 'sub-division of a survey number' as meaning a portion of a survey number in Section 2(12) and the definition of an 'occupant in a survey number' as meaning a person having the right of an occupant in any portion of a survey number, the Legislature negated the effect of the decision in '*Mt. Gangu v. Chandu*' (supra) which came in the way of the consolidation of a survey number.

37. A vital difference between the right as given by the Code and that given under the Mahomedan law is with regard to coparceners. Under the Mahomedan law, unlike under the Code, a coparcener has the right of pre-emption even when another coparcener happens to be the purchaser. See - '*Amir Hasan v. Rahim Bakhsh*', 19 All 466 and - '*Enatullah v. Kowsher Ah*<sup>27</sup>', (SB) . The Code provides that the right of pre-emption shall not arise when an occupant in a survey number transfers his interest to another occupant in survey number, Section 174(3). That is to say, there is no restriction on alienations among the occupants in survey number.

38. Under the Mahomedan law the right affects property which is 'akar' or what comes within the meaning of it - houses, gardens and small parcels of land: - '*Mt. Sheoratni v. Munshi Lal*<sup>28</sup>', But the right based on partnership is extended to villages and large estates as well: - 'In the matter of the Petition of *Chatternath Jha; Sheikh Mahomed Hossein v. Shaw Mohsin Ali*<sup>29</sup>', (FB) . So immovable property in general is subject to the right. But under the Code not all immovable property is affected by the right but only unalienated lands held for agricultural purposes, though the Government may extend the right to alienated' villages: Sections 174(2) and 187(1).

39. The right arises under the Mahomedan law on a sale or an exchange or a foreclosure of a mortgage by conditional sale. See Hedaya, pp. 559-60 and - '*Mahomed Uunis Khan v. Muhammad Saleh Khan*<sup>30</sup>', and - '*Batul Begum v. Mansur Ali Khan*<sup>31</sup>', (PC) . Whether the right arises on a transfer of property by a husband to his wife in lieu of dower is not free from doubt: - '*Bashir Ahmad v. Mt. Zubaida Khatun*<sup>32</sup>', But it does not arise unless there is a complete cessation

of the interest of the transferor. See 35 Cal 575 at p.599 (J). Neither a lease nor a mortgage under which the ownership of the lessor or the mortgagor in the property can be said to cease gives rise to the right of pre-emption under the Mahomedan law. See - '*Dewan Utulla v. Kazem Molla*<sup>33</sup>, and - '*Goordyal Mundur v. Raja Teknarain Singh*<sup>34</sup>', (FB) . The Code, however, grants the right of pre-emption presumably to check absenteeism and improve cultivation even in a case of a transfer of interest by a usufructuary mortgage or by a lease for a period exceeding 15 years: Section 178 (1).

40. Further, in a case of an exchange the Code expressly negatives the right if the transfer effects consolidation in the land held by either party to the transfer: Section 184 (2).

41. Under the Hanafi law, on competition among equal pre-emptors the right is worked out 'per capita'. See '*Jai Ram v. Mahabir Rai*<sup>35</sup>, and - '*Vithaldas Kashandas v. Jamietram Maneklal*<sup>36</sup>', (FB) . According to the Shafei school, the rights of co-sharers are proportioned to their respective shares: Hedaya, p.549. Under the Code the claim of only one is made to prevail to further consolidation. Propinquity to the transferor and the quantum of interest possessed by the pre-emptor are the criteria for determining the priority of right unlike under the Mahomedan law. Competition in a case of equality of right is resolved by lot: Section 179.

42. The notion that the right of pre-emption in Berar is just an unwholesome relic from the Mahomedan period is not warranted by the history of the Code under which it now prevails. In fact, the foregoing examination reveals that in its features and incidents the right of pre-emption as enacted in the Code is not identical with that known to the Mahomedan jurisprudence. There are many purposeful departures, the tendency of which is in the direction of consolidation of a survey number and the prevention of absenteeism. Whatever be the origin of the right in Berar, it is evident that in enacting Chap.14 in 1928 the Legislature was not merely countenancing or continuing pre-emption as a legacy from the past. It perceived in pre-emption, though alien to the soil at its inception, a useful instrument which could be adapted for the fulfillment of objectives considered desirable, namely, consolidation of holdings, improvement of agriculture and strengthening of the corporate life of the village.

43. It was contended on behalf of the impugners that the restriction on the power of disposition or holding could not be regarded as reasonable because it prevented a citizen interested in agriculture or better situated than the pre-emptor to further agriculture. The reasonableness of the restriction has, however, to be adjudged not by reference to its operation in each individual case but in relation to the broad objects of the legislation. The objects are determined by the policy chosen. The choice of a policy is for those entrusted with the task of legislation. With the merits of the policy the Court has no concern. All that the Court is concerned under clause (5) of Article 19 is to see whether the restrictions imposed can be said to be in the interests of the general public and reasonable. The presumption is that a legislature understands and correctly appreciates the need of its own people and that its laws are directed to problems made manifest by experience: - '*Charanjit Lal Chowdhuri v. Union of India*<sup>37</sup>, The test for determining the reasonableness of the restrictions was formulated by Patanjali Sastri C.J. in - '*State of Madras v. V.G. Row*<sup>38</sup>':;

"It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and 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 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 authorizing the imposition of the restrictions, considered them to be reasonable."

44. There is nothing to show that the objects with which Chap.14 was enacted in 1928 were not real. Nor is there anything to show that given these objects, the restrictions imposed on the vendor or the vendee are not in the interests of the general public but are arbitrary or out of relation to the objects sought to be achieved.

45. The point that remains for consideration is whether the impugned provisions are hit by Article 14. The Legislature has chosen to give the right of pre-emption in respect of unalienated agricultural property and the right is given to every person who is an occupant in the survey number without discrimination. The principles for determining whether there is a denial of equality before the law or the equal protection of the laws are found stated by Fazl Ali J. in - '*State of Bombay v. F.N. Balsara*<sup>39</sup>, I am of opinion that none of the principles is infringed. As observed by Das J. in - '*State of West Bengal v. Anwar Ali Sarkar*<sup>40</sup>,

"The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that the differentia must have a rational relation to the object sought to be achieved by the Act.

The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while the Article forbids class legislation in the sense of making improper discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liability proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense I have just explained."

46. It was strenuously contended that priority based on propinquity as enacted in section 179 is archaic and discriminatory. No question of priority based on such a rule arises in any of the three cases. But the contention is without force in that the right itself is not founded upon propinquity. A person who is not an occupant of the survey number is not entitled to pre-empt merely because of his relationship to the transferor. Only as among the occupants propinquity is the rule of preference. The rule thus operates in a very narrow compass. It gives more stability to the consolidation effected: (Hirurkar, p.137).

47. In taking unalienated agricultural property and giving the right of pre-emption to an occupant in survey number, the Legislature cannot be said to have made any unreasonable classification or conferred any privileges or imposed any disabilities which are unrelated to the objects of the legislation.

48. In conclusion, I agree that the right of pre-emption as enacted in the Berar Land Revenue Code, 1928, is not void after the commencement of the Constitution.

**Hidayatullah, J.**

49. (28-9-1954):- I have nothing to add to the opinion of Rao J. with which I concur.

**Sinha, C.J. And Hidayatullah And R. Kaushalendra Rao, Jj.**

50. (8-11-1954).:- As these appeals have rested on the question of 'vires' of the Act and as the Act has been declared to be 'intra vires' by our decision, it follows that the appeal has to be dismissed with costs. No other question was raised thereafter.

Appeal dismissed.

<sup>1</sup> AIR 1914 PC 11 at p.14

<sup>2</sup> AIR 1938 Nag 59 at pp. 60-61

<sup>3</sup> AIR 1916 Bom 255

<sup>4</sup> AIR 1954 SC 92

<sup>5</sup> AIR 1954 SC 119

<sup>6</sup> Beng LR 134

<sup>7</sup> All 775 (FB)

<sup>8</sup> Mad HCR 26

<sup>9</sup> AIR 1949 Nag 361

<sup>10</sup> 35 Cal 575

<sup>11</sup> AIR 1954 Hyd 161

<sup>12</sup> AIR 1953 Pun 20

<sup>13</sup> AIR 1954 Pun 55

<sup>14</sup> AIR 1951 All 247

<sup>15</sup> 7 All 461 at p.465

<sup>16</sup> AIR 1951 SC 128 at p.130

<sup>17</sup> AIR 1952 SC 339 at p.342

<sup>18</sup> 39 Cal 915 at p.921

<sup>19</sup> 87 Pun Re 1895 p. 419

<sup>20</sup> 90 Pun Re 1909 p.338

<sup>21</sup> 52 Pun Re 1896 p.144 at p.147

<sup>22</sup> 5 Nag LR 136 at p.139

<sup>23</sup> 21 All 374 (FB)

<sup>24</sup> 2 Nag LR 150 at p.155

<sup>252</sup> Suth WR 47

<sup>269</sup> Nag LR 16

<sup>27</sup> AIR 1926 Cal1153

<sup>28</sup> AIR 1926 Pat 542

<sup>296</sup> Beng LR 41

<sup>30</sup> AIR 1931 All 106

<sup>3124</sup> AH 17

<sup>32</sup> AIR 1926 Oudh 186 (2)

<sup>3315</sup> Cal 184

<sup>342</sup> Suth WR 215

<sup>357</sup> All 720 at p.728

<sup>36</sup> AIR 1920 Bom 343

<sup>37</sup> AIR 1951 SC 41 at p.45

<sup>38</sup> AIR 1952 SC 196 at p.200

<sup>39</sup> AIR 1951 SC 318 at p.326

<sup>40</sup> AIR 1952 SC 75 at p.93