



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed Edition :

www.ijlra.com

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS

ISSN

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CONDITION RESTRAINING ALIENATION- CRITICAL ANALYSIS OF SECTION 10 OF THE TRANSFER OF PROPERTY ACT, 1882

AUTHORED BY - DR TANVEER KAUR

Abstract

Normally, while transferring a property under the Transfer of Property Act, 1882 the transferor can impose conditions on the transferee that are agreed upon by the parties. Section 10 of the Transfer of Property Act, 1882 places certain limitations on this power of the transferor to impose conditions on the transferee. This short article closely looks at the section highlighting its rationale, essentials as well as the scope. It also attempts to shed light on the two exceptions contained in the second half of the provision.

The Transfer of Property Act, 1882 provides general rules for the transfer of both, movable and immovable property. Sections 5-37 lay down general provisions for the transfer of both types of property. However, post that the statute provides for specific rules regarding transfer of immovable property only (barring a few provisions namely Section 122-137). Under the architecture of the Transfer of the Property Act, an immovable property can be transferred through sale, mortgage, lease, exchange or gift. The focus on the present paper is on one of the general rules regulating transfer of movable as well as immovable property i.e., Section 10.

Ordinarily, the parties can agree to impose terms on the transfer that otherwise do not violate any law. That is also what is contained in Section 7 of the Transfer of Property Act 1882 which provides that a transferor can transfer a property 'either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force'.¹ Therefore, it is not in dispute that conditions on transfer can be imposed. Section 10 draws a line on what kind of conditions can be imposed.

¹ Transfer of Property Act 1882, s7.

As per the terms of Section 10 titled ‘condition restraining alienation’:

“Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him:

provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.”²

The gist of the provision is that while conditions or limitations can be imposed on the transfer, those conditions or limitations that absolutely restrain the transferee from alienating his interest are void. The rationale behind this is the policy of the law favouring the circulation of property over its accumulation. The right to transfer or alienate the property is integral to the ‘beneficial ownership of property’ and therefore, any term of the transfer that takes away this right is done away with by the law.³ In words of the Law Commission Report on the Transfer of Property Act, 1882:

“...if a person is free to dispose of his own property, he must so exercise the freedom that those to whom he transfers an interest in property are not deprived of that very freedom..... the law requires that a person transferring property should not merely look to his own immediate interests, but should also have regard to the interests of future generations. In this sense, a balance is sought to be achieved between the immediate present and the distant future—which is indeed a function of law as social engineering”.⁴

Section 10 uses the word ‘absolutely’ which implies that not all restraints are hit by the provision. Courts have held that partial restraints on the power of alienation with the transferee are valid.⁵ According to the interpretation given by Courts, ‘the test is whether the condition takes away the whole power of alienation substantially; it is a question of substance and not of mere form’.⁶

There are different types of restraints that can be imposed by the transferor. Restraints can be imposed with respect to time, consideration, persons and use of property. If the transferor imposes

² ibid s10.

³ Mulla, *The Transfer of Property Act 1882* (13th edn)

⁴ Law Commission of India, *The Transfer of Property Act, 1882* (Report No. 70, 1977) Ch XVII.

⁵ Poonam Pradhan Saxena, *Property Law* (3rd edn, Lexis Nexis 2017)

⁶ Shephard and Brown, *Commentaries on the Transfer of Property Act 1882* (4th edn, Lawrence Asylum Press 1899).

a condition on the transferee that he can sell that property only to a particular person, the condition would fall within the purview of Section 10. This is because it substantially impairs the right of alienation of the transferee.⁷

However, if the restriction imposed by the transferor directs the transferee to not sell outside the family, the restriction will not be considered an absolute restraint. The Privy Council in *Mohammad Raza v. Abbas Bibi*, ALR 59 I.A. 236 upheld the validity of a restriction that created a limitation against transferring the property to a stranger. It held that the same amounted to a partial restraint and was therefore valid under Section 10 of the Transfer of Property Act 1882.

Likewise, if the condition places fetters on the consideration that can be claimed by the transferee, the same would be hit by Section 10. If the transferor puts a term in the transfer deed directing the transferee to sell the property only at its market value, the transferee is not bound to follow it. This is because it is transferee's prerogative to decide the amount of consideration for which he wants to sell the property.

Transfer of Property Act 1882 specifically deals with 2 distinct types of conditions: condition precedent and condition subsequent. As their names suggest, the former needs to be fulfilled before a transfer can be effected while the latter comes to play after the transfer is done. Section 10 deals with condition subsequent i.e., the limitation or condition that it talks about are imposed after the transfer is done. A significant consequence of this is that if the condition or the limitation is held to be absolute then only the condition would be void. In other words, the transfer would remain valid.⁸

There are 2 exceptions to Section 10. First is the case of a lease. Lease by its very nature leaves some interest in the hands of the lessor or transferor. Therefore, the transferor can put restrictions on the lessee's power to sub lease or assign under the lease. Section 108 (j) which deals with the right of the lessee to 'sub-lease the whole or any part of his interest in the property' is made subject to a contract to the contrary to reflect this. Lease is also exempted in Section 12 which again talks about limitations on alienation.⁹

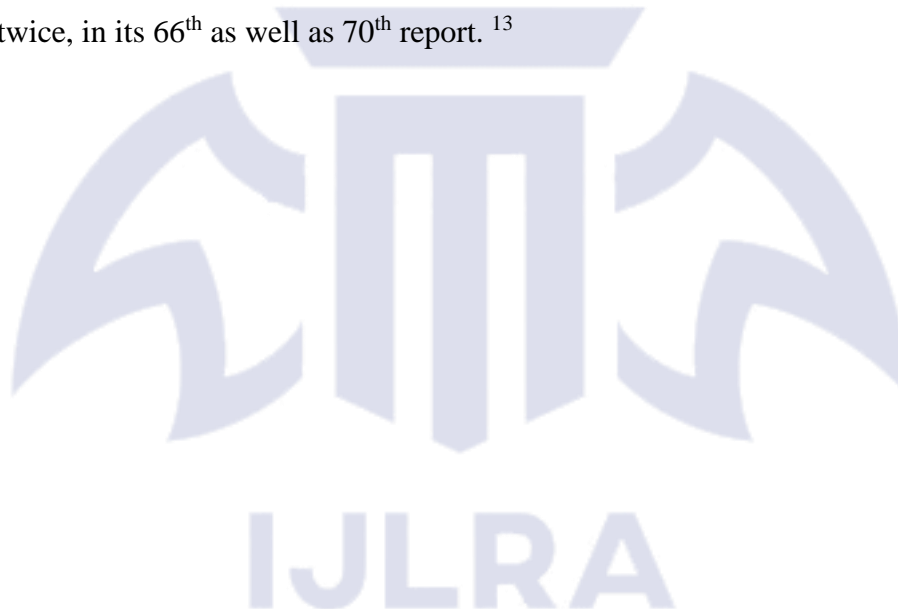
⁷ Saxena (n5).

⁸ *ibid.*

⁹ Brown (n6).

The second exception is made in the case of married women, not being Hindu, Muslim or Buddhist. The effect of the exception is that property can be transferred to such a woman with the condition that she would not transfer the same during her marriage.¹⁰ This exception was retained in the backdrop of a common law rule that a woman's property became her husband's on marriage.

The patriarchal rule was abrogated by the Indian Succession Act, 1865 for all marriages taking place after 1st January 1866. By the doctrine of 'separate use', property could be settled so that she could hold it in a manner as if she was unmarried. In this context, the exception was 'designed to protect her against herself by putting it out of her power to sell or encumber the corpus'.¹¹ However, in light of the 'growing social consciousness in the country' as well as the rise in literacy of Christian and Parsi women,¹² the Law Commission of India has recommended its removal twice, in its 66th as well as 70th report.¹³



¹⁰ Saxena (n5).

¹¹ Brown (n6).

¹² Law Commission (n4).

¹³ *ibid* para 17.37.