(1954) 11 AP CK 0004

Andhra Pradesh High Court

Case No: Appeal No. 7/4 of 1952-53

Pasha Begum and Another		APPELLANT
	Vs	
Syed Shabber Hasan		RESPONDENT

Date of Decision: Nov. 10, 1954

Acts Referred:

- Governer General Regulations, 1793 - Section 15
- High Court Act - Section 4, 5
- Hyderabad Civil Courts Act, 1954 - Section 10

Hon'ble Judges: Qamar Hasan, J; Palnitkar, J; Mohd. Ahmed Ansari, J; Manohar Pershad, J; Deshpande, J

Bench: Full Bench

Advocate: Aneesuddin Ahmed and Mohd. Jahangirali, for the Appellant; Wajid Ali Khan and Aftab Hasan, for the Respondent

Judgement

Deshpande, Palnitkar and Manohar Pershad, JJ.
The following questions have been referred to the Full Bench:

(1) Whether all suits of pre-emption are to be decided according to the rules of Hanafi Law irrespective of the'' fact that the parties belong to a different persuasion? and,

(2) In case it is held that the personal law of other sects has the force of law then by what law the suit would be governed if the person claiming pre-emption is a Shia and the Defendant a Sunni or vice versa.

2. At the outset we may note that this case was instituted prior to the commencement of the Constitution and the question as to how far the rights of the parties would be affected by the provisions of the Constitution, does not arise in this case.

3. The facts out of which this reference has arisen are that one Syed Shabbar Hasan filed a suit against Pasha Begum and Abdul Rehman for pre-emption on the ground of vicinage with the allegation that Abdul Rehman sold his house to Pasha Begum on 17th Isfandar 1352F, and that he made the necessary talabs as soon as he came to know of the sale. But the Defendants are denying the right and refusing to handover the house; hence the suit.

Pasha Begum, Defendant 1, denied the Plaintiff''s allegations and stated that the Plaintiff is not a pre-emptor and did not make the talabs properly. Further she spent more than Rs, 250/- for the repairs of the house. Abdul Rehman, the vendor, admitted the Plaintiff''s claim. On these pleadings the Court of first instance framed certain issues and after recording the evidence decreed the Plaintiff''s suit on condition that the Plaintiff pays Rs. 1000/-. Against this decree both the parties filed appeals.

The appeal of the Plaintiff was allowed and that of the Defendant dismissed, thus decreeing the Plaintiff''s suit in toto. While the appeal was pending before the District Judge, the Appellant brought to the notice of the Court the fact that Respondent 1 is a Shia and as such he has no right to sue for pre-emption on the ground of vicinage. Respondent 1 objected to the plea being raised in appeal and controverted that even if he were a Shia the parties would be governed by the Hanafi School of Muhammadan Law, which according to him was the law of the land.

The lower appellate Court did not take any notice of this plea and decided the appeal on the basis as if the Hanafi Law applied to the parties. Against this judgment Pasha Begum filed an appeal. When her appeal was taken for hearing in the High Court, the learned Judges of the Division Bench on 8th Ardibehist 1357F, called upon Respondent 1 to show whether or not he belonged to the Shia School, and in case of denial he was ordered to appear before the Court for examination.

On 18th Azur 1358F, the Advocate appearing on his behalf admitted that Respondent 1 is a Shia. In the meantime Section 4 of the High Court Act was amended by the Legislature. The appeal was, therefore, ordered to be placed before the Single Bench. Hon''ble Shri A. Srinivasachari J., before whom the case was placed for decision by his judgment dated 20th Mehir 1358F, held that Hanafi Law being the law of the land, the parties would be governed by that law. On this finding he dismissed the appeal. Aggrieved by the judgment, the Appellant put in a review application, which he allowed and referred the case to the Division Bench u/s 5, High Court Act on 8-3-1951.

It came up before the Division Bench on 28-10-1952, for decision and the said Bench being of the opinion that the case involves a question of general importance referred the case to a higher Bench for the consideration of the question whether the majority view expressed in - ''Mazhar-un-nissa Begum v. Dayalaramlingam 34 D

LR 433(A), is applicable to the facts of the case and whether the Plaintiff would be governed by the Shia Law in his claim for pre-emption.

The Full Bench consisting of the three Judges on 8-3-1,954, formulated the above questions and have referred the same to this Bench consisting of five Judges.

4. So far as the first question is concerned the answer will depend on the question whether the law of pre-emption among Muhammadans is a statutory law, common law, customary law or personal, law. So far as we can gather there is nothing to indicate that it is a statutory law just as in the Uttar Pradesh, Bihar and Punjab.

As regards the custom it is not proved that there was any such custom in this part of the country before the Constitution was made applicable to this State.

5. As observed in the Full Bench case of - ''Moti Bai v. Kandakari Chinniah AIR 1954 Hyd 161 (FB) (B), to which one of us was a party:

The first point to be decided is whether the right of pre-emption was enforced in this State before the Constitution on the basis of the Muhammadan Law being the law of the land. In - ''Gangaram v. Hari Bhav 10 D LR 159(C),... it was observed that the Muhammadan Law was the common law of the State and would be followed in the absence of statutory or other order to the1 contrary.

Then in - ''Manik Chand v. Sharnappa 20 DLR 581(D), a Full Bench of three Judges, decided that the right of a Hindu to pre-empt, arose under the Muhammadan Law and not on custom, and therefore, when the pre-emptor dies during the pendency of his suit the right to continue does not survive to his heirs.

Another case reported in 28 DLR 107 (E), also decides the same principle. So far as I am aware, there is no authority insisting on all parties to the suit or the pre-emptor and the vendor being Muhammadan to justify the conclusion that the pre-emption was enforceable on grounds of religious usage or equity and good conscience as has been done by some other High Courts in this country.

There is, therefore, considerable force in the argument that the right as enforced by the Courts in this State prior to the inauguration of the Constitution was not on the basis of custom or religious usage or rules of equity and good conscience.

The question was as to the application of the Hanafi Law of pre-emption to the Hindus (Zimmies). The question of its application between the Shias and the Sunnies was never discussed nor decided. From this judgment it is evident that pre-emption was not a customary law in this part of the country and when it is not a customary law it cannot be lexloci or the law of the place affecting all lands situated in that place irrespective of the religion or nationality or domicile of the owners of the lands as is held in the case of - Shri Audh Behari Singh Vs. Gajadhar Jaipuria and Others, Therefore, we cannot regard pre-emption as a, customary law nor can it be considered as a territorial law.

6. So far as the common law is concerned no doubt in some cases it has been held that it was considered to be so but this idea of common law is foreign to our jurisprudence. The word ''Common Law'' is English in its origin. It means- unwritten law. Therefore, pre-emption cannot be considered to be a Common law here. In the result we are of the opinion that it was a personal law which was applied.

7. The Robekar of the Home Department dated 13th Rabiulawal 1289 A.H. is cited by which it was directed that in all departments off Government no other school of law was to form the basis of decision except the Hanafi School. From this it is contended that it was a law by which it was directed that in every matter the Hanafi School of law will be made applicable. This Robekar no doubt directs that all matters should be decided according to the Hanafi Law but we find that it was never acted upon.

As the wording denotes it means that even succession is to be decided according to the Hanafi Law, which was never done in our State. If this Robekar is applied according to its words then succession of a Hindu will also be governed by the Hanafi Law. This apparently does not seem to be the intention of the Robekar and such decisions were never taken. On the other hand the principle that the Muhammadans should be governed by their own personal law and the Hindus should be governed by their own law was accepted without hesitation at the very outset.

Even in British India this principle was accepted. The course of legislation will bear out this truth. It may suffice here to state that the Statutes passed by the Parliament, the Regulations of the Governor-General and the Acts go to indicate that in suits regarding succession, inheritance, marriage and caste, and all religious usages and institutions, the Muhammadan Laws with respect to Muhammadans and the Hindu Laws with regard to the Hindus are to be considered as the general rules by which the Judges are to form their decisions. The various Civil Courts Acts of the Provinces contain similar sections.

Thus, the Legislations of the British India also show that important branches of the Hindu and the Muhammadan Laws were in force. In our State also the High Court in the year 1296F, issued Circular No. 5 dated 10th Ardibehist 1296F, with the previous sanction of the then Prime Minister of Hyderabad, providing that in suits regarding succession, inheritance, marriage, adoption, will, gift, hizanat, guardianship, maintenance and in those rights and obligations arising out of religious matters, the Hindu Law with respect to Hindus and the Muslim Law with regard to the Muslims is to form the basis of decisions.

8. It is to be noted that the right of preemption is not to be found in the subjects enumerated in the Circular unless it is deemed to be covered by the general expression ''rights and obligations'' arising out of religious matters. However that may be, in view of the fact that Section 10, Hyderabad Civil Courts Act gives recognition to the right of pre-emption, there can be no doubt that the Civil Courts

possess jurisdiction to enforce that right.

But the said section does not specify the school of law according to which the rights and obligations of the parties in that respect will be decided. In our opinion, the absence of specification of any school of law would imply what the Privy Council has said in - ''Rajah Deedar Hcssein v. Zuhooroon-nissa 2 Moo Ind App 441 (PC) (G), that the Muslim Law applicable to each sect ought to prevail as to litigants of that sect and not one uniform law in this respect.

In the British India after the Muhammadan rule the same question came up before the Courts there. The matter came up for the consideration of the provisions of Section 15 of the Regulation No. IV of 1793, which provided that in suits regarding succession, inheritance, marriage, caste and all religious usages and institutions, the Muhammadan Laws with respect to the Muhammadans and the Hindu Laws with respect to the Hindus are to be considered as the just rules by which the Judges are to form their decisions. In this connection their Lordships of the Privy Council in the above mentioned case held that:

According to the true construction of this regulation, in the absence of any judicial decision or established practice limiting or controlling its meaning, the Muhammadan Law of succession applicable to each sect ought to prevail as to litigants of the sect. It is not said that one uniform law should be adopted in all cases affecting the Muhammadans, but that the Muhammadan Law, whatever it is, shall be adopted. If each sect has its own rules according to the Muhammadan Law, that rule should be followed with respect to litigants of that sect.

Thus, from this it will be found that Hanafi School of law does not occupy the status of a territorial law. As observed by Nawab Alam Yar Jung C.J., in 34 D LR 433 (A), that ''Hanafi law is no more than a personal law''. From this it is apparent that all suits of pre-emption are not to be decided according to the rules of the Hanafi Law irrespective of the fact that the parties belong to a different persuasion.

But so far as each sect is concerned their own rules will be made applicable in so far as the question of pre-emption is concerned.

9. As observed by their Lordships of the Supreme Court in the case in Shri Audh Behari Singh Vs. Gajadhar Jaipuria and Others, at p. 423 (F),

The law of pre-emption is stated to be a purely personal law even when it rests on custom. It is no incident of property and the right which it creates is enforceable only against persons, who belong to a particular religious community or fulfil the description of being natives of a particular district....

As between Muhammadans the right undoubtedly arises out of their personal law; but that is because the law of pre-emption is no part of the general law in India. Muhammadans live scattered all over our country and unless the right of pre-emption is regarded as part of their personal law they would lose the benefit of

it altogether.

Hence, if a Muhammadan owns land in any local area and has co-sharers or neighbouring proprietors, who are also Muhammadans, a right of pre-emption would accrue to the latter under the personal law of the Muhammadans, which is enforced in this country since the British days on grounds of equity, justice and good conscience. But though arising out of personal law the right of pre-emption is not a personal right; it is a real right attaching to the land itself.

From this observation of the Supreme Court it will be evident that the right of pre-emption is a personal right and when both the parties are Muhamadans they will be governed by their own personal laws.

10. The case in 34 D LR 433 (A), is distinguishable. In this, case the question was that if the pre-emptor died before the decree was passed whether the right to sue survives. The parties to this case were not all Muhammadans. The vendee was a Hindu and the pre-emptor was of a Shafie sect. It was held that the law of the Defendant will be made applicable in such a case.

While dealing with this subject the majority decision was that Circular No. 5 of 1296F, will be made applicable to this case and it was held that the. Hanafi Law will be applicable to the Hindus. From this it will be clear that so far as the pre-emption is concerned Circular No. 5 of 1296F, will be made applicable. When once this Circular is made applicable, we do not see any reason why in the case like the present where both the parties are Muhammadans of different sect the rules of Shia Law be not made applicable.

No reason is given in the Full Bench case referred to above. In our opinion, the logical conclusion is that in the case like the present the /Muhammadan law as held in the case in 2 Moo. Ind App. 421 (PC) (G) will be applicable and all suits of pre-emption cannot be decided according to the rules of Hanafi Law, irrespective of the fact that the parties belong to different persuasion.

No doubt Hanafi School was made applicable to the Hindus but it was so made because according to the Hanafi School the application of the law of pre-emption was extended to ''Zimmies'' also, but so far as the Shias and other sects are concerned it cannot be said that the same rule of law will be made applicable. We are of the opinion that the answer to the first question is in the negative.

11. Now we come to the second question. We have held that a personal law of each sect has the force of law, therefore, where the pre-emptor and the vendor belong to different schools of law the right of pre-emption can be exercised by those persons only, who are entitled to it according to the law applicable to the vendor provided that a person shall not be entitled to claim the right of pre-emption if he is not entitled to it according to his own school of law.

This means that when the pre-emptor and the vendor are both Sunnies the law applicable to the case will be the Sunni law. But if the vendor is a Shia and the pre-emptor a Sunni then as the Shia Law does not recognise the right on the ground of vicinage the Plaintiff does not succeed in such a case though his own school of law would have favoured his claim. The case of Pir Khan Vs. Faiyaz Husain and Others, is in point in this respect.

Similarly, when the vendor is a Sunni- and the pre-emptor a Shia, then a Shia could not preempt by reason of his own law. The reasoning underlying this was that due to the want of reciprocity in the matter of enforcing the right a Shia would not be entitled to any decree, vide the cases of - ''Gobind Dayal v. Inayatullah 7 All 775(FB) (I) andPir Bakhsh v. Sugra Bibi 12 All WN 34(J). The answer to the second question is as above.

12. With these answers the case is sent back to the Pull Bench of three Judges for being decided in the light of the above answers.

Mohd. Ahmed Ansari, J.

13. The facts of the case are that by a registered sale deed of Isfandar 17, 1352F., (20-1-1943) Abdur Rahman, Respondent 2 to the appeal sold a house to Padshah Begum, the Appellant. Thereupon Syed Shabber Hasan, a Shia, Muhammadan and Respondent 1 to the appeal instituted a suit for pre-emption on the ground of vicinage. He claimed that the two necessary demands had been made by him soon after his knowledge of the sale.

The Trial Court decreed the claim on payment of Rs. 1,0Q0 as the purchase-money. The pre-emptor and the purchaser appealed against the decree, the former against the amount of the purchase-money which he claimed to toe Rs. 750 and the latter against the allowing of the pre-emption suit. It appears that in the lower appellate Court an objection on behalf of the purchaser was raised about the vicinage, according to the personal law of the pre-emptor, not being a ground for claiming pre-emption and hence the decree in the suit being incorrect due to the absence of mutuality of restraint.

But the lower appellate Court did not attach Importance to the aforesaid plea and applying the Hanafi Law of pre-emption to the parties, though the pre-emptor was a Shia Muhammadan, dismissed the purchaser''s appeal and allowed that of the pre-emptor. The-objection has since been urged in this Court and, it has eventually given rise to the following two questions, which have been referred to the Full Bench, of five Judges:

(i) Whether all suits of pre-emption are to be decided according to the rules of Hanafi Law irrespective of the fact that parties belong to a different persuasion.

(ii) In case it is held that the personal law of other sects has the force of law, then by what law the suit would be governed if the person claiming pre-emption is a Shia

and the Defendant a Sunni or ''vice versa''.

14. No question of constitutional law arises in the case, as the sale and the suit for pre-emption are both prior to the inauguration of the Constitution. The questions referred to the Full Bench, however, require determination of the basis on which such suits during the period preceding the Constitution were decided by the law Courts of this State. If the view which I took in the Full Bench case in AIR 1954 Hyd 161 (B) that the then law was pre-emption according to Hanafi School of Muhammadan Law and it was of general application, be correct, it would follow that the religious persuasion of the parties to such suits would be of no material importance and the answer to question 1 would be in the affirmative.

In such circumstances no answer to question 2 would be necessary. Even on the assumption that the right of pre-emption according to the aforesaid school had ceased to be enforced, the existence of the customary right of pre-emption cannot be excluded and the position would be not different if the custom be held to be territorial. For there are cases where the religious persuasion or residence of the parties are held to be of no importance if pre-emption be claimed on basis of the territorial custom.

We find in - ''Zamir Husain v. Daulat Ram 5 All 110 (K) a suit for pre-emption in respect of a sale between persons of different persuasion, and based on the local custom being decreed. Similarly in - ''Jadulal Sahu v. Janki Koer 39 Ind App 101(PC) (L) a suit on the basis of custom by a person of a different religion for preemption of property sold by a Muhammadan lady was allowed by Courts in India and the appeal was dismissed by the Privy Council. His Lordship Mr. Amir Ali, at pp. 106 and 107 observed:

The law of pre-emption under which the Plaintiff claims the right was introduced into India with the Muhammadan Government. The province of Bihar to which the district of Champaran pertains was an integral part of the Muhammadan Empire and consequently it would not be surprising to find that in Bihar the right of pre-emption is enforceable irrespective of the persuasion of the parties concerned.

In the case of ''Fakir Root v. Sheikh Imam Baksh'' Beng LR Full Bench Rulings 35 (M) a Full Bench of the High Court of Bengal gave judicial recognition to the existence of the right of pre-emption among the Hindus of Bihar. In delivering the judgment the Chief Justice (Sir Barnes Peacock) reviewing the earlier cases bearing on the subject, had held that... "a right or custom of pre-emption is recognised as prevailing among Hindus in Bihar and some other provinces of Western India; that in districts where its existence has not been judicially noticed, custom will be the matter to be proved; that such custom when it exists must be presumed to be founded on and co-existensive with the Muhammadan Law, upon that subject unless the contrary be shown, that the Court may, as between Hindus, administer a modification of that Law as to the circumstances under which the right may be claimed, when it is shown

that the custom in that respect does not go the whole length of the Muhammadan Law of pre-emption, but that the assertion of the right by suit must always be preceded by an observance of the preliminary forms prescribed in the Muhammadan Law, such forms after they have been invariably observed and insisted on through the whole of the cases from, the earliest times of which we have record.

In their Lordships'' judgment the decision in - ''Fakir Root''s case (M)'' is conclusive on the point raised on behalf of the Defendant....

15. Recently in Shri Audh Behari Singh Vs. Gajadhar Jaipuria and Others, similar observations have been made. In this case both vendors and the vendee were residents of Calcutta and the Appellant brought a suit of pre-emption against them because of the sale of the land in Benaras City where according to the earlier judicial decisions the custom of pre-emption prevailed. The suit was dismissed by the trial Court and the High Court disallowed the appeal on the ground that the vendors and the vendee not being the natives or domiciles of the City of Benaras were not bound by the custom.

Their Lordships overruling earlier decisions of High Courts held this view of law to be incorrect and remanded the case to the High Court for decisions on other points in the case. Mukherjee, J. at p. 420 gives the origin and the history of the right of pre-emption in this country in the following words:

During the period of the Mogul Emperors the Law of Pre-emption was administered ''as a rule of common Law of the land'' in those parts of the country which came under the domination of the Muhamadan Rulers, and it was applied alike to Muhammadans and Zimmies... no distinction being made in this respect between persons of different races and creeds....

In course of time, the Hindus came to adopt pre-emption as a custom for reasons of convenience and the custom is largely to be found in provinces of Bihar and Gujerat which had once been integral part of the Muhammadan Empire.

... Since the establishment of British rule in India the Muhammadan Law ceased to be the general law of the land, and as pre-emption is not one of the matters respecting which Muhammadan Law is expressly declared to be the rule of decision, where the parties to a suit are Muhammadans, the Courts in British India administered the Muhammadan Law of Pre-emption as between Muhammadan on the grounds of justice, equity and good conscience....

... As between Muhammadans the right undoubtedly arises out of their personal laws; but, ''that is because of the law of pre-emption is no part of the general law in India''. Muhammadans live scattered all over our country and unless the right of pre-emption is regarded as part of their personal they would lose all benefit of it altogether....

Then his Lordship dealing with the customary right of pre-emption says on the same page:

When the right is created by custom it would be, as the Privy Council has said, co-extensive with the right under Muhammadan Law unless the contrary is proved. This means that the nature and incidence of the right are the same in both cases. In both it creates right in the property and not a mere personal claim against the vendor or the vendee and the essential pre-requisite to the exercise of the right and the terms of enforcement are identical in both.

But this does not mean that the customary light must be personal to the inhabitants of a particular locality. It may be so if that is the incident of the custom itself as established by evidence, but not otherwise. Under Muhammadan Law the right is continued to persons of a particular religious persuasion because it has its origin in the Muhammadan Law which is no longer a law of the land.

But when it is the creature of a custom, the religious persuasion of the parties or the community to which they belong are altogether immaterial. All that is necessary to prove in such cases is that the right of pre-emption is recognised in a particular locality and once this is established the land belonging to every person in the locality would be subject to the custom, irrespective of his being a member of a particular community or group.

The whole doctrine, as enunciated above, is based upon the fallacious assumption that the right of pre-emption is a personal right arising out of certain personal conditions of the parties like religion, nationality or domicile; and this fallacy crept into our law, simply because the right of pre-emption as between Muhammadans, is administered as a part of their personal law in our country.

16. I have extensively quoted from the judgment of the Supreme Court to show that it is now settled about the Hanafi Law of pre-emption during a certain period being the ''lex loci'' in parts of this country; that on its ceasing to be so, customary territorial rights of pre-emption have arisen, and that under both, the religious persuasion of the parties is of no material consideration. This would be true even where all the parties are Muhammadans but of different schools.

It is equally clear from the judgment that on the Hanafi Law of pre-emption ceasing to be ''lex loci'' and in absence of territorial customs, Muhammadan law of pre-emption is administered in parts of the country on the basis of justice, equity and good conscience. Where such rights are enforced all the parties to the suits, or the vendor and pre-emptor are required to be Muhammadans. Therefore, the personal law of the parties is only looked into where the right of preemption is claimed neither under ''lex loci'' nor is asked for on basis of territorial custom.

It appears to me that for the purposes of ascertaining whether the law of pre-emption prior to the Constitution was being administered in this State on basis

of justice, equity and good conscience the absence of any decision requiring all the parties to a suit to be of a particular persuasion or at least the purchaser or vendor to be of the same persuasion is material. For it would show the basis of the enforcement to be other than on personal law.

Equally relevant would be the decisions by Courts of this State, allowing claims of pre-emption where parties'' personal law did not recognise any right of pre-emption; for such decisions could proceed only on the Hanafi Law of Pre-emption being one of general application or on territorial customs. To my mind the explanation about these decisions being based on the application of the Hanafi Law of Pre-emption to Zimmies would not detract from the conclusion of the law being of general application.

For the right would be enforceable against the Defendant not on the religious persuasion of the Plaintiff and consequently the different persuasion of the Defendant could not be pleaded as bar. Moreover the general application of territorial custom of pre-emption where the Hanafi Law of pre-emption formerly prevailed, shows that the earlier right to be of general nature, otherwise how could the customary right in other respects similar to the Hanafi right of pre-emption, become one of general application? I do not say that the religious persuasion of the parties is never material in claims of pre-emption.

It is material, but only when the right is being claimed on the basis of the personal law of the Plaintiff and not on the general law nor on the customs of the locality. If it be based on personal law, the question of justice, equity and good conscience arises. Therefore I would, for the purposes of ascertaining whether the Hanafi Law of Pre-emption was at any time part of the general law of the State, rely on the decisions where it has been applied to persons of different religion.

I would not rely on the Resolution alone which said that the aforesaid law was the general law of this State, nor on the later resolution preserving personal laws of the parties in cases of marriage, succession and religious usage.

17. In - ''Gopal v. Bhagwan Das'' 3 Mokanin Deccan 134(N) Syed Afzal Husain C.J. observed that though in the State there was no Contract Act yet rights should not be decided on mere opinions of the Judges and that the Muhammadan Law with the exception of matters relating to marriage or succession was the general law of the State. Again in 10 DLR 159 (C) it was held that the right of pre-emption according to the Muhammadan Law became enforceable from the date of the knowledge of the same.

In - ''Lakshmi Narsu v. Gundu Ellappa 19 DLR 114 (O) it, was laid down that within the State matters relating to pre-emption were decided according to the Hanafi Law. So also in 20 DLR 581 (D) the pre-emptor died during the pendency of the suit in the trial Court and the question arose whether the suit had abated. It was argued that under the Shafi Law the right to sue continued; but the learned Judges rejecting the

argument held that law of pre-emption in the State to be according to the Hanafi Law, and there were series of authorities holding it to be so.

The learned Judges at p. 587 observed that had the parties been Shafis they might have considered the point. I take the aforesaid observation to mean that the question whether the right of pre-emption could be claimed according to the personal law of parties was left undecided, and the dictum does not mean that if the parties were of different persuasion, the general application of the Hanafi Law of pre-emption would be excluded.

Then in the case of ''Lingappa v. Narain 23 DLR 37(P) it was held that the right of pre-emption arose on the completion of sale according to the Muhammadan Law. Also in -''Narhari v. Datatri 28 DLR 1092 (Q) the sale of trees was held not to give rise to a claim, of pre-emption according to the aforesaid law. It is true that in 34 D LR 433 (A) divergent views were expressed as to which law should govern the case where the parties were of different persuasion.

Abdul Aziz, J. held that the law of the Defendant should govern the case, and as the Defendant was Hindu the Hanafi Law of Pre-emption according to which the suit abates, would be applicable. My learned brother, Sripat Rao, J. took the view that the rules of'' procedure should govern it. The observations of Alam Yar Jung, C. J. are in the case not clear. He held that the law of pre-emption was not the law of the land like the Contract Act or the Penal Code.

If by use of the words "law of the land" his Lordship mant statutory law, there can be no objection to his views. But if by use of the words his Lordship meant that there was no general law of pre-emption in the State, then I do not see how the suit could have been entertained against the Defendant, whose personal law did not recognise the right.

If in the State prior to the Constitution the law of pre-emption was no part of the general or of the customary law, then on what basis the right claimed by the persons whose personal laws did not recognise such a right, was being enforced? I do not take the aforesaid authority as laying down that the right of pre-emption according to the Hanafi Law was not exercisable by non Muhammadans, and if it was enforceable, could a Shia Muhammadan as a Defendant urge in such a suit that his personal law was different?

He would obviously be met with the reply that the right was not being claimed according to the personal law, and consideration of personal law was out of question. The Plaintiff would justifiably urge that his right was under a different law and the Defendant was being called upon to perform a duty cast alike upon all the residents of the State. Also if a Shia Muhammadan brought a suit against a purchaser, whose personal law did not allow such a right, could such a purchaser urge that under Plaintiff''s personal law no such right was recognised? He would be met by the reply that the Plaintiff was not claiming performance of a duty under the

personal law but under the law of the State.

The law of pre-emption between persons of different persuasion would in these circumstances be a law of general application, and I do not see how it can be excluded in case of Muhammadans who belong to different schools. I have not found a single authority, where reciprocity of burden has been gone into and the reason is obvious. The right of pre-emption was being claimed in this State not on basis of personal law.

It, therefore, follows that in this State the law of pre-emption prior to the inauguration of the Constitution was being administered on the ground of its being part of the general law, which the authorities show to be the Hanafi Law and the religious persuasion of the parties did not matter. My answer to question 1 is, therefore, in the affirmative.

18. As I am of the opinion that the personal laws of the parties are not relevant under the Hanafi Law or territorial customs of pre-emption which I have held to have been the general law of this State, no answer to question 2 is necessary.

Qamar Hasan, J.

19. I agree with my learned brother Ansari, J. and have nothing to add.