

Amendment in Pre-emption Law

Report No. 122

AMENDMENT IN PRE-EMPTION LAW

Certain provisions of the Punjab Pre-emption Act, 1913 and the NWFP Pre-emption Act, 1950 were held repugnant to the injunctions of Islam by the Shariat Appellate Bench of the Supreme Court with the direction to amend the law till 31st July 1986 failing which the said provisions would cease to have effect from that date (PLD 1986 SC 360).

The NWFP Pre-emption Act was enacted and enforced in 1987, while the Punjab Pre-emption Ordinance was promulgated in 1990 but the said Ordinance on expiry of its life as provided by Article 128 (2) (a) of the Constitution was re-promulgated by Ordinance No. XII and XXVIII of 1990 till the Punjab Pre-emption Act, 1991 (Act IX of 1991) was passed which was again challenged in the Federal Shariat Court and the Federal Shariat Court in its judgment (PLD 1991 FSC 80) declared the following provisions of the said Act as repugnant to the injunctions of Islam:

- (i) Section 2(a); to the extent it excluded urban property from the purview of pre-emption law.
- (ii) Section 6(2); which made the exercise of right of pre-emption dependent on the existence of Zaroorat or to avoid Zarar.
- (iii) Section 12; which prohibited the exercise of right of pre-emption within a period of sixty days, if the sale was subject to the stipulation of revocation thereof within that time.
- (iv) Proviso of sub-section (3) of section 13; which made the performance of Talab-i-Ishhad in the presence of two truthful witnesses, in rural areas having no postal service, indispensable. The requirement was subjected to his ability to do so.
- (v) Section 22; which barred improvement in the status of the vendee-defendant through inheritance, after the institution of suit, as defence to non-suit the pre-emptor-plaintiff.

- (vi) Section 29; which empowered the Government, in the public interest, by a Notification in the Official Gazette to declare that in any local area or with respect to any sale or class of sales, no right of pre-emption shall exist or only such limited right, as it may specify, shall exist.
- (vii) Section 35 (2) read with section 1 (3); which excluded the application of sections 13 and 30 to suits, filed between the 1st day of August 1986 and the 28th March 1990 (both days inclusive), whether dismissed or pending, provided the pre-emptor established that he had made Talab-I-Ishhad in the presence of two truthful witnesses.

The said judgment was appealed by the Provincial Government before the Shariat Appellate Bench of the Supreme Court and the Court in its judgment dated 2nd September 1993, (PLD 1994 SC 1), observed that:

1. “The exemption of all the immovable properties situated in urban areas does not fulfil the requirement of Zaroorat on the basis of which a particular property can be exempted in the Shari’ah from the application of the law of pre-emption. Thus section 2(a) of the Act, 1991 is repugnant to the Injunctions of Islam to the extent that it excludes all the urban properties and the properties situated within the Cantonment limits permanently from the application of the Act.”
2. “Although the removal of Zarar can be taken as a basic philosophy underlying the law of pre-emption, but in the manner in which it has been laid down in section 6(2) of the Act, 1991 it has become a precondition for the exercise of the right of pre-emption and onus to prove the Zarar has been laid on the plaintiff and without such proof he has been denied the right of pre-emption. The logical result of section 6 (2) is that if a person who is a co-sharer of a vender has made all the three Talabs required under section 6(1) of the Act 1991, but did not mention in his plaintiff that his claim to pre-emption is based on the Zarar apprehended by him, his claim to pre-emption shall be rejected. Such a person (is entitled

to the claim of pre-emption under the express traditions of the Holy Prophet (P.B.U.H) but section 6(2) debars him from the right of pre-emption. Therefore, this subsection contravenes the injunctions of Islam as laid down in the Sunnah of the Holy Prophet (P.B.U.H).”

3. “Section 35(2) of the Act 1991 is repugnant to the Injunctions of Islam in so far as it exempts the cases pending or instituted during the period from 1st August, 1986 to 28th March, 1990 from the requirements of Talab-i-Muwathbat, and extends to the right of limitation for them up to one year. However, the provision of sending a notice to the vendee, as contemplated in section 13 of the Act, 1991, can be dispensed with in relation to these suits because, as mentioned earlier, sending of notice is not a substantive requirement in the Shari’ah to effect the Talab-i-Ishhad. On the contrary, it is procedural provision enacted by the legislature on the basis of expediency. Therefore, it is open for the legislature to dispense with this requirement altogether or with respect to certain cases.”

The Supreme Court in its Judgment declared that the following provisions of the Punjab Pre-emption Act, 1991 are repugnant to the Injunctions of Islam as laid down in the Holy Qur’an and Sunnah of the Holy Prophet and if the law is not amended up till 31-12-1993 the following provisions of the Act shall cease to hold effect.

- (i) Section 2(a) so far it excludes from the definition of “immovable property” all properties situated in urban areas or within Cantonment limits.
- (ii) Section 6(2) as it makes the plaintiff in the case of pre-emption liable to prove that he is exercising the right of Shuf’a on the basis of Zaroorat or to avoid Zazar.
- (iii) Section 35(2) so far as it exempts the suits of pre-emption instituted or pending between 1st day of August, 1986, and 28th March, 1990 from the requirement of Talab-i-Muwathbat and because they have extended the period of limitation for such suits to one year.

In view of above directions of the Supreme Court amendments have been made in some provisions such as sections 24 of the NWFP Preemption Act. However, the other provisions of the Acts have been declared repugnant to the Injunctions of Islam by the Supreme Court which still exist in the Punjab Pre-emption Act, 1991 and the NWFP Pre-emption Act, 1987 and they have not been amended as directed by the Supreme Court. These provisions are making confusions in filing suits for pre-emption. It is therefore, proposed that the matter may be referred to the Government of Punjab and Khyber Pakhtunkhwa under Clause (3)(a) of Article 203D of the Constitution for taking steps to amend the Punjab Pre-emption Act 1991 and the NWFP Pre-emption Act, 1987 in accordance with the directions of the Shariat Appellate Bench of Supreme Court.

In this regard, it is pointed out that the definitions of "Immovable Property" given in Section 2(a) of the Punjab Pre-emption Act excluded the property from pre-emption which is situated in urban area or within the Cantonment limits. Section 2(a) is reproduced as follows:

"immovable property" means immovable property situated in any area other than an urban area or within cantonment limits as declared by any law relating to Local Bodies or Cantonments, as the case may be, for the time being in force".

- (I) The definition of property has been amended in the NWFP Pre-emption Act, 1987 accordingly by substituting it with the following:-

"Immovable property" includes land, building, house, shop, water tank and well;

Section 2(a) of the Punjab Pre-emption Act may also be amended accordingly.

- (II) Section 21 of both the said Acts provide the provisions of Cost in case of making of improvements in the immovable property by the vendee before Talab-i-Ishhad made by the pre-emptors, but the vender is not

entitled to claim the bona-fide expenditure incurred by him for completion of sale in addition to actual sale consideration.

In Section 21 of the Punjab Pre-emption Act, 1991 and the NWFP Pre-emption Act 1987 a subsection (2) may be added as follows:-

(2) "Vender will also be entitled to bonafide expenses incurred by him for completion of the sale and same will included in the amount of consideration to be paid by the pre-emptor to the vendee".

(III) Section 31 of Punjab Pre-emption Act, 1991 and Section 32 of NWFP Pre-emption Act, 1987, provided the provision of serving notice as follows:-

(1) The officer registering the sale-deed or attesting the mutation of a sale shall, within two weeks of the registration or attestation, as the case may be, give public notice in respect of such registration or attestation.

(2) The notice under subsection (1) shall be deemed to have been sufficiently given if it is displayed on the main entrance of a mosque and on any other public place of the village or place where the property is situated.

(3) The charges for the notice under subsection (2) shall be recovered from the vendee by the officer registering the sale or attesting the mutation, as the case may be, at the time of such registration or attestation.

The requirement of serving of notice by Registration Authority subject to payment of charges of notice by the vendee is against the tradition of Prophet (P.B.U.H.). It is a duty of the vender who intends to sell the property to intimate the person who have right of Pre-emption under the classification of Pre-emptors as provided by

the Act, if he fails to intimate the intention of sale of property to pre-emptor and sale out the property to any stranger then he is responsible to pay the compensation/charges incurred on sale deed to the vendee. The provision of notice may be deleted.

- (IV) The provinces of Sindh and Balochistan have no enactments on right of pre-emption and filing of pre-emption suits, as reported by the High Courts of Sindh in its Judgment Allah Bux versus Jano & other [PLD 1962 (WP) Karachi 317] it was held that:-

“It is thus, obvious that the right of Pre-emption is not a personal right sting in the pre-emptor, it is a right which vests in him by reason of ownership of property and it exist prior to the date of sale, although it can be enforced only after the sale has taken place. It is also obvious that as in this part of the province there is no statute law on the subject, and as custom was not pleaded the Mohammedan Law of Pre-emption would apply on the grounds of Justice, equity and good conscience.”

Recommendations

- i. Section 2(a) of the Punjab-emption Act may be substituted on the pattern of NWFP Pre-emption Act as follows:

Section 2(a) “Immovable property includes land, building, house, shop, water tank and well”.
- ii. In sub-section (2), Section 6 of the Act, the exercise of right to pre-empt is conditioned with Zaroorat which is not proper. For instance, there may not be an immediate fear of Zarar when a person working abroad buys a house in avicinity through his agent but such can happen on his return back to live therein. It is, therefore, proposed that the following Section 6(2) be deleted.

- iii. For avoiding complications and delay in the final disposal of cases the following provisions in Pre-emption Acts may be introduced after Section 13 so the following Section 13-A may be added in both the Acts:

13A. "The vendee should not transfer the property after receiving notice Talab-i-Shhad till the final decision of suit."

- iv. In Section 21 of the Punjab Pre-emption Act a sub-section (2) may be added due to worldwide inflation, prices of properties are going up due to devaluation on the currency the prices can be assessed on the basis of value of gold/silver or any other means as follows:-

(2) "Vendee will be entitled to bonafide expenses incurred by him for completion of the sale and same will be included in the amount of consideration to be paid by the pre-emptor to the vendee".

- v. Notice under Section 31 of the Punjab Pre-emption Act 1991 and section 32 of NWFP Pre-emption Act 1987 may be deleted because the vander/saler is liable to serve notice to the pre-emptor prior to the sale of immovable property.
- vi. Section 35(2) of the Punjab Pre-emption Act 1991 has been declared repugnant to the injunctions of Islam hence ceased to effect from 01-01-1994. The provision of Section 35(2) may be deleted.
- vii. The provinces of Sindh and Balochistan have no law of pre-emption. It is proposed that the provincial governments of Sindh and Balochistan may enact the law on the subject.

Comparative Chart for Amendment in the NWFP Preemption Act, 1987 and the Punjab Preemption Act, 1991 follows:

COMPARATIVE TABLE

Punjab Pre-emption Law	NWFP Pre-emption Law	Proposed
<p><u>Section 2 (a):</u> “Immovable Property” means immovable property situated in any area other than an urban area or within cantonment limits as declared by any law relating to Local Bodies or Cantonments, as the case may be for the time being in force:</p>	<p><u>Section 2(a):</u> “Immovable Property” includes land, building, houses, shop water tank and well;</p>	<p>Section 2(a) of the Punjab Pre-emption Act may also be amended as under:-</p> <p>“Immovable Property” includes land, building, houses, shop water tank and well;</p>
<p><u>Section 6(2):</u> Notwithstanding anything in subsection (1), the right of pre-emption shall be exercisable only in case of “Zaroorat” or to avoid ‘Zarar’.</p>		Deleted
<p><u>Section 21:</u> Improvements made by the vendee.- Where a vendee has made any improvements in the immovable property before Talb-i-Ishhad is made by the pre-emptor under subsection (3) of Section 13, the vendee shall be entitled to the cost of such improvements.</p>	<p><u>Section 21:</u> Improvements made by the vendee.- Where a vendee has made any improvements in the immovable property before Talb-i-Ishhad is made by the pre-emptor under subsection (3) of Section 13, the vendee shall be entitled to the cost of such improvements.</p>	<p>(2) “Vendee will also be entitled to bonafide expenses incurred by him for completion of the sale and same will</p>

		be included in the amount of consideration to be paid by the pre-emptor to the vendee”.
<u>Section 31: Notice.</u> (1) The Officer registering the sale deed or attesting the mutation of a wale shall, within two weeks of the registration or attestation, as the case	<u>Section 32: Notice.</u> (1) The Registrar registering the sale-deed or the Revenue Officer attesting the mutation of a sale shall, within two weeks of the registration or attestation, as the case may be, given public notice in respect of such	Deleted

Commission’s deliberations on 04 June, 2011

The Commission recommended that since the issue pertains to implementation of judgment of Supreme Court; therefore, the matter may bereferred to the Secretary, Ministry of Law, Justice and Parliamentary Affairs for implementation of the judgment.