

**(1984) 05 RAJ CK 0005**

**In the Rajasthan High Court**

**Case No :** Reference in Civil First Appeal No. 18 of 1972

Radha Ballabh Haldiya and Others

APPELLANT

Vs

Pushalal Agarwal and Others

RESPONDENT

---

**Date of Decision :** 25-05-1984

**Acts Referred:**

Constitution of India, 1950 — Article 14, 141, 142, 16, 226

**Citation :** AIR 1986 Raj 88 : (1985) 1 WLN 468

**Hon'ble Judges :** Guman Mal Lodha, J;G.K. Sharma, J

**Bench :** Division Bench

**Advocate :** R.K. Rastogi, for the Appellant; L.R. Mehta, for the Respondent

---

## **Judgement**

1. Sohan Nath Modi J., vide judgment dated the 27th August, 1973, made a reference as he had differed with the earlier judgment dated the 28th April, 1972 passed by J.P. Jain J., in S. B. Civil Second Appeal No. 261/1971 (Prabhu Narain Patwa v. Suraj Narain Sanahi and others). Jain J., in substance, held that the customary right of pre-emption founded on Mohammedan Law stood modified by the notification of the State of erstwhile Jaipur dated the 7th April, 1927, and the formalities of Talabs, stood abolished by the said notification.

2. Before we proceed to decide this reference, we may mention chronological history of the civil proceedings from which the present reference has arisen. The appellant filed a suit for preemption on 29th August, 1963 in the Court of Senior Civil Judge, Jaipur City No. 1, when the Rajasthan Pre-emption Act, 1966 was not in force, which was decided on 23rd October, 1971. There, almost all the issues were decided in favour of the appellant, except issues Nos. 5 and 7. Being dissatisfied with the judgment of 23th October, 1971, the appellant filed an appeal before this Court on 11th January, 1972, which resulted in making reference on 27th August, 1973 deciding issue No. 7 in favour of the appellant. Modi J., while deciding issue No. 5, referred the matter for consideration of a Division Bench for answering the following question:

"Whether the notification dated 7th April, 1927 published in the Jaipur Gazette dated 15th April, 1927 modified the customary right of pre-emption prevailing in the former Jaipur Slate and made the formalities of making talabs" as unnecessary?"

3. The only question which calls for adjudication is, whether the making of Talabs is necessary or has become "unnecessary" in Jaipur and what is the effect of notification dated the 15th April, 1927, which runs as under:

"No. 2155/J-148- Dated Jaipur, the 7th April, 1927

Whereas it is expedient to give ail possible claimants formal notice of a sale, with a view to facilitate their assertion of pre-emptive right without recourse to litigation, the following rules have been passed by the Council of State, and they shall come immediately into force:

1. When any person proposes to sell any property in respect of which any persons have a right of pre-emption, he shall give notice to the persons concerned of

(a) the property: and

(b) the price at which he is willing to sell it.

Such notice shall be given through the Court within the local limits of whose jurisdiction the property or any part thereof is situate,

2. Any person having a right of pre-emption in respect of any property proposed to be sold shall lose such right, unless within 3 months from the date of service of such notice he or his agent pays or tenders through the Court the price aforesaid to the person so proposing to sell.

3. Any person entitled to a right of preemption may bring a suit to enforce such right on any of the following grounds (namely): --

(a) that no due notice was given as required by Rule 1;

(b) that tender was made under Rule 2 and refused;

(c) that the price stated in the notice was not fixed in good faith:"

4. Shri R.K. Rastogi, the learned counsel for the appellant-Radha Vallabh Haldia, argued that according to the Mohammedan Law as modified by custom in the then Jaipur State territory, Talabs were not necessary. According to him, a doubt has been created on the correctness of the judgment of Mustt. Mathura v. Mustt. Ramzano, (10 Jaipur Law Reporter 39) which was passed by the Full Bench relying on decision in Gobind Dayal v. Inayat Ullah, (1885) ILR 7 All 775 (Five Judges Bench), in view of the Supreme Court judgment in Bhagirath Singh v. Ramniwas, (Civil Appeal No. 2545/69 decided on 1st November, 1979) and Jagannath v. Radhey Shyam ILR (1960) Raj 75.

5. Shri Rastogi submitted that in Bhagirath's case (supra) their Lordships of the Supreme Court did not express any final opinion because the High Court in that case had summarily dismissed the Vendee's appeal and, as such, remanded the case for decision on all the points including the one on which doubt was raised. The decision in Jagannath v. Radhey Shyam (supra) was brought to the notice of the Supreme Court but it was not brought to the notice of the Court that Mohammedan Law applied to the then Jaipur State Territory modified by customs. According to Shri Rastogi, the decision in Jagannath v. Radhey Shyam (supra) was not dealing with Talabs" but substantive right of co-sharers and preferential rights amongst them. The remarks applied to the points before it and not the whole law of pre-emption whether procedural or substantive as laid down in (1940) 8 ITR 635 (Privy Council) wherein it was held that the ruling lays down the law pertaining to the facts of the case before it and the general remarks were not meant to apply to poi its not before the Court; nor the important effect of Gazette notification of 7th April, 1927 was an issue in that case. Shri Rastogi further submitted that, even, the Gazette notification of 7th April, 1927 laying down the rules as regards the exercise of the right of pre-emption was not brought to the notice of the Supreme Court. According: to Shri Rastogi, a custom judicially noticed, again and again, need not be pleaded as that is the law of the land. In support of this contention, Shri Rastogi relied on the following decisions:

1. Banarsi Das v. Sumat Prasad AIR 1936 All 641.
2. Ramrao v. Rajat of Pitlapur, ILR 41 Mad 778: (AIR 1918 PC 81)
3. Syed Habib Hussain and Others Vs. Kamal Chand,
4. Gokalchand v. Brijnarain 1954 Raj LJ 710
5. Panch Gujar Gaur Brahmans Vs. Amarsingh and Others,
6. The notification of 1927 was noticed by the Chief Court of Jaipur and held binding in Jamnalal v. Mohammad Abid, (12 Jaipur Law Report 34) and Kadir Bux v. Jagdish Narain, (12 Jaipur Law Report 55).
7. Shri Rastogi further submitted that the direct case law on the notification of 1927 is of the following decisions:
  1. Prabhu Narain Patwa v. Suraj Narain Civil Second App. No. 261/1971 (Per J.P. Jain J.,) (unre ported)
  2. Gopal and Others Vs. Hari Dutt Sharma, (per M.B.Sharma J.,)
  3. Bhagwan Sahai v. Satya Narain 1982 Raj LW 250 (per D.P. Gupta, J.)
  4. Brijmohan v. Chhoteylal, Civ. Second Appeal No. 447/1970 decided on 17-12-1981 (unreported).
8. Shri Rastogi argued that the purpose of the notification is expressly not to facilitate primary right of offer by the Vendor but to facilitate the secondary right, i.e. "assertion of pre-emptive right" by the pre-emptor as per first clause of the

notification. According to Shri Rastogi, the stage for "assertion of preemptive right" by Talab Moasibat"" comes only after the sale is completed by copying out sale deed in favour of a stranger or an inferior pre-emptor and Talab made prior to that is useless according to the Mohammedan Law. Shri Rastogi further averred that there is no procedure provided in Mohammadan Law for making an offer with the result that there is litigation and, evidence on both sides is led creating difficulty to find out the truth and putting the parties to expense and inconvenience. Even if provision would have been made of offer by notice of proposed sale (offer of sale) by notice through Court and left the matter there that it was not enough as that was not the purpose, but the purpose was to facilitate assertion of pre-emptive right by the pre-emptors and avoid litigation on that account. As much, the provision was to be made for assertion of pre-emptors, right i.e. "Talab" which was to be made after sale deed, for that stage was provided earlier, i.e., "assertion of pre-emptive right", Talab" was to be made after notice through Court but, before sale.

9. Shri Rastogi relied on the decision of the. Supreme Court in Sheikh Mohammad Rafiq Vs. Khalilul Rehman and Another, wherein, according to Shri Rastogi, it was held that it was almost impossible for a pre-emptor to go on daily watching the copy of the sale deed in the registration department and at once make the first demand as soon as it is copied and, to avoid this, "almost impossible" situation the notification further provided for an easy method of assertion through Court even at the stage prior to sale, so that the trouble and expense of sale may also be avoided. As per Shri Rastogi this replaced the "Talab" after sale. If this was additional along with "Talab" then instead of facilitating it was creating an additional procedural process instead of shortening.

10. Shri Rastogi then pointed out that the notification provided not only "assertion" orally or in writing but provided for payment of sale price which was the most effective method of assertion as, payment is more effective and reduced chances of litigation. This avoided sale to a stranger or to inferior pre-emptor then merely asserting and thereafter filing suit. A short cut method through the process of court was provided, easy, quick and avoiding litigation, saving time of court in recording and writing judgment on voluminous oral evidence and, expenses of sale. After such effective assertion through court "talabs." were not necessary and had no meaning. If there, was no such assertion than the right was lost according to notification.

11. Shri Rastogi pointed out that the offer through court was not the purpose but was means to invite assertion or substitute of Talab if assertion of pre-emptive right before sale purpose is a mandatory provision so as to affect sale for a rightful claimant or he must lose the right and, it can only be if such assertion of preemptive right was substituted or Talab which was intended to be done away with.

12. To make the process provided by notification compulsory, it was provided that absence of notice of proposed sale with details will entitle the pre-emptor to

file a suit; argued Shri Rastogi. K still Talab" would have been necessary it must have been provided that, the right to file suit shall be subject to further condition of Talabs" and, this would have defeated the purpose of the notification of "facilitating", as argued by Shri Rastogi.

13. According to Shri Rastogi, the absence of notice made it a cause of action for suit which necessarily means that talabs were eliminated under that contingency.

14. The whole process starting from making proposals of sale up to the filing of suit has been provided by Rules 1, 2 and 3 of the notification and the same has been provided in corresponding provisions of Sections 8, 9 and 10 of the Rajasthan Pre-emption Act, 1966. Shri Rastogi then pointed out that, the respondent's counsel has conceded that Talabs" are not necessary under the Rajasthan Pre-emption Act. In such situation, as per Shri Rastogi, why should the same be necessary under the notification. The only argument of respondent's advocate, to make Talab necessary in spite of the notifications is that Rajasthan Act is amending and consolidating Act for the whole of the law of pre-emption, i.e. substantive and procedural, while the notification is pertaining to procedural part only and consolidating but, that will not make any difference if it is so but does not say so and is pertaining to procedural part only. The same provisions regarding procedure until the two enactments come, shall have the same effect. There is no question of deleted legislation as the legislative body framed the notification.

15. Shri Rastogi then argued that though the right of pre-emption is a weak one but it is being maintained by this notification and acts in all slates but making the almost impossible Talab" on which legislation was required in the verdict of the Supreme Court in Sheikh Mohammad Rafiq Vs. Khalilul Rehman and Another, making it more easy and effective, less expensive and minimising chances of litigation and changing the stage of assertion of right of pre-emption from "after the sate" to "before sale" and applying the law to Hindus and Mohammadans, alike.

16. Further, the submission of Shri Rastogi is that the notification makes provision for a stage when there is a proposal for sale at a certain price and he has to wait until either a pre-emptor purchases or loses his right to purchase. Thus, at that stage the purchaser has no right and if he has any, it is subject to the right of pre-emption and instead of clearance of that right at a stage of after sale, it is cleared before sale. Thus the notification is for the advantage of the purchaser also minimising chances of litigation and avoiding unnecessary expenses of sale deed; argued Shri Rastogi.

17. Lastly, Shri Rastogi submitted that the notification has simplified the procedural law and with regard to that minimised chances of false allegations and litigations and unnecessary expenses of sale deed and made "impossible talabs" easy and did not add one more procedure along with the Talabs" maintaining them. According to Shri Rastogi, the "talabs" are no more necessary

after the notification in question although according to the appellant Talabs were not necessary even on custom.

18. Shri Lakhpatt Raj Mehta, appearing for the respondent, learned counsel seriously controverted the above submissions made by Shri Rastogi. According to him, the notification does not contain any express repeal of the customary law already prevalent in Jaipur city, and unless it is found that the clear intendment of notification was to do away with the requirements Talabs", it is not possible to hold on the face of the language of the notification that such requirement became unnecessary after its publication in the gazettes on 15th April, 1927.

19. Shri Mehta then pointed out and referred to the Full Bench decision of this Court in Nathuram v. Pat Ram ILR 10 Raj 443 : (AIR 1960 Raj 125) about the customary right of pre-emption founded on and co-extensive with Mohammadan Law prevalent in the city of Jaipur.

20. Full Bench in Nathuram's case (supra) observed that under the custom as prevailing in Jaipur City the right of pre-emption is coextensive with the Mohammedan Law. To substantiate such observations, Full Bench referred to the case of Ram Rakh v. Mst. Gulab ILR (1955) Raj 650 : (AIR 1955 Raj 140) wherein that proposition of law has been accepted. Shri Mehta contended that the same view was taken by this court in Jagannath v. Radhey Shyam, ILR (1960) Raj 75.

21. Shri Mehta then relied upon the observations in Chhaju Ram v. Manulal (4 Jaipur Law Report 134) made by the Chief Court of Former State of Jaipur. Chief Court laid down as under: (Hindi translation reproduced)

(Matter in Hindi omitted -- Ed.)

22. Their Lordships of the Supreme Court in Bhagirath Singh Sakhawat v. Ram Niwas Barit (Civil Appeal No. 254571969 decided on 1-11-1979) had not accepted the view taken by Former Jaipur Chief Court in Mst. Mathura v. Mst. Ramsahu (10 Jaipur Law Reporter 39). In Bhagirath Singh's case (supra) it has been held that the customary law of pre-emption prevalent in the Jaipur City was founded on and was coextensive with Mohammadan Law and Mst. Mathura's case cannot be said to hold the field.

23. Their Lordships of the Supreme Court while dealing with the various sections of Punjab Pre-emption Act, 1913 (Sections 19 and 20 of the said Act are substantially similar to the provisions of the notification in question), in Bishan Singh and Others Vs. Khazan Singh and Another, observed that Sections 19 and 20 "prescribe the procedure for the exercise of the primary right": The primary right of the pre-emptor according to the Supreme Court's view is the right to the offer of a thing to be sold and it is not identical with the right to the thing itself. According to Shri Mehta, in other words, the primary right is only against the Vendor, while the secondary right which is the right to follow the thing sold without offer to the pre-emptor, in the hands of the purchaser.

24. The object of the notification in question according to its preamble was to facilitate the claimants to assert their right of pre-emption without recourse to litigation. Rule 1 of the notification provides that the Vendor is required to give a notice to the persons having the right of pre-emption when he proposes to sell the property.

25. Shri Mehta pointing out towards preamble, argued that a reading of the preamble of the notification in question leaves no manner of doubt that it deals with the stage when the Vendor proposes to sell his property, and it cannot be said that it dispenses with the requirement of "Talabs". It has been submitted that the notification deals with the stage of primary right, only.

26. According to him, the provisions made in Clause 2 of the notification, that the claimant would lose his right in case he failed to pay or tender amount mentioned in the notice served on him, refers to the primary right of the claimant and not to his secondary right, which as mentioned above, comes into existence only after the sale and on making of Talabs". It has been submitted that if the primary right is itself extinguished, it cannot be revived or renewed on the making of Talabs".

27. Shri Mehta referring to the treatise of Tyabji "Mohammadan Law" p. 694 (1960 Edition), argued that the customary law on the point was not different even when there was no notification. Emphasis was laid on the following :

"A person otherwise entitled to claim preemption, loses that right if he expressly or impliedly waives it, or omits duly to assert demand or enforce his claim, or acquiescence in the sale of the land, or any part thereof, notwithstanding that he may have already asserted and demanded it, or associates in a suit to enforce pre-emption a co-plaintiff who has no claim to it and in that manner waives part of the claim, and extinguishes the whole of it".

28. Shri Mehta contended that on the basis of Clause 3, it cannot be said that the requirement of Talabs" is inconsistent with the notification, and it failed to take into account the Mohammedan Law of Pre-emption which is basis of the custom applicable to the parties.

29. Shri Mehta then commented upon the decision of this Court (per D. P. Gupta, J.) in Bhagwan Sahai v. Satya Narain 1982 Raj LW 250 and argued that Gupta J., proceeded on the erroneous premise that, the customary law of pre-emption was modified by a special custom and making of "Talabs" was not necessary when both the parties or one of them was a Hindu and, Gupta J., referred to for this purpose the decision in Mst. Mathura v. Mst. Ramsahu (supra).

30. According to Shri Mehta, if the Vendor gives the notice as contemplated by the notification and the claimant pays or tenders the amount in court, the vendor cannot sell the property to a stranger, as his offer deemed to be embodied in the notice given through the court would be accepted by the claimant. If the vendor still sells the property to the stranger, the claimant can surely file a suit for

specific performance of the agreement to sell the property for the price mentioned in the notice irrespective of his right of pre-emption and Rule 3 of the notification in question. If that such a situation arises, it is needless to say, as per submission of Shri Mehta that it would not be necessary for him to make "talabs" for his suit and it would be for the enforcement of the agreement and not for enforcement of his right of pre-emption and Clause 3 of the notification by enabling him to file such suit only affirms the obvious and it would be doing violence to its language to argue on its basis that it has rendered the requirement of "talabs", it is a matter of substance under customary law of pre-emption and unnecessary being inconsistent.

31. It was pointed out that Clause 3 of the notification simply states that the person entitled to a right of pre-emption may bring a suit to enforce such right on any of the grounds mentioned therein may be examined from another angle, and according to Shri Mehta, it presupposes that the claimant has a right of pre-emption according to law already prevalent in the Jaipur City. Since there is no doubt about the existence of such law of pre-emption, it cannot be said that a part of such law which pertains to the requirements of "talabs" and which is not only regarded as invariable but also a matter of substance is inconsistent with the provisions of the notification and, therefore, stands repealed by implication.

32. Shri Mehta then argued that Clause 3 instead of doing away with the existing law of pre-emption or any part thereof, proceeds on the assumption that that law is intact and the claimant, who files a suit for the enforcement of his secondary right of pre-emption, will succeed only if he satisfied all the requirements of such law including the requirement of "talabs". According to Shri Mehta, Clause 3 of the notification does not confer any right of suit on the claimant which is not already there. His primary right not having been lost, because of payment/tender of the amount, and his secondary right comes into existence after sale to stranger and on making of "talabs" soon after. It has been further submitted that language of the notification does not justify the conclusion that it is inconsistent with the requirements of "talabs" or that it has rendered them unnecessary.

33. Shri Mehta relied upon the decision of the Supreme Court in Shri Audh Behari Singh Vs. Gajadhar Jaipuria and Others, It has been further argued that it cannot be said merely because of Clauses 2 and 3 of the notification in question that the requirement of Talabs, which has been held by the Supreme Court in Smt. Rajeswari Devi v. Mukesh Chandra (Civil Appeal No. 162/1965, decided on 31-10-67 - 1967 SC (Notes) 403) to be a "rule of substance" has been dispensed with after the promulgation of the notification.

34. Shri Mehta then put another facet of his submission and argued that the notification, which was intended "to facilitate the assertion of pre-emptive right without recourse to litigation" deals with only procedural law namely, how and who will cause the notice to be served on the claimants before sale, what will be the consequences if such notice was served on them and they paid or tendered the amount and, what consequences will flow if such notice was not given. It has

been submitted that it does not deal with or in any way alter or modify the law of pre-emption as such, and it does not create any fresh right/ rights of pre-emption. But, it provides for losing of primary right of pre-emption, which exists even before sale and leaves the secondary right untouched, which can come into existence only on sale to stranger.

35. Shri Mehta submitted that the allegation about offers before sale were always be set with difficulties of proof and pleas of waiver usually failed for want of adequate proof. The notification in question does not deal with as to who are entitled to pre-empt and in what order and when, are entitled. On the other hand, the claimants also had no machinery for receiving authentic offers. To avoid litigation, the notification making the rules for service of notice of proposed sale was issued and it did not purport to interfere with the customary law of pre-emption as such and which it could not do. It has been contended that the requirement though technical but a matter of substance it is for legislature to repeal it and not for the courts to do so by stretching the meaning of notification, as has been held by their Lordships of the Supreme Court in Sheikh Mohammad Rafiq Vs. Khalilul Rehman and Another,

36. Substantiating his argument that the notification is exhaustive and after its enactment by the State legislature, the customary law does not survive; Shri Mehta pointed out that the notification is not a legislation on the subject of pre-emption as the Rajasthan Pre-emption Act of 1966 is a consolidated and amended one.

37. Shri Mehta submitted that by making notification the State Council did not purport to replace the customary law of pre-emption as founded on Mohammadan Law, but simply intended to make a provision for giving of a notice by the Vendor before sale to claimant with a view to do away with the filing of suits, if possible and, therefore, it cannot be interpreted so as to repeal the requirement of Talabs", which is a matter of substance and without which the right of pre-emption, i.e. the right in the secondary sense or in other words the right to follow the property in the hands of purchaser by filing suit, does not come into existence.

38. It has been contended that the right of pre-emption isa very weak right and is even of a piratical nature and should not be allowed to succeed by stretching the scope of the notification beyond its plain language. In support of his contention, Shri Mehta placed reliance upon the decisions of the Supreme Court in Bishan Singh and Others Vs. Khazan Singh and Another, Radhakisan Laxminarayan Toshniwal Vs. Shridhar Ramchandra Alshi and Others, seep. 258 : Radhakisan Laxminarayan Toshniwal Vs. Shridhar Ramchandra Alshi and Others,

39. To conclude the arguments, Shri Mehta argued that the notification and the customary law both, can stand together as they deal with different stages and therefore, there is no question of repeal of the customary law regarding Talabs" by the notification. Since the notification does not speak anything about

secondary right of pre-emption which comes into existence only on making of the "Talabs" soon after the completion of sale, it cannot even be suggested that they occupy the same field and for this reason as well there can be no repeal of the customary law by implication, argued Shri Mehta.

40. It would thus be seen that whereas earlier there was difference of opinion in between the judgment by S.N. Modi J. and J.P. Jain J., but after the reference was made, D. P. Gupta J., has supported and reiterated the view taken by J.P. Jain, J., as against the view enunciated and proposed by S.N. Modi J., the short point for adjudication by this Court is, whether the view taken by J.P. Jain, J., as he then was, and reiterated by D. P. Gupta J., lays down the correct statement of law or, whether the correct law has been laid down by S.N. Modi J.

41. we have given a very serious and thoughtful consideration to the rival contentions of the learned counsel for the parties, briefly, extracted above, from verbal as well as written arguments. We have also carefully gone through the three earlier judgments of this court, firstly of J.P. Jain, J., second one of S.N. Modi J., under present reference and third one latest of D. P. Gupta J.

42. We must, at the very threshold of our discussion, observe that it would have been in the fitness of things as per judicial precedents and propriety if after the reference was made by S.N. Modi J., and seemingly there was a conflict of opinions in between S.N. Modi, J. and J.P. Jain J., the learned single Judge would have refrained from giving his own judgment. In our opinion, it is established principles of propriety and judicial decorum that single Bench of the same court should not take a different view from another single Bench. This becomes all the more important when a reference has been made pending before the Division Bench in respect of difference of opinions, expressed by single Bench earlier, as was done by S.N. Modi J., when he wanted to differ from J.P. Jain J.

43. In *Jaiwant Rao and Others Vs. State of Rajasthan and Others*, Full Bench of this Court took exception to the practice of a single Bench taking a different view from its earlier without reference to the case to a larger bench. This view has been reiterated by this Court in *Dewaram v. State of Raj.* 1983 Raj LR 754 : (1984 Cri LJ 129). The Apex Court of this country has been repeatedly observing that if there is a decision of a Division Bench, the other Division Bench should not normally give a different judgment, but, propriety and law of precedence require that it must refer the case to a larger bench with a view to avoid uncertainty of law in subordinate courts and the public at large. This view of ours is verified by the following decisions of the Apex Court.

1. *Mahadeolal Kanodia Vs. The Administrator-general of West Bengal*,
2. *Jaisri Sahu Vs. Rajdewan Dubey and Others*,
3. *Addagada Raghavamma and Another Vs. Addagada Chenchamma and Another*,
4. *Sri Venkateswara Rice, Ginning and Groundnut Oil Mill Contractors Co. and Others Vs. State of Andhra Pradesh and Others*,

5. Jaiwant Rao v. State of Rajasthan AIR 1961 Raj 250 (FB)

6. Dewaram v. State of Rajasthan 1983 Raj LR 754 : (1984 Cri LJ 129)

44. In Sri Venkateswara Rice, Ginning and Groundnut Oil Mill Contractors Co. and Others Vs. State of Andhra Pradesh and Others, the Supreme Court observed us under :

"Our approach to the question before us is similar to that adopted by the High Court in the decision under appeal. We are in agreement with the reasoning of the High Court. But our attention was invited to a latter decision of the same High Court in M. Madar Khan and Co. Vs. Assistant Commissioner (C.T.), Ananthapur and Others, which took a view contrary to that taken in the decision under appeal. It is strange that a co-ordinate Bench of the same High Court should have tried to sit on judgment over a decision of another Bench of that court. It is regrettable that the learned Judges who decided the latter case overlooked the fact that they were bound by the earlier decision. If they wanted that the earlier decision should be reconsidered, they should have referred the question in issue to a larger bench and not to ignore the earlier decision."

(Para 9)

45. Be that as it may, we would not like to develop this theme any more because now third judgment is also before us. It would be again against the principles of propriety to take any exceptions to it as all said and done. we have to embark upon the important task of adjudication to ascertain and decide as to which of the judgments lays down the correct law and simply because third judgment is based on the departing from the principles of propriety and judicial decorum, it cannot be treated as laying down bad law nor its existence can be ignored or undermined. We have to give full respect to the latest judgment equally in spite of the above infirmity pointed out by us.

46. Before we deal with the judgment of this court we may like to make a mention of the various decisions which were cited before us. Again, before we do that, we may take notice of the common ground that under the customary Mohammadan law as it exists in India generally and used to exist according to Sariyat. "Talabs" in a particular pre-emptive matter is a "must". Even though Shri Rastogi has argued that in Jaipur State, a departure was made even before the notification of 1927 which he wanted to substantiate from a series of decisions of former Chief Court of Jaipur State and earlier to it, which would be dealt with by us, a little later.

47. Their Lordships of the Supreme Court had occasion to consider the question of "Talabs" in Smt. Rajeshwari Devi v. Mukesh Chandra (1967 SC (Notes) 403) (supra) 31-10-1967 and, Bhagirath Singh v. Ramniwas Barit (supra I on 1st November, 1979.

48. In Smt. Rajeshwari Devi v. Mukesh Chandra (supra) as discussed above, a dispute was from Uttar Pradesh as property was in Rampur City. Their Lordships

of the Supreme Court, after discussing the various earlier judgments, ultimately held that the making of demands being a condition precedent to the exercise of the right, failure to establish that condition is sufficient to non-suit the plaintiff.

49. The "making of a demand" is called Talab" in Urdu language and in the customary Mohammedan law.

50. Bhagirath Singh Shekhawat v. Ram Niwas Bark"s case is nearer one being a case arose from Rajasthan, itself and relating to the property of Jaipur State. In that case, the question which assumed importance was that "Talab" was necessary under the customary law of pre-emption in Jaipur. Rajeshwari Devi"s case (1967 SC 403) (supra) was referred to and relied upon. Reference was also made to Mst. Mathura v. Mst. Ramsano (10 Jai LR 39) (supra). The conclusion to which O. Chinnappa Reddy and R.S. Sarkaria JJ., arrived at, may be taken note of :

"In the subsequent decision ILR (1960) Raj 75 of the Rajasthan High Court (which was relied upon by the trial court in the present case), has been observed that there is no custom regarding pre-emption prevailing in Jaipur city, which may be at variance with the Rules of Mohammadan Law. In view of this, we wonder whether the decision of Jaipur Chief Court in Mst. Mathura v. Mst. Ramzano, ibid, still holds the field Several arguable points of law had been raised by the appellant before the High Court. It was, therefore, not proper for the High Court to summarily dismiss the appeal."

61. As mentioned above, Shri Mehta further referred to the judgment of Chhajuram v. Nanulal (4 Jai LR 134) (supra) wherein Full Bench of Chief Court of former State of Jaipur on 13-12-1927 observed that pre-emption is not based on "Dharamshashtra" but it is based on "Shra Mohammadi" and therefore, unless it is shown that the government laws are different we will have to obey "Shra Mohammadi" according to which there are conditions namely, "Shafi Sariq", Shafi Khalit" and "Shafiye Zar".

52. Another judgment of Chief Court in Civil Case No. 111 of Samvat 1981 decided on 16th September 1924 was referred to by Shri Mehta, in which it was observed that the preemption law in Jaipur is based on "Shra Mohammadi" and the right of pre-emption would only arise after sale by registration.

53. Prima facie, in the face of the above two judgments of the Supreme Court, it is to be inferred that up to 1927 year, High Court has insisted upon the customary law of preemption and "talabs" were necessary precedents for exercising such rights. However, both Shri Rastogi and Shri Mehta agreed to the factual situation that the impugned notification of 1927 was neither brought to the notice of their Lordships of the Supreme Court nor it was discussed and adjudicated upon.

54. Since our reference is limited to the effect of this notification and we are hearing a reference made by the single bench and referred to us by the Chief

Justice, we will have to assume that the judgments of the Supreme Court which rather than to be followed both in letter and spirit, would not solve the question of interpreting the notification dated the 7th April, 1927.

55. We have therefore, no hesitation in holding at the very threshold of our discussion that both the judgments of Rajeshwari Devi and Bhagirathsingh's cases (supra) have not interpreted notification which we are required to interpret. These judgments are without consideration of the notification with which we are not concerned.

56.. Now before proceeding to discuss the interpretation of the notification we may also mention that the judgments referred to by M/s. Rastogi and Mehta, including Gordhan v. Ram Kishan decided by Ijilas on 13-2-1924, Chhoteylal v. Sheo Shanker (2 Jaipur Law reporter 14) Mst. Mathura v. Mst. Ramzano (supra) need not detain us any further because, as observed above, we are not required to decide what is the customary right amongst mohammedans at Jaipur in respect of "Talabs". This customary law if at all is required to be considered, then the latest authoritative pronouncement of the Supreme Court in Bhagirath Singh Shekhawat's case (supra) pronounced on November 1, 1979 would hold-the field and any judgment to the contrary either of the Chief Court of Former Jaipur State or of Rajasthan High, Court or of any other court need not be looked into in view of Arts. 141 and 142 of the Constitution of India.

57. We do not agree with Shri Rastogi that in Bhagirath Singh's case (supra) their Lordships of the Supreme Court did not express any final opinion. It would be sufficient to mention in this connection that in Bhagirath Singh's case (supra) the Supreme Court in terms observed that Mst. Mathura v. Mst. Ramzano's decision cannot hold field and this was observed in the context of the decision of Rajasthan High Court in Jagannath v. Radhey Shyam ILR (1960) Raj 75 in which it was observed, that there is no custom regarding pre-emption prevalent in Jaipur city which may be at the variances with the rules of mohammadan law.

58. We have, therefore, no hesitation in rejecting the submission of Shri Rastogi that we must hold that even earlier to notification dated the 7th April, 1927 in Jaipur City there was no requirement of Talabs" for exercising the right of pre-emption. Although as we have said earlier, we are not making any final adjudication regarding the customary law as such prevailing, as assumption of the reference is based on such a prevalent customs in Jaipur City.

59. Now only the important question, which requires to be considered is, whether the notification of 7th April, 1927 modifies the customary rights of pre-emption as prevailing in the Former Jaipur State and made the formalities of "talabs"; as unnecessary.

60. According to the various contentions raised by the learned counsel for the parties and also the factual history of this litigation, in which reference has been made, we are not required to discuss as to what were the customary rights of pre-emption as prevailed in the Former Jaipur State because the question

referred to us is, based on the assumption that formalities of making Talabs" was necessary and, the only decision which is being sought from us is, whether it has become unnecessary now after this notification.

61. It is here, that the conflicting judgments of this Court require consideration.

62. We have already extracted above the notification in question.

63. S.N. Modi J., while making reference to this court in the present case, observed that the provisions of the notification are neither inconsistent nor they are such that they cannot stand together side by side, with the customary right of pre-emption founded on the Mohammedan law and according to which making of talabs is essential.

64. J.P. Jain J., in *Prabhu Narain Patwa v. Suraj Narain* (Civ. Second App. No. 261/71 decided on April 28, 1972) held that the notification of 1927 made the Talabs by a pre-emptor unnecessary, in case of a sale governed by customary law of pre-emption applicable to the area comprised in the former State of Jaipur.

65. Similarly, *Gopal and Others Vs. Hari Dutt Sharma*, on July 24, 1981 held that the customary law of pre-emption founded on Mohammadan Law stood modified in Jaipur State by notification of 1927.

66. The main thrust of the well reasoned and sustained argument of Shri Mehta who gave a very large discourse on the interpretation of the statute of procedural law, and substantive law, law of forum as against law of substance was, that the "Talabs" are not matter of procedure but matter of substance and the notification of 1927 only lays down the procedure and, therefore, the requirement of Talabs" which is branch of substantive law and matter of substances, cannot be dispensed with. In support of the above, Shri Mehta referred to certain passage from the above certain judgment of the Supreme Court (*supra*) in which it has been observed that the Talabs" are not matter of forum only but of substance in customary law of mohammedan.

67. With great ingenuity, Shri Mehta tried to convince us that in view of the fact that the Talabs" are matter of substance and belong to substantive branch of law, the notification has not dispensed with the requirement of Talabs" and, therefore, the view taken by S.N. Modi J., should be taken as the correct view in preference to the view expressed by J.P. Jain J., (in *Prabhunarain Patwa's* case, *ibid*), N. B. Sharma, J., (in *Gopal and Others Vs. Hari Dutt Sharma*, and by D. P. Gupta, J., (in *Bhagwan Sahai v. Satya Narain* ( 1982 Raj LW 250 *ibid*)).

68. We must confess that, to start with that we were correctly impressed and endeavoured by the arguments of learned counsel, Shri Mehta who tried to support it with the series of judgment of various courts, including the Supreme Court, and classical passage of interpretation of statutes from Maxwell and Cretes. However, on a serious dissection, an analysis and probe of the legal and logical submission of Shri Mehta, we could not maintain the same fervour of reasonableness and correctness which, we thought of, to start with and we find

that though prima facie, attractive and plausible submissions suffer from serious fallacy of logic and law.

69. In our considered opinion, the procedure law and substantive law though well defined concept in jurisprudence and there was no watertight compartments for them created by any statute. If we have to make a correct statement of law we must further mention in unequivocal manner that the matter of substance in contradistinction to the matters of form can be found both in substantive law and procedural law and it would be fallacious to say that all which form in the branch of substantive law are matter of substance and all which form in procedure law are matter of form. It all depends upon the particular statute, its object, its formulation and the effect which is desired to be achieved by the requirement of procedure. We do not propose to deal with this point any further because in our considered opinion the substantive law and procedural law overlap each other more often than not and the proposition of law laid down by us is so patent and well known that it requires no examples, illustrations and citation of decisions, any further.

70. We may now examine the notification dated the 7th April, 1927 with a view to find out, whether it would dispense with the requirements of Talab. The Council of State of Jaipur described the requirement of compliance of this notification as the "rules" and, the preamble or the object clause contained in the preamble mentioned that this is being done with the object of giving all possible claimants formal notice of sale with a view to facilitate their assertion of their claims, without recourse to litigation.

71. Clause (i) of the notification requires that a person proposes to sell any property in respect of which any persons have a right of pre-emption, he will have to give notice to the persons concerned through the court mentioning the property and the price at which he is willing to sell it.

72. Once this requirement is fulfilled by the Vendor, the responsibility shifted to the claimant to pay or tender through the court the price proposed within three months of receipt of the notice, to the persons proposing to sell, Clause (3) of Rule 3 of this notification is very important because it prescribes three conditions, any of which may become a ground for filing a suit to enforce such right. First condition being that no due service was given by giving a notice as required by Clause 1. Second condition which is an alternative is that the tender was made under Clause 2 and was refused. Third one which is again in the alternative is that the price stated in the notice was not fixed in good faith.

73. Obviously, even if we discuss this law, in terms, of procedure or substantive law these conditions would not fall within the branch of procedural law because they give a substantive right to file a suit to a pre-emptor and absence of it would take away the right of pre-emptor.

74. It is to be noticed that the Council of the State of Jaipur have introduced the entire law of pre-emption by notice through the court, payment or tender

through the court, and filing a suit in the court on fulfilment of either of the three conditions mentioned in Rule 3.

75. We are of the opinion that this notification is a complete Code in respect of right of pre-emption except that the concept of pre-emption has been left to be deduced from the customary law of the parties and has not been mentioned in it. In other words, the right of pre-emption, as per the customary law is to be found in the customary law but once the right of pre-emption exists either on account of vicinity or otherwise then that right can be enforced only according to the requirement and conditions laid down in this notification of 1927. It is true that "Talabs" have not been dispensed with in this notification. We are assuming for the purpose of this reference that the requirement of "Talabs" was necessary under the customary mohammedan law before this notification was issued and if there is any doubt on that point, that is amply answered by the two judgments of the Supreme Court in *Smt. Rajeshwari Devi v. Mukesh Chandra* ((1967 SC 403) (supra) and *Bhagirath Singh Shekhawat v. Ramniwas Barit* (ibid) later being related to the Jaipur State, itself.

76. We certainly feel that reliance cannot be placed on the decisions in *Mst. Mathura v. Mst. Ramzano* after the decision of Rajasthan High Court in *Jagannath v. Radhey Shyam* (ILR 1960 Raj 75) (supra) and of the Supreme Court in *Bhagirath Singh v. Ramniwas* (supra).

77. The learned single Judge (S. N. Modi J.,) was of the opinion that this notification and the provisions contained therein are neither inconsistent nor they are such that they cannot stand together side by side with the customary right of pre-emption founded on the Mohammedan Law and according to which making of talabs is essential. We on a thoughtful consideration of the various pros and cons, different faces of the requirement of "Talabs" in Mohammedan Law and, the conditions prescribed in this notification, feel that the above statement of law made by S.N. Modi J., is too wide to be sustained and confirmed.

78. As is obvious from the customary law prevalent in Former Jaipur State as was recognised by the decision of Chief Court and was generally noticed, the stage of "Talabs" comes only when sale becomes complete and as per the present law, the registration of the sale deed is done.

79. Now, let us dissect the notification of 1927 with an illustration. "A" proposes to sell a house to "B" on a consideration of Rs. 5,000/-on 1st Jan. 1980 in the City of Jaipur. Now, according to Rule 1 of this notification, a notice will have to be given through the court of Munsif Jaipur City to "C" who may be assumed to have a right of pre-emption under the old law. Now, Rule 2 comes into effect and "C" fails to deposit the amount within three months from the date of service, then he would lose his right. In such a situation, can we do that right of "C" would be revived if "C" makes three Talabs" according to the customary Mohammadan law and "A" or "B" refuses it. The answer is bound to be in negative.

80. Now, let us further dissect this illustration. If he namely, "C" pays the

amount within 3 months and then the vendor refuses to sell him the property-house and he filed a suit for pre-emption or should he wait till the formalities of Talabs are made. In our view, letter and spirit of this notification show that as soon as he pays the amount within a period of three months from the date of notice, he gets a right of bringing a suit for enforcing such rights if that is so when the requirement of talabs has become redundant after the notification of 1927. It is obvious that Jaipur State was conscious of the fact that the pre-emptor remains in great predicament as he is required to stand watch and be vigilant as to when the party would complete the sale and would present the sale deed for presentation so that he can make Talabs". It should not be lost sight of that the advancement of the society, increase of the population and prosperity, the transaction of sale of property became more frequent and what was very rare under the ancient customary Mohammadan law in the old pre-emptive test, became frequent and, therefore, Jaipur State Council became ceased of inconvenience, defects and anomalies of enforcing the customary law to the extent of waiting for registration and then making Talabs and then undoing the sale, created a lot of difficulties and complicity of litigations. It was the whole object of the Jaipur State prescribed by this notification to give a notice through the court, then tender payment of consideration of house within three months, and thereafter prescribed three conditions either of which would be sufficient for giving a cause of action to the pre-emptor for filing a suit for his right of preemption.

81. We may extract, with approval, the following deduction of D. P. Gupta J., made in *Bhagwan Sahai v. Satya Narain* (1982 Raj LW 230) (supra) :-

"After the enforcement of the Rajasthan Pre-emption Act, the requirement of making Talabs stood abrogated. The same position must be considered to have been brought about after the enforcement of the aforesaid notification by its publication on April 15, 1927 so far as the territories comprised in the former State of Jaipur were concerned and in these territories the necessity of making Talabs stood abrogated and the Mohammedan Law of pre-emption stood modified to the extent provided by the aforesaid notification"". (Para 11)

82. In view of the above, we do not feel inclined to enter into the controversy, whether the requirement of Talabs" as it exists earlier would never belong to the branch of "substantive law" or procedural law or, is a matter of forms or substance because, in our considered view, even after holding that it was a matter of substance and not of form, it cannot be allowed to stand after this notification of 1927.

83. It would be preposterous to think that the legislative authority has got no preliminary powers to lay down as to what is the requirements of law in a particular branch at a particular point of time in the society as per the social needs and "felt necessities of times" in the words of Justice Holmes. What was valid in Sheriyat may not remain relevant for all times just life, what was ordained or prescribed by Manu or Yajnavalkya, Brihaspatti or Kautilya lost its

relevancy in branch of Hindu Law after the advent of new horizons and new concepts of equality between males and females, out-castes and the ultramodern socialistic society with Dr. Ambedkar's Articles 14 and 16 of the Constitution taking inspiration from Mahatma Gandhi for emancipation of weaker section and segment of the society.

84. Shri Mehta, the learned counsel, presumably being conscious of the above dynamism and pragmatism of land reformation, lastly tried to open new avenues of constitutional debate by arguing that the Council of Jaipur had no authority in law to issue the notification of 1927 and this notification was unconstitutional, invalid non est, ultra vires on account of absence of constitutional powers of law making under the Council of State in 1927, he tried to substantiate his submission from the same decision of the Supreme Court in which the peculiar constitutional conditions of Jaipur State in 1927 have been discussed and it has been held, according to Mehta that such powers could not be exercised. We are afraid that in this reference it would not be possible for us to expand our jurisdiction for entertaining this new controversy which has neither been raised in the terms of reference nor it is permissible by well established principles, precedents and judicial functioning, we would, therefore, only append a note that it would be open to the parties to raise constitutional debate about the validity of the notification dated April 7, 1927 in a proper constitutional forum either under Article 226 or otherwise if so advised and the decision of this reference would be subject to the decision about the validity in case such constitutional challenge is made within the reasonable time from the date of this judgment.

85. We would, further, like-to clarify that. we should not be taken to have held either expressly or even by implication that this notification of 1927 is constitutional and valid as we have refrained and restrained, ourselves, from applying our juristic mind to that issue being outside scope of this reference.

86. The result of the/above discussion is, that with the above reasons which we have given, in details, and the" reasons which have been-given in the decision of Bhagwan Sahai v. Satya Narain (1982 Raj LW 250 ) (supra)" (Per D. P. Gupta J.) Gopal and Others Vs. Hari Dutt Sharma, Per M.B. Sharma J.,) and Prabhunarain Patwa v. Surajtarain (supra) (Per J.P. Jain J.,), we hold that the requirements of "Talabs." in the area of Former Jaipur State have become unnecessary after the notification dated the 7th April, 1927 published in the Jaipur Gazette dated the 15th April, 1927 and to this extent this notification has modified the customary right of Preemption as prevailing in the Former Jaipur State in respect of Talabs";

87. The following is the answer to the reference made by the learned Single Judge (Per S.N. Modi J.,) in the instant case :

The notification dated the 7th April, 1927 published in the Jaipur Gazette dated the 15th April, 1927 modified the customary right of pre-emption prevailing in the Former Jaipur State and made the formalities of making "Talabs" as unnecessary.

We direct that the record of the case with this answer, mentioned above, to the reference may be returned to the single Bench who would now decide the first appeal according to law after hearing the parties.