



**IN THE HIGH COURT AT CALCUTTA  
CIVIL APPELLATE JURISDICTION  
APPELLATE SIDE**

Present:

**THE HON'BLE JUSTICE HARISH TANDON  
&  
THE HON'BLE JUSTICE MADHURESH PRASAD**

**FMA 372 of 2023  
IA No. CAN 1 of 2023**

**Md. Shahzada**

**Vs.**

**Md. Arif & Ors.**

**and**

**FMA 373 of 2023  
IA No. CAN 1 of 2023**

**Shahzadi Begum**

**Vs.**

**Md. Arif & Ors.**

**Appearance:**

For the Appellant : **Mr. Tarique Quasimuddin, Adv.  
Ms. Meena Shabnam, Adv.  
Ms. Sanchita Chaudhuri, Adv.**

For the Respondent No. 1 & 2 : **Mr. Nilanjan Bhattacharya, Adv.  
Mr. Aniruddha Ganduly, Adv.  
Mr. Aniruddha Ganguly, Adv.  
Mr. Sayan Sinha, Adv.**

Judgment On : **22.12.2023**

**Harish Tandon, J.:**

An interesting point is raised by the appellant in the instant appeal on the nuances of the principles of pre-emption under the Mahomedan Law.



Though the instant appeal arises from an order dated 27.02.2023 passed by the learned Civil Judge (Senior Division), 1<sup>st</sup> Court, Howrah in TS 73 of 2021 by which an application for injunction was allowed restraining the appellant from alienating, transferring or creating any third party interest in respect of the suit property and also from changing the nature, character and possession thereof but the point is taken by the said defendant no. 1/appellant on the intricacies of the pre-emption recognised under the Mahomedan Law and the mode and manner in which it is so exercised.

The facts, so unfurled, reveal that the Title Suit no. 799 of 2021 is filed by the plaintiff-respondent seeking a decree for pre-emption in respect of the scheduled properties and permanent injunction restraining the principal defendant, the men and agents for taking peaceful possession of the suit property and also from changing the nature and character thereof, on the fact that by a registered deed of sale dated 30<sup>th</sup> June, 2005 the plaintiff along with his brother Md. Rashid jointly purchased 1 Bigha 14 Chittaks 15 Sq. Ft. comprising of the structure standing thereupon together with another land measuring 6 Cottahs 1 Chittaks 5 Sq. Ft. with the structure in a separate holding within the district of Howrah. The aforesaid two premises were subsequently amalgamated and the brother namely Md. Rashid later on executed a registered deed of gift transferring his undivided share in favour of his wife namely, Rubina Rashid. Subsequently, the said Rubina Rashid executed a registered deed of sale in favour of the principal defendant, the appellant herein on 19<sup>th</sup> August, 2021. It is alleged that the aforesaid sale-deed was executed without any prior intimation to the



plaintiff and the appellant being a stranger purchaser suddenly came to the scheduled property on 17.10.2021 along with the men and agents and some labourers and tried to change the nature and character of the best portion of the suit premises by raising a pucca structure on the strength of the ownership which he acquired by said sale-deed. It is thus alleged that the property being undivided and joint, the plaintiff for the first time on 15.11.2021 was made aware of the sale effected by the said Rubina Rashid and the same day being made known to such sale, the plaintiff-respondent declared their intention to assert the right of pre-emption and demanded to pre-empt the said scheduled property by jumping thereupon against the said erstwhile owner. On 16.11.2021 the plaintiff-respondent made a search about the execution and registration of the purported deed of sale through online with the help of the lawyer and came to know that the said deed was executed in favour of the appellant and on the same day the plaintiff was also served with the copy of the plaint as well as injunction application in connection with the title suit no. 1167 of 2021 filed by the appellant as well as her husband namely Md. Shahzada against them and, therefore, for the first time they came to know about the execution and registration of the purported sale-deed in their favour by the said Rubina Rashid and on being aware of the same the certified copy of the purported deed of sale was obtained through online. On 2<sup>nd</sup> December, 2021 the appellant with someone known surveyor came to the scheduled property declaring that they have purchased the suit premises and therefore they intended to demarcate the possession therein and immediately the plaintiff-respondent made a demand of pre-emption on the very same day by uttering the words



“where it claim our shufaa” as we are a shaffee in respect of the larger property. The said claim was made in the presence of two witnesses who were present at the material point of time and subsequently on the same day the appellant openly declared that she will transfer the scheduled property in favour of the third party stranger.

Such being the pleadings, an application for temporary injunction was taken out which is eventually allowed by the Trial Court.

The Counsel for the appellant raises a point that the pleadings of the plaintiff on a meaningful reading would indicate that the plaintiff-respondent was aware of the sale having effected much prior to the date allegedly mentioned when the claim for pre-emption was made which is opposed to the spirit and the purport of Section 236 of the Mahomedan Law. According to the learned Advocate for the appellant the language employed in the aforesaid section would indicate that the exercise of right of pre-emption should be immediate on making a demand by jumping followed by a second demand and any delay in exercise of such exercise is opposed to the aforesaid provision. In support of the aforesaid contention, the reliance is placed upon a judgment of the Calcutta High Court in case of **Lal Mahammad Sarkar v. Husain Mohammad Saha** reported in **AIR 1925 Cal 655** and a judgment of Nagpur High Court in case of **Abdul Gaffarkhan Abdul Ajikhhan v. Abdul Jikar Dada Kachhi** reported in **AIR 1954 Nagpur 113**. It is further submitted that the aforesaid section envisaged twin exercise which cannot be segregated and the Courts have always taken a stricter view in this regard in the event any of one act which



is mandatory is not exercised in tune and spirit of the said provision and relied upon a judgment of the Gauhati High Court in case of **Arjun Rahman Barbhuiya v. Haji Moshaid Ali Laskar & Ors.** reported in **AIR 1991 Gau 66** and a judgment of Karnataka High Court in case of **Maheboobsab Buransab Maniyar & Ors. v. Mohadinsab Maheboobsab Maniyar & Ors.** reported in **AIR 2013 Karn. 29**. It is thus submitted that the plaintiff-respondent are not entitled to a pre-emption under the Mahomedan Law having allegedly exercised the right of pre-emption belatedly, as evident from the pleading, therefore, the order of injunction is liable to be set aside.

*Per contra*, the Counsel for the respondent submits that the right of pre-emption was exercised on a day when the factum of deed of sale was made known to his client and the delay cannot be attributed to their conduct. It is further submitted that the plaint is required to be read as a whole and the Court cannot segregate or separate the same from others. It is further submitted that the requirement under the aforesaid statutory provision has been fulfilled on the meaningful reading of the pleadings and, therefore, the point which is raised by the appellant is untenable.

On the conspectus of the aforesaid stand taken by the respective Counsels, it would be profitable to quote the relevant provisions relating to a pre-emption under the Mahomedan Law. Section 236 of the Mahomedan Law is quoted as under:

**“S236. Demands for pre-emption: No person is entitled to the right of pre-emption unless –**



- (1) he has declared his intention to assert the right immediately on receiving information of the sale. This formality is called talab-i-mowasibat (literally, demand of jumping, that is, immediate demand): and unless**
- (2) he has with the least practicable delay affirmed the intention, referring expressly to the fact that the talab-i-mowasibat had already been made, and has made a formal demand –**
- (a) either in the presence of the buyer, or the seller, or on the premises which are the subject of sale, and**
- (b) in the presence at least of two witnesses. This formality is called talab-i-ishhad (demand with invocation of witnesses).”**

It is not in a dispute that both the parties have relied upon the aforesaid provisions but the dissent can be seen on the stand taken in the said pleading and the inference to be drawn therefrom. It would not be wrong to say that the concept of pre-emption is introduced in this country by the Muslims and is basically founded upon a necessity to protect, preserve the privacy and the integrity of the Muslim family and avoidance to a minute sub-division under the Muslim Law of inheritance. Ordinarily, the right to claim pre-emption have a connection with the property and recognised in favour of the person having a pre-existing right in respect thereof. Before we embark our journey on the understanding of the expression *Talab-i-Mowasibat* which can be reasonably understood from the expressions using in the said aforesaid section but we feel that the word ‘*talab*’ has to be understood first. The ‘*talab*’ in a common parlance means and includes a demand and, therefore, the expression *Talab-i-Mowasibat* literally means a demand of jumping in other words the intention and the



idea underlying the aforesaid notion is that the person is jumping from his seat as and when he received an information that the sale in respect of an undivided property is made by a co-owner. The word “immediately” used in the said section qualifies the act of demand of jumping and there has been a considerable debate thereupon on assigning the meaning and the purport thereof. In one sense, it mandates a person to make a demand of jumping within a fraction of seconds upon being informed that the sale has been affected in respect of the property followed by a second demand of affirming such intention which is commonly known as *Talab-i-ishhad* i.e. the demand with invocation of witnesses.

The basic requirement under the aforesaid section can be segregated into three parts - firstly, the demand of jumping immediately upon knowing the factum of the sale made by the co-sharer in respect of the property (*Talab-i-Mowasibat*) and the second stage is to affirm such demand in presence of at least two witnesses (*Talab-i-ishhad*) and thirdly, by approaching the Court or initiating a legal action before the Court of law. What can be culled out that primary demand of jumping is invariable and is peremptory followed by a second demand (*Talab-i-Ishhad*) which has a reference to a first demand whereas the third part which is not actually a demand but right to claim relief by initiation of a legal action. In case of ***Lal Mahammad Sarkar v. Husain Mohammad Saha*** reported in ***AIR 1925 Cal 655*** the point which arose was as to whether a short delay in making the first demand cannot be held to be fatal under the aforesaid provision



leading to a denial of right claimed in a legal action. The Division Bench held:

*“It seems that the Mahomedan Law requires that on the receipt of an information as to the sale the Plaintiff must perform the ceremony of talab-i-mowasibat immediately without any loss of time. It has been pointed out by the learned District Judge and correctly that the Mahomedan law upon this point is very strict. It may appear to be somewhat unreasonable to our mind that the short delay which occurred in the present case should be inexcusable but the law is very clear and must be followed. The law has gone so far, in refusing to condone any delay, as to hold that, if a person on receipt of an information of a sale conveyed in a letter instead of performing the necessary formalities required by the Mahomedan law at once, delays to do so until he has furnished the perusal of the letter the right is lost. The question therefore turns upon this fact, namely, whether the information which was received by the Plaintiff was one which he believed to be correct and then whether he delayed in making the demand. It is not denied that if a Plaintiff in a suit for pre-emption receives an information as to the sale which he doubts or has reason to doubt any delay that takes place before he gets an authentic information would be no delay within the meaning of the law. The question which arises in this case is whether the information which the Plaintiff received as to the sale by Defendants Nos. 3 and 4 to Defendants Nos. 1 and 2 was true information or was such an information as required corroboration by a further enquiry. It is true in the present case that the Plaintiff's conduct shows that on receipt of the information he went to the vendors who lived close by for either definite information or for confirmation of the information which he had received. The learned District Judge has taken that fact into consideration and after quoting the law as laid down in the case of *Jadu Lal Sahu v. Janki Koer (2)* and bearing in mind the real question in the case the learned Judge says as follows: “it is not possible to*



*credit that the Plaintiff did not believe that the sale had taken place when he was told by Abdulla Kaviraj. His statement that he asked Defendant No. 3 for confirmation is not supported by any other testimony.” Whether the learned Judge’s finding is justified on the evidence or not is a matter which is beyond our jurisdiction to decide. There is no doubt that after considering all the real questions that arose in the case he came to this clear finding, the result of which is that he believed that although the Plaintiff had received the definite and reliable information as to the sale there was a delay before he complied with the necessary formality of talab-i-mowasibat. Consequently, it is not disputed by the learned vakil for the Appellant that on this finding the Plaintiff’s claim for preemption will become untenable on account of the omission of this formality. The case cited, Amjud Hossein v. Khurug Sim does not help us in this case because the question that arises here is as to the effect of the finding of the learned District Judge and what that finding is. We have already indicated that that finding is one which destroyed the efficacy, on the delay of the ceremony of talab-i-mowasibat.*

In ***Abdul Gaffarkhan Abdul Ajikhhan v. Abdul Jikar Dada Kachhi*** reported in ***AIR 1954 Nagpur 113*** the High Court was considering a case where the first demand was made after one day from coming to know of the sale and it was held that the word “immediately” should be given a stricter meaning in the following:

*“6. The learned counsel for the appellant, however, contends that ‘talab-i-ishhad’ may be combined with ‘talab-i-mowasibat’ and it is not necessary that the two ‘talabs’ should have performed separately. That is permissible in a case where the pre-emptor on hearing about the sale ‘immediately’ claims pre-emption invoking the witnesses in presence of the seller or the purchaser or on the premises to attest the immediate demand. In such an event the essential requirements of both the ‘talabs’ must be considered to*



*have been satisfied. See – ‘Mt. Nathu v. Shadi’, AIR 1915 All 294 (L), but in the present case though the pre-emptor came to know about the sale on the evening of the 15<sup>th</sup> he did not assert his right to pre-empt until 9-30 p.m. the next day. The assertion not having been made immediately on the pre-emptor coming to know of the sale the essential requirement of the first ‘talab’ remains unfulfilled. In – ‘Ali Muhammad v. Taj Muhammad (K)’, (supra) the pre-emptor came to know about the sale at 7-30 a.m. and did not mention about pre-emption till 7-30 in the evening. The Court held that there was no performance of ‘talab-i-mowasibat’ and the suit was dismissed.”*

It admits no ambiguity that the right of pre-emption is a weak right and in the event the modalities and the manner of its exercise has been provided in the statutory provisions the liberal interpretation should be eschewed. The word ‘immediately’ appearing in the said provision recognises the stricter meaning and a minuscule delay may be proved to be fatal.

The Gauhati High Court in ***Ajijur Rahman Barbhuiya v. Haji Moshaid Ali Laskar & Ors.*** reported in ***AIR 1991 Gau 66*** held that the exercise of right of pre-emption is hyper-technical and, therefore, the Court should adopt a stricter meaning thereto in a claim for pre-emption under the Mahomedan Law in the following:

*“9. The talab-i-mowasibat should be made as soon as the fact of sale in known to the claimant. For validity of talab-i-mowasibat it is not necessary that it should be performed in presence of witnesses. It is enough if the pre-emptor makes known his intention in some way. But, it is of the essence of talab-i-ishhad that it should be performed before witnesses. It is also necessary when the talab-i-ishhad is made that the pre-emptor should refer*



*expressly to the fact of the talab-i-mowasibat having been previously made. However, the formal demand called talab-i-ishhad can be made either in presence of the buyer or he seller or “on the premises which are the subject of sale”.*

*10. It is well settled that the law relating to exercise of right of pre-emption is of a highly technical nature. Talab-i-mowasibat and talab-i-ishhad are conditions precedent for exercise of the right of pre-emption. The rules relating to aforesaid two talabs must be strictly complied with. Presence of the witnesses at the time of talab-i-ishhad is also important. It is for the pre-emptor to prove the fulfilment of all the requirements to sustain his claim for pre-emption. However, once the pre-emptor succeeds in adducing satisfactory evidence in regard to fulfilment of the aforesaid requirements, his claim cannot be rejected on hypertechical interpretation of the formalities or on microscopic examination of the evidence to find some fault here or there. In any event, the Court should examine the evidence and materials on record in regard to the observance of the formalities in a judicial manner keeping in view the practical and real estate of affairs and also the fact that when the Mahomedan Law has given such a right to the person, it should not be whited away by insisting hyper-technical and unrealistically strict compliance of the formalities accompanied with its exercise. It must be remembered that “formalities” after all are only formalities intended to serve some ostensible purpose and once that purpose is served, these should not be allowed to be used to take away the legal right of a claimant. “formalities” in no case should be allowed to operate beyond the field allotted to them by law.”*

The aforesaid view is reiterated in a subsequent decision rendered by the Karnataka High Court in **Maheboobsab Buransab Maniyar & Ors. v. Mohadinsab Mahoboobsab Maniyar & Ors.** reported in **AIR 2013 Kar 29** in the following:



***“26. Therefore it is clear that when a Muslim wants to enforce the pre-emptive right that is conferred on him by the custom, the requirement prescribed under the custom is to be strictly followed. The essence of this pre-emptive right is firstly he must express his intention to purchase the property immediately on receiving the information of the sale. Then he has to follow such communication by making a demand to the purchaser or seller in the presence of two witnesses. It is only if such a demand is not complied with, a cause of action arises for him to file a suit within a period of one year from the date of sale enforce the right of pre-emption. This is the requirement prescribed in the custom. Therefore when the customary right is sought to be enforced in a Court of law, all the prescriptions of the custom have to be meticulously followed.”***

We are conscious of the proposition of law that all the aforesaid judgments as noted above were delivered after the final adjudication is made in the suit but it is equally important that at the temporary injunction stage the Court must form a prima facie opinion on the basis of the pleadings filed by the parties and the consequences of non-granting the temporary injunction and its impact on the plaintiff. It is no longer *res integra* that the temporary injunction is granted in aid of the final relief and, therefore, the Court should stay away from making any observations which would have the impact on the final decision. Equally, the Court cannot brush aside the pleadings of the parties and in the event the Court finds that a prima facie case has not been made out, there is no fetter on the part of the Court in denying the temporary injunction.

It has been categorically averred in the plaint that the deed of sale was executed on 19<sup>th</sup> August, 2021 in favour of the appellant and the appellant



came to the suit premises on 7<sup>th</sup> October, 2021 along with the men and labourers with an intent to change the nature and character of the best portion of the suit property on the strength of his claim as a owner thereof. The plaint further proceeds that on 15<sup>th</sup> November, 2021 the said Rubina Rashid declared that she sold out the property to the appellant and on 16<sup>th</sup> November, 2021 online search was made with the help of the advocate in order to ascertain the veracity thereof. It is further stated that on 16.11.2021 the copy of the plaint as well as the documents annexed to the application for injunction was served by the plaintiff/respondent and from there he came to know that a sale-deed is executed in favour of the appellant but the right of pre-emption was exercised on 12.12.2021 claiming the date of the knowledge and the exercise of right of pre-emption by making the first demand. There is a considerable delay which can be perceived from the aforesaid pleading as the requirement under the statutory provision does not appear to have been fulfilled more particularly, the immediate demand of jumping, which is the first step in furtherance of the exercise of the said right, is conspicuously absent.

In view of the above, we do not find that the Trial Court was justified in passing the mandatory injunction. The order is set aside. The application for temporary injunction is dismissed.

No order as to costs.



Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with the requisites formalities.

**(Harish Tandon, J.)**

I agree.

**(Madhuresh Prasad, J.)**