
DISCRIMINATION IN SALE OF PROPERTY

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This paper tries to understand the prevalence of restrictive covenants in property law and its interaction with constitutional law. Covering a range of case laws, the theme of restrictive covenants is understood internationally, traced through the history. It tries to evaluate how the recent developments constitutionally will affect restrictive covenants.

Anu buys land from Banu. When Banu had bought it from Cris, the deed contained an agreement of restrictive covenant, which held that 'the property shouldn't be sold to a Dalit or Black'. Anu resells the land to David, who is a Dalit. A suit is filed in the court against this sale.

Restrictive Covenants

Restrictive covenant is an agreement in a deed which imposes rules/ conditions which restricts the use of land by its owner.¹ They can be enforced against future owners of the land as well.² 'A covenant is in essence an agreement to do or refrain from doing something in respect of that property'.³ The issue of restrictive covenants in general arise when there is a dilemma between the freedom to alienate property and accumulation. The prominent issue with restrictive covenant is the imposition of racially restrictive covenants. While racially restrictive covenant was prominent in UK and USA, the situation in India is slightly different. The issue here is specific to religion and caste, sometimes language as well.

The Transfer of Property Act, 1882 (hereinafter TPA) deals with restraints places on alienation of property statutorily. Section 10 deals with conditions restraining alienation; absolute restraint is void unless they fall under the given exceptions. Sections 11, 12, 31 and 32 also deal with rules regarding restriction, which we aren't concerned with in this paper. Section 40 is the one which deals with restrictive covenants under the TPA. There are essentially two types of covenants mentioned under this section; affirmative/ positive and restrictive/ negative.

¹ *Restrictive Covenants on Freehold Properties Explained*, SIMSON MILLAR (Sept. 18, 2021, 10:30AM), <https://www.simpsonmillar.co.uk/media/restrictive-covenants-on-freehold-properties-explained/>.

² Lorraine Conway, *Freehold Covenants*, PARLIAMENT RESEARCH BRIEFINGS (Sept. 18, 2021, 01:25PM), <https://researchbriefings.files.parliament.uk/documents/CBP-8560/CBP-8560.pdf>.

³ VEPA P. SARATHI, *LAW OF TRANSFER OF PROPERTY* 51 (6th ed. 2017).

Affirmative covenants are those which pose an obligation onto the party to perform a certain act. For example, paying maintenance fee as a part of the agreement, would be regarded as positive covenant. A negative covenant imposes rules which refrain the right of the owner to do certain things with respect to the property. For example, an agreement to never sell the land to a non- Hindu would be a negative covenant.

Restrictive Covenants and Other Nations

In USA, the case of *Shelly v. Kraemer*⁴ settled the position on racially restrictive covenants. After a series of cases where the judiciary had refused to hold racially restrictive covenants as unconstitutional, this case held racially exclusive covenants to be unenforceable judicially. Owing to this decision, Cris's suit against the sale to David would not be judicially enforceable in USA. *In Re Drummond Wren*⁵ is the case in Canada, which conclusively held racially restrictive covenant to be void citing public policy. Similarly in South Africa, the case of *Curators v. University of Kwa-Zulu Natal*⁶ held that racially discriminative covenant would be void as it is against public policy. It held that while the contract as a whole will remain valid, the clause specific to racially restrictive covenant would be terminated.⁷ The judgements by the Canadian and South African Supreme Courts are problematic to extent of defining public policy, and how public policy can affect an individual owner's right to his/her property. Hence, in Canada and South Africa, sale to David would be valid, and the restrictive covenant would be struck down on the basis of public policy.

United Kingdom is another country where, property deeds included restrictive covenants widely. The case of *Tulk v. Moxhay*⁸ was when it became established that 'equitable' covenants can bind future purchasers, though they aren't essentially privy to the original contract where the covenant was laid down.⁹ The rule in this case applies both to positive and negative covenants. Later cases in England, changed this position a bit, and clarified that negative covenants can be enforced against future purchasers, whereas positive covenants weren't

⁴ *Shelly v. Kraemer*, 334 U.S. 1 (1948).

⁵ *In Re Drummond Wren*, (1945) 14 D.L.R. 674.

⁶ *Curators v. University of Kwa-Zulu Natal*, (510/09) [2010] ZASCA 136.

⁷ Gautam Bhatia & Vasudev Devadasan, *Exclusionary Covenants and the Constitution*, WORDPRESS- INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (Sept. 19, 2021, 05:15PM), <https://indconlawphil.wordpress.com/2014/01/12/exclusionary-covenants-and-the-constitution-ii-the-zoroastrian-co-op-case/>.

⁸ *Tulk v. Moxhay* [1848] 41 ER 1143.

⁹ *Tulk v. Moxhay- Case Brief*, LAW TEACHER (Sept. 19, 2021, 11:30PM), <https://www.lawteacher.net/cases/tulk-v-moxhay.php>.

enforceable.¹⁰ The Race Relations Acts, 1965 and 1968 later held racially restrictive clauses to be unlawful.¹¹ Even then, there was a widespread prevalence of such clauses in property deeds, since such acts of racial discrimination weren't criminal in nature. The Equality Act, 2010 regulates this further, and aids to the removal of such covenants. If the same hypothetical regarding sale of land to David is juxtaposed in UK, with Black person replacing Dalit, this case would be resolved easily. The restrictive covenant would be held unlawful citing the Equality Act, 2010.

Unlike UK, New Zealand has clear statute governing racially restrictive covenants. Section 33A of the New Zealand Property Law Act, 1952 which states racially restrictive covenant to be void. A similar juxtaposition of facts in New Zealand would give a similar outcome, where the suit would not sustain due to legislation governing against it.

Restrictive Covenants and India

As mentioned already, the main section governing restrictive covenants is Section 40 of TPA. Generally restrictive covenants are enforceable on the future buyers of the property, if the covenant runs with the land. Similar to UK, positive covenants aren't usually enforceable on the future owners of the property, unless the covenant was annexed.¹² While racially restrictive covenants aren't an issue in India, there lies an issue of caste and gender. India lacks any specific statute which deals with such housing discrimination. Though our Constitution guarantees equality, as a fundamental right, it doesn't run horizontally, i.e., unenforceable against private individuals.

In the case of *Zoroastrian Co-operative Housing Society Ltd. & Anr. v. District Registrar Co-operative Societies & Ors.*¹³ (hereinafter Zoroastrian Housing Society Case), the Court held restriction to sell a property to non-Parsi to be valid. The property owner who wanted to sell it to a non-Parsi didn't buy it from anyone, he had inherited the said property from his father. Holding religious restrictive covenants to be binding even in case of inheritance is problematic. What if the son didn't follow the same religion as the father? Would the inheritance be valid? What about the applicability of the covenant? These questions are left unanswered by this case. It essentially gave 'green signal' to judicial enforcement of even restrictive clauses which are

¹⁰ SARATHI, *supra* note 4, at 61.

¹¹ J. F. Garner, Racial Restrictive Covenants in England and the United States, 35 MOD. L. REV. 478 (1972).

¹² SARATHI, *supra* note 4, at 60.

¹³ *Zoroastrian Co-operative Housing Society Ltd. & Anr. v. District Registrar Co-operative Societies & Ors.*, Appeal (civil) 1551 of 2000.

religiously discriminatory. The Court here had also rejected the public policy argument. This rejection would have made more sense if it was in line with minority rights rather, it was premised on viewing 'public policy' within the statutory limitation. Public policy and public interest lie outside the scope of statute which isn't realised by the Court in this case. In general, what would be good for the public is what should have been considered, which is non-discrimination even by private entities. The Court also cited Article 19 (1)(c), freedom to association as a reason for their holding. The problem with this reasoning is that it reinforces caste boundaries. Association in an endogamous way is the core practice leading to propagation of the caste system. I believe the holding of the Court on this front is problematic, as it indirectly supports and propagates the discriminatory practices of the caste system.

Gautam Bhatia argues that the interpretation by the Court in case of *IMA v. Union of India*¹⁴ would aid in holding racial/religiously restrictive covenants void. This, he argues would be possible due to the expansive definition of 'shop' which would encompass anyone who offers services, and isn't restricted to four walls. This can extend to sale of property, as it could also come under the service of 'sale'. Aiding in justification of horizontal application of rights in economic transactions and private spheres.

The outcome of the suit filed against the sale of land to David would be uncertain in India. In India, since there is no specific jurisprudence governing a caste based restrictive covenant, the Court could either follow the precedent of Zoroastrian case and hold the restriction to be valid and judicially enforceable, or it can establish a new jurisprudence governing such clauses to be unlawful.

Conclusion

Restrictive covenants are enforceable in India, as well as in other countries. The problem we are concerned with is the racial, religious and caste based discriminatory restrictive covenants. Though none of the countries (UK, US, SA, Canada and India) have any specific legislation dealing with such discrimination in the housing sector; UK has a general statute against racial discrimination which can be applied to property sales as well and hence extends to racially restrictive covenants. United States, Canada and South Africa, all have had judgements by their Courts which have ruled against racially restrictive covenants. India on the other hand, lacks any such legislation and judgement. Rather we have a judgement which held religiously

¹⁴ *IMA v. Union of India*, (2011) 7 SCC 179.

discriminatory restrictive covenant to be valid and judicially enforceable. Viewing how the decision for the hypothetical would all be in favour of David in all the other countries mentioned, except India, it shows the necessity of legislations/ judgements similar to those which are present in other countries to take a step towards progress.

In a country like India, where the society is still riddled with discrimination due to caste and religion, it is essential for the law to govern and regulate it for the sake of public good and progress of the society. For there to be any change in society, law is the fulcrum which would propel it. Hence, there is need for a legislation which specifically deals with discriminatory restrictive covenants, like New Zealand has. Horizontal application of rights would be helpful as well, in solving this discriminatory practice as Bhatia argues. But it would be a long drawn legal procedure, which might be inaccessible to people. If there is a legislation which holds discriminatory (religiously/caste/sexuality/gender) restrictive covenants to be illegal, it will act as a deterrent to such practices. There is a need to balance an individual's right to property against the State's goals, but when the issue is concerned with human rights, the individual's right to property needs to step aside giving way to State interest. Human rights of any person is an important right to be protected and catered to by the State.