

6. Application of Law of Preemption on Commercial Properties in Islamabad Capital Territory: A Critical Appraisal of Case Law in Light of Islamic Law

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ABSTRACT

Right of preemption has been recognized by English law, as codified in the Sub-continent, as well as Islamic law. English law was initially enacted in the shape of Punjab Preemption Act, 1913 and remained applicable until the same was substituted by different provinces after codification of different provincial laws as applicable today. These laws were though codified after independence, but the principles of these laws are almost the same as were available in the Punjab Preemption Act, 1913, which was promulgated during English rule. However, certain principles applicable in English law have been seen and declared to be against the injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet (ﷺ) by various jurists as well as by the Honorable Federal Shariat Court and august Supreme Court of Pakistan, which has been mandated under the Constitution of Pakistan to analyze and declare any law or provision of law un-Islamic, if found as such. Certain provisions of Punjab Preemption Act, 1913 as well as other provincial laws as applicable today in the provinces of Pakistan exclude commercial properties from the scope of the right of preemption. Astonishingly, base of this principle has been attributed to Islamic law, but main texts of the Holy Quran and Sunnah as well as writings of the classical as well as contemporary jurists do not make any such distinction between commercial and private properties from the exercise of the right of preemption. The case with regard to the exercise of the right of preemption in Islamabad Capital Territory is altogether different as no special

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law has been enacted for Islamabad and old law being applicable with regard to properties being subject to law of preemption, principles of Islamic law shall be applicable in accordance with verdict of Honorable Federal Shariat Court rendered in Said Kamal Shah case.

I. INTRODUCTION:

Right of preemption has been defined by legal jurists as well as courts and the precise and oldest definition appears to be given in *Gobind Dayal* case, where the right of preemption was defined as:-

*Pre-emption is a right which the owner of immovable property possesses, as such, for the quiet enjoyment of that immovable property, to obtain, in substitution for the buyer, proprietary possession of certain other immovable property, not his own, on such terms as those on which such latter immovable property is sold to another person.*³

Law of Preemption is an important subject of civil law particularly in the Subcontinent and the same has also been recognized by Islamic law. Based on the same, Punjab Preemption Act, 1913 was promulgated during English rule. Later on, Punjab and Khyber Pakhtunkhwa have promulgated their own laws on preemption as Punjab Preemption Act, 1991 and Khyber Pakhtunkhwa Preemption Act, 1987 respectively. Whereas, there is no codified law of preemption in the provinces of Sindh and Baluchistan and in accordance with the principles laid down in the case of *Iftkharuddin v Jmshed K. A. Marker*,³ honourable Sindh High Court held that having no codified statutory law, the law of preemption in Sindh and Baluchistan shall be governed by the custom, if there was an established custom, or according to Islamic law.⁴ Therefore, it is clear that in the provinces of Punjab and Khyber Pakhtunkhwa, statutory law is applicable and in Sindh and Baluchistan, customary law and Islamic law are

³ Govind Dayal v Inayatullah, (1885) 7 All 779.

⁴ PLD 1995 608 Karachi.

applicable. However, case is different as far as Islamabad Capital Territory (ICT) is concerned. A few Courts and even legal experts are of the view that Punjab Preemption Act, 1991 is applicable in ICT. A few others say that having no codified statutory law, principles of Islamic law are applicable. However, the position has been clarified by the honorable Islamabad High Court in the case of “*Rab Nawaz & others Vs. Rustam Ali*”, wherein the Honorable High Court was pleased to hold that: -

“13. An attempt was made in 1997 to make preemption laws for the I.C.T. The Islamabad Capital Territory Preemption Ordinance 1997 (“the 1997 Ordinance”) was promulgated on 15.02.1997 and it extended to the I.C.T. This Ordinance lapsed by efflux of four months in terms of Article 89 of the constitution. Section 34 of the 1997 Ordinance is reproduced herein below: -

“34...Repeal. The Punjab Pre-emption Act, 1913 (Punjab Act I of 1913) in its application to the Islamabad Capital Territory, is hereby repealed.

*14. The mere fact that the Ordinance repealed the 1913 Act implies that the 1913 Act was in force in the I.C.T. prior to its repeal by the 1997 Ordinance. Since the 1997 Ordinance lapsed upon the expiry of ninety days from the date of its promulgation, the 1913 Act to the extent of it being applicable to the I.C.T. revived. It is well settled that when an Ordinance amends or repeals a statute and thereafter the Ordinance expires, the original Statute re-emerges. Reference in this regard may be to the law laid down in the cases of *Federation of Pakistan v. M. Nawaz Khokhar* (PLD 2000 SC 26) and *Sarghoda Bhera Bus Service Limited V. Province of West Pakistan* (PLD 1959 SC 127).²⁵*

⁵ PLD 2020 Islamabad 293.

It has been made further clear by holding that: -

“It is not disputed that the 1913 Act was in force in the I.C.T. prior to the passing of the President’s order No.1 of 1970. By virtue of Article 19 of the President’s Order of 1970, the 1913 Act continued to apply to the I.C.T. The President, in exercise of powers under Article 6 of the President’s Order No.1 of 1970, could have amended the 1913 Act to the extent that it applied to the I.C.T. or could have passed an Order with respect to the laws of pre-emption. This, the President did not do. However, in exercise of the powers conferred under Article 89 of the Constitution, the President promulgated the 1997 Ordinance dealing with the laws of pre-emption applicable to the I.C.T. Therefore, upon the repeal of the 1997 Ordinance by efflux of time, the 1913 Act stood revived to the extent of its application to the I.C.T. Until the 1913 Act is not repealed or amended by the competent legislature, its provisions (other than the ones that were declared unislamic in the case of Government of N.-W.F.P v. Said Kamal Shah (supra)) would continue to apply in the I.C.T. Even though the 1991 Act had repealed the Punjab Pre-emption Ordinance, 1991 and other Ordinances which in turn had repealed the 1913 Act, the application of the 1991 Act would be confined to the Province of the Punjab and cannot by implication be extended to the I.C.T. The enactment of the 1991 Act would not operate as a repeal of the 1913 Act to the extent of its application to the I.C.T. This is because the provisions of the 1913 Act continued to apply to the I.C.T. by virtue of Article 19 of the President’s Order No.1 of 1970.”⁶

⁶ Ibid.

In accordance with abovementioned detailed analysis of the situation and the principles laid down by the honorable Islamabad High court, Islamabad, it is now well established that the Punjab Preemption Act, 1991 is not applicable in ICT rather any claim of preemption is required to be governed by the Punjab Preemption Act, 1913 to the extent of provisions having not been struck down by the Honorable Federal Shariat Court in the case titled “*Government of NWFP Vs. Said Kamal Shah*”.⁷

Having established that the applicable law on preemption in ICT is the Punjab Preemption Act, 1913, with regard to the subject matter of law of preemption, provisions have been inserted in the Act, 1913 to include or exclude certain properties from the operation of law of preemption. In this regard, Section 3 of the said Act states that: -

“In this Act unless a different intention appears from the subject or context, -

(1) 'agricultural land' shall mean land as defined in the [Punjab Alienation of Land Act, 1900] (as amended by Act I of 1907), but shall not include the rights of a mortgagee, whether usufructuary or not, in such land;

(2) 'village immovable property' shall mean immovable property within the limits of a village other than agricultural land;

(3) 'urban immovable property' shall mean immovable property within the limits of a town, other than agricultural land. For the purposes of this Act a specified place shall be deemed to be a town (a) if so declared by the [State] Government by notification in the Official Gazette, or (b) if so found by the Courts”.⁸

⁷ PLD 1986 SC 360.

⁸ Section 3 of Punjab Preemption Act, 1913.

Furthermore, Section 4 of the Act of 1913 mentioned the property where the right of preemption is applicable and states that: -

*“the right of pre-emption shall mean the right of a person to acquire agricultural land or village immovable property or urban immovable property in preference to other persons, and it arises in respect of such land only in the case of sales and in respect of such property only in the case of sales or of foreclosures of the right to redeem such property. Nothing in this section shall prevent a Court from holding that an alienation purporting to be other than a sale is in effect a sale.”*⁹

Section 5 of the Act of 1913, on the other hand, excludes the property from the right of preemption and states that: -

“No right of pre-emption shall exist in respect of-

(a) the sale of or foreclosure of a right to redeem -

(i) a shop, serai or katra;

(ii) a dharmsala, mosque or other similar building; or

*(b) the sale of agricultural land being waste land reclaimed by the vendee.”*¹⁰

The above-mentioned provisions of Punjab Preemption Act, 1913 reflect those certain properties are subject to the law of preemption and certain others are not included within the law of preemption. Among others, the description of property given in Section 5(a)(i) is also excluded from the application of law of

⁹ Section 4 of Punjab Preemption Act, 1913.

¹⁰ Section 5 of Punjab Preemption Act, 1913.

preemption. The principle has been primarily deduced from the word 'shop' occurring in section 5 *supra*. On the basis of the same, opinion has been adopted that the law of preemption is not applicable on commercial property and no right of preemption can be exercised over any such property. Apart from the word 'shop' occurring in section 5 *supra*, different terms have been used in other laws including Punjab Preemption Act, 1991 and Khyber Pakhtunkhwa Preemption Act, 1987. The case law developed in this regard also supports the contention that the law of preemption is not applicable over commercial property. For instance, it was held in the case of '*Bilal Ahmed and another Vs. Abdul Hameed*' by august Supreme Court of Pakistan that:-

“First, we will consider whether the Respondent/Plaintiff can claim the right of pre-emption on the basis of Revenue Records. We are clear in our mind that the Suit property was constructed and urbanized, and it has also been admitted between the parties that the Suit property, as well as the property on the basis of which the Respondent/Plaintiff claims the right of pre-emption, are commercial properties having property number allocated by the Excise and Taxation Department. Therefore, no benefit of Revenue records, even if ownership of both the parties would have been recorded in the same Khewat, would be given to the Respondent/Plaintiff for grant of a decree of pre-emption on the basis of Shafi-e-Shareek in the light of section 3 (before its amendment in 2019) read with section 56(d) of the Land Revenue Act, 1967. Where co-ownership could not be established on the basis of Revenue Records, the question arises as to whether the properties are physically adjacent to one another.”¹¹

August Supreme Court of Pakistan also laid down the same principles earlier as it was held in the case of '*Muhammad Idress and others. Vs. Sardar Ali*' in the following manner that even

¹¹ 2020 SCMR 445

urban immoveable property is outside the ambit of law of preemption: -

“A close look at the afore-referred provision would indicate that urban immovable property is not merely the immovable property which fell within the limits of a town as declared by the Board of Revenue but the courts of law could also hold any property to be urban immovable property if there was evidence to that effect. The suit land was a small plot of two kanals and it was specifically averred in the written statement that it was purchased for building a house; that it was part of the Shakargarh Town; that no custom of pre-emption prevailed at the relevant time. Respondent plaintiff did not lead evidence to prove that it was not urban property. The sale deed itself indicates that the suit land was purchased for construction purposes and three vendors had placed on record their affidavits to the effect that the suit land was not agricultural and further that it was sold for construction purposes.¹²”

Section 3 of Punjab Preemption Act, 1913 deals with ‘urban immoveable property’ and while interpreting section 3 of Punjab Preemption Act, 1913, it was held by august Supreme Court of Pakistan in the case titled ‘*Muhammad Hussain and others Vs. Ghulam Qadir through legal heirs*’ that: -

8. The provisions of subsection (3) of section 3 of the Punjab Pre-emption Act, 1913 which Act regulated the pre-emption of sales at the relevant time, read as under: -

“(3) Urban immovable property’ shall mean immovable property within the limits of a town, other than agricultural land. For the purposes of this Act, a specified

¹² 2013 SCMR 913

place shall be deemed to be a town--(a) if so declared by the Board of Revenue A by notification in the official Gazette, or (b) if so found by the Courts." (Underlining is ours)

9. It would thus be noticed that 'urban immovable property' did not mean only that immovable property which fell within the limits of a town and that it was open to the Courts of law to declare any property to be urban immovable property even if the same fell outside the limits of a town provided there were facts and circumstances warranting such a finding.

10. Having perused the entire evidence which has been noticed above, we find that the suit-land had all the characteristics of urban property which pieces of evidence available on record appear to have escaped the notice of all the three learned Courts including the Hon'ble High Court. The above noticed facts and circumstances available on record are a definite indication of the fact that the suit-land was nothing other than urban immovable property and we hold accordingly.¹³"

All the above-mentioned principles laid down by august Supreme Court of Pakistan reflect that the commercial property is not subject to law of preemption. Furthermore, urban immoveable property has also been excluded from the operation of law of preemption. However, provisions excluding all these properties are no more part and parcel of the relevant law as the same shall be seen in the proceeding section of this paper.

¹³ PLD 2006 Supreme Court 594

Provisions of Punjab Preemption Act, 1913 as well certain other laws were challenged before honourable Federal Shariat Court and according to the decision in '*Government of NWFP Vs. Said Kamal Shah*', Section 5 of the Act of 1913 has been declared to be against the injunctions of Islamic Law as laid down in the Holy Quran and Sunnah of the Holy Prophet (ﷺ). According to the judgment of Mr. Justice Muhammad Taqi Usmani, as he then was, he has concluded the matter in the following terms: -

"Section 5 of the Act exempts various types of immovable property from pre-emption. Clause (b) of Section 5 exempts Dharamshala, mosque, church and other charitable institutions and buildings from preemption. It is held that if such property is a trust or Waqf, then their exemption is correct and this is not against the Sunnah. But where the immovable property is privately owned, it is not valid to exempt them from preemption. [Translated]."

With regard to exclusion of any property from the operation or application of law of preemption, it was further held by the Honorable Court in categorical terms that: -

"And since the right of preemption has been proved only by analogy based on the hadiths of the Holy Prophet (peace and blessings of Allah be upon him), and the Holy Prophet (peace and blessings of Allah be upon him) has explicitly expounded on the right of preemption to every land, therefore any exclusion thereof would be against Sunnah. However, only in exceptional circumstances or extreme need, in the light of Islamic principles, there can be scope for creating an exception, and that too temporarily and as much as necessary. Nonetheless some lands are permanently excluded from the orbit of right of preemption, hence to authorize the provincial government with the power to make it subject to preemption whenever

and wherever it wishes at its own discretion, would not be in accordance with Islamic injunctions”[Translated]

In the above-mentioned scenario, it is quite evident that clause ‘d’ of Section 5 has been partially declared un-Islamic by the Honorable Federal Shariat Court and Section 5 of the Act of 1913 to the extent of exclusion of any kind of property in the private ownership has been declared un-Islamic. Furthermore, with regard to application of law of preemption in ICT, in accordance with *Rab Nawaz case supra*, it has already been laid down by the Honorable Islamabad High Court, Islamabad that to the extent of decision of honorable Federal Shariat Court in *Said Kamal Shah* case and after efflux of time period after promulgation of the Islamabad Capital Territory Preemption Ordinance, 1997, provisions of the Act of 1913 not declared un-Islamic by the honorable Federal Shariat Court stood revived and in accordance with above mentioned ratio of honorable Federal Shariat Court, Section 5 of the Act of 1913 was declared against the injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet (ﷺ). Therefore, it is also evident that no provision exists in Punjab Preemption Act, 1913 which could exclude any property from the operation of law of preemption in ICT and accordingly all the properties, including commercial properties, are subject to the law of preemption in ICT except those defined in the judgment of honorable Federal Shariat Court in *Said Kamal Shah* case *supra*.

Furthermore, to the extent of Punjab Preemption Act, 1991, provisions of the said Act were also challenged before the honorable Federal Shariat Court in the case of ‘*Muhammad Ismail Qureshi v Government of Punjab*’ and it has been held by the honorable Court that among other provisions, section 2(a), to the extent it excluded urban property from the purview of preemption, has been declared against the injunctions of Islam.¹⁴ Said judgment of honorable Federal Shariat Court was assailed by the Provincial Government before the Shariat Appellate Bench of the Supreme Court and the august Court in this regard held in

¹⁴ PLD 1991 FSC 80.

case of '*Muhammad Shabbir Ahmed Khan v Government of Punjab*' that:

The exemption of all the immoveable properties situated in urban areas does not fulfill the requirement of Zarurat on the basis of which a particular property can be exempted in the Sharai'h from the application of the law of Preemption. Thus section 2(a) of the Act, 1991 is repugnant to the injunctions of Islam to the extent it excludes all the urban properties and the properties situated within the Cantonment limits permanently from the application of the Act.¹⁵

Therefore, it is evident that all the properties falling within the definition of urban immoveable property and any property even if situated within Cantonment limits cannot be excluded from the operation of the law of preemption by the Federal or Provincial governments. To this extent and to the extent of remaining provisions declared by honorable Federal Shariat Court and Shariat Appellate Bench of the Supreme Court to be against the injunctions of Islam, have not been amended in accordance with the decision of these Courts and thus all those provisions, including section 2(a), excluding urban immoveable properties and properties situated within Cantonment limits, have ceased to exist, but practically continuous reference is still being made by the lawyers as well by the Courts to these provisions as they are still part of the said Act. Therefore, it was proposed by the Law and Justice Commission of Pakistan to refer the matter to the Government of Punjab and Khyber Pakhtunhwa to amend Punjab Preemption Act, 1991 and Khyber Pakhtunhwa Preemption Act, 1987 respectively in accordance with directions of Federal Shariat Court and Shariat Appellate Bench of the Supreme Court in the abovementioned cases.¹⁶

¹⁵ PLD 1994 SC 1.

¹⁶ "Amendment in Pre-emption Law", Report No. 122, *Law and Justice Commission of Pakistan*, available at [122.pdf \(ljcp.gov.pk\)](#), last accessed on 20-08-2022.

2. ISLAMIC LAW ON PREEMPTION:

It has been seen that the Courts in Pakistan are of the firm view that the law of preemption is not applicable in commercial properties and while taking this view, reference is also made to Muhammadan Law as well as Islamic law, but majority of the principles of honorable Superior Courts are laid down with regard to Law of Preemption of the Provinces and not in respect of principles of the right of preemption in ICT. It has also been seen that the provisions of the Act of 1913 are applicable in ICT and Section 5, excluding commercial property, has been declared against the injunctions of Islam in Said Kamal Shah case supra. Therefore, no exclusion or ousting provision with regard to commercial property is available in the applicable law of preemption in ICT and in such like situation, recourse should be made to the principles of preemption in Islamic Law. In this regard, in accordance with Traditions of the Holy Prophet (ﷺ), every kind of immovable property in the private ownership of any party is included within the right of preemption and no exception is made in this regard. For instance, it has been narrated by Imam Malik that: -

“Yahya related to me from Malik from Ibn Shihab from Said ibn al-Musayyab and from Abu Salama ibn Abd ar-Rahman ibn Awf that the Messenger of Allah, may Allah bless him and grant him peace, decreed for partners the right of preemption in property which had not been divided up. When boundaries had been fixed between them, then there was no right of pre-emption.”

It has been further reported by Imam Malik that:-

“Malik said that he heard that Said ibn al-Musayyab, when asked about pre-emption and whether there was a sunna in it, said, “Yes. Pre-emption is in houses and land, and it is only between partners.”

Various other sources of Islamic Law including original sources containing traditions of the Holy Prophet (ﷺ) have been cited by Honorable Mr. Justice Muhammad Taqi Usmani, as he then was, in the Said Kamal Shah supra and even according to contemporary scholars, no distinction has been found in any immovable property in private ownership with regard to the exercise of the right of preemption. For instance, according to Dr. Wahba Al-Zuhayli, a Syrian Scholar, following conditions are required to be fulfilled for exercise of right of pre-emption under Islamic Law: -

“1) Negation of all seller ownership rights in the preempted, with no options established

2) The contract must be a commutative financial contract, such as a sale or equivalent

3) The contract must be valid

4) The preemptor must have ownership from the sale time to the time of ruling that he has the right of preemption.

5) The preemptor must be objecting to the sale

6) The non-Hanafis stipulated further that the preemptor must be a partner in the sold property. Thus excluding preemption by neighbors and also object of sale to be an unidentified share in a divisible property.

7) All jurists agreed that the preemptor must take the entire sold part of the property, to avoid harming the buyer by portioning his contract. This follows from the principle that one harm cannot be removed by imposing another.

8) Property must be immovable.

9) *Property cannot be owned by the preemptor prior to sale.*”

Therefore, even the writings of contemporary scholars do not make any distinction with regard to the exercise of the right of preemption in immovable property, including residential and commercial and in light of the decisions of honorable Federal Shariat Court and Shariat Appellate Bench of Supreme Court in PLD 1984 SC 360, PLD 1991 FCS 80 and PLD 1994 SC 1, all the provisions excluding commercial property, urban immovable property and property situated within Cantonment limits, have been declared to be repugnant to the injunctions of Islam and these provisions, at the moment and in light of abovementioned decisions, do not form part of these laws anymore.

CONCLUSION:

Law of preemption is part of Islamic law as well as law of the land in Pakistan. Two provinces in Pakistan have enacted their provincial laws on preemption namely Punjab and Khyber Pakhtunkhwa as Punjab Pre-emption Act, 1991 and Khyber Pakhtunkhwa Pre-emption Act, 1987 respectively. Rest of the provinces namely Sindh and Baluchistan have no codified law on the law of preemption and in accordance with the case law available on this subject, customary law and principles of Islamic law are applicable in such like cases. In ICT, in accordance with ratio of Rab Nawaz case supra, provisions of Punjab Pre-emption Act, 1913 are applicable. Furthermore, provisions of Punjab Preemption Act, 1913, Punjab Preemption Act, 1991 and Khyber Pakhtunkhwa Preemption Act, 1987, to the extent of exclusion of certain properties including commercial, urban immovable property and property situated within Cantonment Limits, have been declared repugnant to the injunctions of Islam by the Federal Shariat Court and Shariat Appellate Bench of Supreme Court and in accordance with the directions passed by these Courts, those provisions do not practically exist in these laws and legally no property, including commercial, urban immovable property or the one situated within Cantonment limits can be

excluded from the operation of the law of preemption. However, all these provisions are still part and parcel of abovementioned laws despite of having legally ceased to exist and their physical existence still causes ambiguity and confusion among the legal fraternity as well as Courts. Therefore, it is desirable that either these provisions should be amended or should be completely removed in order to avoid any confusion and ambiguity in this regard.