
PARTIAL RESTRAINTS ON ALIENATION AND THE PROMISE OF FREE TRANSFER: A RE-EXAMINATION OF SECTIONS 10 AND 11 IN FAMILY ARRANGEMENTS

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ABSTRACT

The Transfer of Property Act, 1882, voids conditions that strictly prohibit alienation of property, but it does not impose any limitation on alienation; Indian case law has addressed this omission by acknowledging the existence of a permissible partial limit on alienation through judicial decisions involving family arrangements. This article reviews the history of the law concerning the distinction between absolute and partial restrictions, beginning with the Privy Council's decision in *Mohd. Raza v. Abbas Bandi Bibi* (1932) and continuing through an examination of the Gayasi Ram test, the conflicting results in *Mata Prasad* and *Rosher v. Rosher*, and the further extension of the doctrine found in *Zoroastrian Co-Operative Housing Society* (2005). The review finds that reasonable partial restrictions are consistent with the general intention of the statute supporting alienation of property, but that due to the lack of an appropriate proportionality test in the present statutory framework, it is capable of being applied inconsistently and therefore, subject to abuse. Finally, recommendations for changes to both the legislative and judicial procedures regarding the Transfer of Property Act are made to establish a coherent statutory structure for the purposes of Sections 10 and 11.

INTRODUCTION

There is something deceptively simple about Section 10 of the Transfer of Property Act, 1882. It declares that any condition absolutely restraining a transferee from parting with his interest in property is void.¹ Read it once, and the meaning seems clear enough. But if one reads it again, more closely, one realizes that the key word is... "absolutely." The legislature was addressing situations that took away that right entirely. They were not, at least in my reading, addressing all possible restrictions on that right. And it is this word, this qualifying word, which has led to over a century of judicial improvisation.

But what of those that merely limit the right to transfer? What of a provision in a family arrangement that stipulates that property will not be transferred to strangers? What of a provision that accords a family member a right of first refusal before property can be transferred to an outsider? What of a provision that suspends transfer during a widow's lifetime in order to permit her to live out her days in peace? The statute does not address these questions. It merely voids absolute restraints and passes on.²

Indian courts have filled this gap by creating a type of restriction not contemplated by the act: the "partial restraint." Since the decision of the Privy Council in *Mohd. In Raza v. Abbas Bandi Bibi* in 1932³, Indian judges were unanimous in holding that conditions limiting, but not eliminating, the power of alienation are perfectly valid. This judicially created rule has found its most logical application in informal agreements between family members that settle land disputes, divide ancestral estates, and preserve the peace. These agreements are treated by Indian courts with a special equity of their own, and they are more willing to enforce restrictions contained within them than they would be with regard to other agreements.

This project asks a pointed question: has the judiciary, in carving out this exception, gone too far? Do partial restraints in family arrangements, however well-intentioned, quietly betray the legislative intent of unfettered circulation that Sections 10 and 11 were intended to preserve? The process of answering this question proceeds through four steps: the statutory scheme and underlying rationale; the judicial development of the absolute-partial dichotomy through landmark cases; a detailed analysis of family arrangements as a distinct category; and a critical

¹ The Transfer of Property Act, 1882, § 10.

² *Id.*

³ *Mohd. Raza v. Abbas Bandi Bibi*, AIR 1932 PC 158.

evaluation of whether the current approach is doctrinally sound.

RESEARCH QUESTION

Do judicially recognised partial restraints on alienation, particularly in the context of family arrangements, undermine the legislative objective of free circulation of property under Sections 10 and 11 of the Transfer of Property Act, 1882?

STATUTORY FRAMEWORK: SECTIONS 10 AND 11

To comprehend what courts have made of partial restraints, one must first comprehend what the statute says, and perhaps more important, what it does not say. Section 10 states: "Where property is transferred subject to a condition absolutely restraining the transferee from disposing of his interest in the property, the condition is void."⁴ There are two exceptions, however: conditions in leases for the benefit of lessors, and conditions in transfers to married women who are not Hindu, Muslim, or Buddhist. Apart from those exceptions, the rule is clear. The right to alienate, it suggests, is not merely a right but an integral part of ownership.

Section 11 deals with a related but different concern. It states that conditions on the enjoyment of property, rather than its alienability, are valid so long as they are not against public policy or unconscionable.⁵ This difference may seem minor at first glance, but it is actually significant. A transferor can certainly impose a condition on you as to how you may use the property (residence only, for example), but not as to whether you may sell it at all. A reading of both sections suggests that legislative concern for alienability was more intense than that for enjoyment.

The rationale behind this hierarchy is not difficult to discern. In its examination of Section 10 in its 70th Report, the Law Commission stated: "The key question is, however, whether a condition 'substantially removes the transferee's power of transfer.'⁶" In fact, in the Statement of Objects and Reasons for the Act, there is a strong emphasis on the need to ensure that property is not locked up in unproductive states, with a concentration of wealth in a few hands while commerce stagnates.⁷ In the Latin maxim which this Act inherited, *alienatio rei praefertur*

⁴ The Transfer of Property Act, 1882, § 10.

⁵ The Transfer of Property Act, 1882, § 11.

⁶ Law Commission of India, *The Transfer of Property Act, 1882*, Report No. 70, ¶ 3.2 (1977).

⁷ *Statement of Object & Reasons of The Transfer of Property Act, 1882*.

juri accrescendi, alienation is favoured over accumulation. But this is not merely a formalistic rule, but a vision of a society in which property is mobile, in which commerce thrives, and in which no family or class is able to lock up property for all time in a private arrangement.

The difference that concerns us for purposes of this project is that Section 10 does not address partial restraints at all. It does not define them, does not list what types are permissible, and does not indicate what criteria are to be used to determine whether a permissible partial restraint has been imposed or whether what has been imposed is, in substance, absolute. All of that law has been developed case by case over more than nine decades without a statutory foundation to anchor it. Whether that is a legitimate filling of gaps or a circumvention of the statute is a concern that runs through all that follows.

JUDICIAL EVOLUTION OF THE ABSOLUTE-PARTIAL DISTINCTION

The Privy Council Lays Down the Foundation

The facts of the case date back to a family dispute in colonial Oudh. In the case of *Mohd. Raza v. Abbas Bandi Bibi (1932)*⁸, a compromise deed between Sughra Bibi and her cousin, Afzal Husain, resolved a long-standing dispute over land by granting Sughra Bibi her claimed share of the land, but with the condition that she would not alienate it to "strangers," meaning anyone outside the family. When Sughra Bibi's transferees claimed the land, the respondent argued that this restriction was valid and binding. Their Lordships upheld this.

The first move by the Privy Council was to treat this restriction as partial and not absolute, since Sughra Bibi was free to alienate the land within the family.⁹ The more important move, however, is the one that is often missed: the nature of the deed itself was not an ordinary conveyance or gift. It was a family arrangement, a compromise of a disputed claim.¹⁰ And holding this binding, the Court argued, was not contrary to justice, equity, and good conscience.

The Gayasi Ram Test

Three years later, however, the Allahabad High Court laid down a framework that still holds

⁸ *Mohd. Raza*, *supra* note 3.

⁹ *Id.*

¹⁰ *Id.* The Privy Council held that "a partial restriction upon the power of disposition would not, in the case of a transfer *inter vivos*, be regarded as repugnant."

today. In *Gayasi Ram v. Shahabuddin (1935)*¹¹, a deed of sale provided that the purchaser was not to transfer the property, whether by mortgage, gift, or sale, to anyone except the original vendor or his heirs, at a price of Rs. 175 for all future generations. The Court struck this down as an absolute restraint, laying down a framework for what constitutes a restriction. There are two parts to this framework. First, does actual practical impossibility of alienation exist? If it does, then it does not matter what words are used to express it. Second, does the bare possibility of alienation negate the existence of an absolute restraint? No. A restriction that allows for transfer to a few persons who may or may not have a desire to buy, does not negate it.¹²

Boundary Cases: Contrasting Outcome

The application of these principles has resulted in vastly different outcomes depending upon the context. In *Mata Prasad v. Nageshwar Sahai (1925)*¹³, the Privy Council upheld a condition in a family compromise which provided that the nephew would not alienate the property during the widow's lifetime. Their Lordships saw nothing wrong with it. The widow was in possession, the nephew was in title, and both parties avoided years of costly litigation. The compromise was "prudent and reasonable."¹⁴

On the other end of the spectrum is the English case of *Rosher v. Rosher (1884)*¹⁵, where an English court struck down a testamentary condition which provided the widow with an option to buy the land at a price much below its market value. The effect of such a condition was to make alienation at fair value impossible. Similarly, in *Manohar Shivram Swami*¹⁶, which was heard by the Bombay High Court, a condition which restricted alienation to the vendor's caste family was voided because the pool of available buyers was simply too small to make any right of alienation meaningful.

The Zoroastrian Society Expansion

The major change in recent times occurred in the year 2005 with the Supreme Court's decision in *Zoroastrian Co-operative Housing Society Ltd. v. District Registrar*¹⁷. The bye-laws of a

¹¹ *Gayasi Ram v. Shahabuddin*, AIR 1935 All 625.

¹² *Id.*

¹³ *Mata Prasad v. Nageshwar Sahai*, (1925) 47 All 484 (PC).

¹⁴ *Id.*

¹⁵ *Ros Rosher v. Rosher*, (1884) 26 Ch D 801 (Eng.).

¹⁶ *Manohar Shivram Swami v. Mahadeo Guruling Swami*, AIR 1988 Bom 116.

¹⁷ *Zoroastrian Co-op. Housing Society Ltd. v. District Registrar, Co-op. Societies*, (2005) 5 SCC 632.

cooperative society provided restrictions for membership or the alienation of property to members of the Parsi community only. The Gujarat High Court had held that it was an absolute restraint under Section 10. The Supreme Court disagreed with the Gujarat High Court's view. If an individual joins a society voluntarily and agrees to abide by its bye-laws, any restriction for the alienation of the property to only members of the society who were qualified is not an absolute restraint but a partial restraint. The Supreme Court stretched the law with its decision in *Mohd. Raza and Gumman Shetty v. Nagaveniamma*¹⁸ to apply the law to covenants involving communities.

FAMILY ARRANGEMENTS AS A SPECIAL CATEGORY

Family arrangements are not ordinary contracts, and Indian law has never recognized them as such. In *Kale v. Deputy Director of Consolidation (1976)*¹⁹, the Supreme Court defined family arrangements as an agreement between members of a family for settlement of property disputes through fair and equitable division of property.²⁰ The Supreme Court laid down several guidelines for family arrangements, which are as follows: they are bona fide, they are not required to be registered unless they are reduced to writing for the first time, they are permissible orally, and once the parties have taken benefit, they are estopped from going back on them. The rationale behind family arrangements is that they keep families out of court.

The first problem that arises when applying Section 10 to cases involving families is that these are not even transfers as defined under Section 5 of the TPA. According to Section 5 of the Transfer of Property Act, a transfer of property takes place through acts by which a person conveys any property to another person.²¹ But in case of partition or settlement of a family, there is no such conveyance of property to anyone as no one is transferring anything to others. In the case of *Basangowda Virupaxgowda v. Irgowdati Kallangowda*²², the Privy Council held that strict construction of the word "transfer" prevents its applicability to a case involving family arrangements.

This is where it gets interesting. Although stating that Section 10 does not govern family

¹⁸ *Gumman Shetty v. Nagaveniamma*, AIR 1967 SC 1595.

¹⁹ *Kale v. Deputy Director of Consolidation*, (1976) 3 SCC 119.

²⁰ *Id.*

²¹ The Transfer of Property Act, 1882, § 5. Section 5 defines "transfer of property" as an act by which a living person conveys property to another living person.

²² *Basangowda Virupaxgowda v. Irgowdati Kallangowda*, (1923) 25 Bom. L.R. 293 (Bom.).

transactions, the courts have been applying the principles of Section 10 in deciding family cases. The logic for this is found in *Mohd. Raza* where it is stated that the court applies the doctrine of reasonableness regarding restraints contained in family agreements on the basis of justice, equity, and good conscience.²³ It raises a peculiar question. Since Section 10 does not apply to family transactions, from what jurisdiction then does the power to invalidate unreasonable restraint derive? It would appear that it is the general equitable jurisdiction of the court to make orders as per the dictates of justice, equity, and good conscience.

From the various judgments of cases, some common categories of partial restraints that have been recognized by the courts in relation to familial relationships can be observed. First, those which restrict the alienation to the members of the family alone, such as in the case of *Mohd. Raza* where it was decided that the condition prohibiting alienation by the owner of the property to strangers only could stand. Second, time-related partial restraints such as those which restricted the right to alienation till the death of a certain family member, such as in the case of *Mata Prasad* where the nephew was not allowed to alienate until the death of the widow.²⁴ Third, rights of first refusal, as was the case of *Debi Dayal v. Ghasita*²⁵.

A major problem arises due to the scope of the judicial exception of "family arrangement". If every agreement amongst families having any element of restraint on alienation comes under the category of "family arrangement", hence exempting it from the purview of Section 10, then the principle of freedom of alienation will continue to lose its significance with each passing day. From *Mohd. Raza* (the actual family arrangement case in Oudh), through *Kale* (general principles of family arrangement cases), down to *Zoroastrian Society*²⁶ (by-law of cooperative housing in Ahmedabad), a long distance has been covered. All steps individually seem to have merit, but together they amount to something far more.

CRITICAL ANALYSIS

A. The Absence of a Coherent Test

The core issue is the lack of consistency in the test used. The *Gayasi Ram* bifurcated inquiry

²³ *Mohd. Raza*, *supra* note 3.

²⁴ *Mata Prasad*, *supra* note 13.

²⁵ *Debi Dayal v. Ghasita*, AIR 1929 All 667 (All.).

²⁶ *Zoroastrian Co-op. Housing Society Ltd.*, *supra* note 17.

into whether the condition of alienation was "practically impossible."²⁷ Who defines what "practical" is? An arrangement that bars the transfer to the family, whose members belong to an aged and small clan, may be partial according to theory but absolute in practice. On the other hand, a condition of consent, while appearing difficult on the face of it, may in reality have been freely provided. There is no absolute rule in determining when an arrangement would be termed as absolute or partial but the decision depends on the intuitive understanding of judges.

B. Principled Distinction or Arbitrary Boundary

This juxtaposition of *Manohar Shivram Swami v Union of India*²⁸ where the rule barring transfer on caste basis was set aside, against that of *Zoroastrian Society v Union of India*²⁹, where a restriction on transferring within the community was held to be a valid one, brings out this point vividly. It is true that in both instances, there were restrictions on transfers to a particular group only. The court made the difference by emphasizing the voluntary adoption of bye-laws in the cooperative case. However, when viewed from the property owner's point of view, the outcome was quite similar - he could sell the property only to a restricted class, thereby depressing its price.

C. Two Policies Pulling in Opposite Direction

Ultimately, it comes down to the conflict of two equally valid goals. There is an economic reason for free alienability, as there is nothing more efficient than free markets, while any limitations cause welfare loss.³⁰ The social reason for family structures is just as compelling since family structures avoid conflicts, maintain unity within the family, and, as the Kale case suggests, provide "social justice."³¹ The problem with the present legal system is that it lacks any systematic approach to balancing these goals. Courts handle this issue intuitively on a case-by-case basis, reaching good practical results but no clear legal principles.

D. A Comparative Glance

Other legal systems have taken more structured methods. In particular, the Indian model, which is heavily influenced by the concept of personal law, joint family structure, and the

²⁷ *Gayasi Ram*, *supra* note 11.

²⁸ *Manohar Shivram Swami*, *supra* note 16.

²⁹ *Zoroastrian Co-op. Housing Society Ltd.*, *supra* note 17.

³⁰ Mulla, *The Transfer of Property Act* 112 (14th ed., LexisNexis 2013).

³¹ *Kale*, *supra* note 19.

importance attached to family arrangements, stands out.³² English law has been rather strict in its approach to restrictions, tending to frown upon them.³³ The Indian judiciary can certainly learn from adopting such a structured method for its analysis.

CONCLUSION AND RECOMMENDATIONS

The project thus sought to examine whether judicially sanctioned partial restraints on alienation, especially in the context of family relationships, would conflict with the legislative intent of facilitating free transfer under Sections 10 and 11 of the Transfer of Property Act. The response to such a query, as is customary in the legal world, would invariably be: it depends.

A partial restraint on alienation by itself cannot be seen as being against the spirit of the statute, which guarantees freedom in the matter of transfer of property. Right of first refusal, a time-bound condition, or an agreement regarding reasonable consent of the grantor to facilitate the sale of the property in question – none of these are in conflict with the transferee's right to dispose of the property at will and also achieve the socially desirable end of preventing familial disputes from being resolved via litigation. However, it is the lack of a clear criterion for distinguishing between legitimate partial restraints on alienation and absolute restraints disguised as partial restrictions that poses a threat to the underlying statutory intent.

Two avenues for reform must be examined. First, legislative amendment is possible. In particular, parliament could amend Section 10 so as to recognize partial restraints, provide a standard for determining whether the restraint satisfies the relevant standard (i.e., whether the restraint substantially defeats the power of alienation) and fix certain parameters: maximum periods of restraint, the necessity of maintaining a wide class of transferees such as to maintain a viable market, and the ban against what might otherwise appear to be partial restraint yet is in practice an absolute one.³⁴ Second, the courts themselves can introduce a four-part proportionality test into their analyses. This could consist in extending the Gayasi Ram test to include proportionality (is the restraint proportional to the purpose behind the familial arrangement?), temporality (is it temporary or perpetual?), and market impact (would it render

³² Poonam Pradhan Saxena, *Property Law*, 198 (LexisNexis, 2nd edn., 2017).

³³ G.C. Cheshire, *Modern Law of Real Property* 420 (17th ed. 2006). English law has historically taken a stricter view, treating most restraints on fee simple estates as void.

³⁴ Law Commission of India, *supra* note 6.

the property frozen from any commercial circulation?).³⁵

Neither of the proposed reforms represents a radical departure from current judicial practice. They simply codify into law what is already being done. However, there is something to be said about codification in light of the increasing dynamism of property markets, the geographical dispersion of families, and the intertwining of ancestral properties and commerce.

³⁵ *Gayasi Ram, supra note 11; Mohd. Raza, supra note 3.*

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