

LEGAL LOCK JOURNAL
2583-0384

VOLUME 1 || ISSUE 4

2022

This Article is brought to you for “free” and “open access” by the Legal Lock Journal. It has been accepted for inclusion in the Journal after due review.

To submit your Manuscript for Publication at Legal Lock Journal, kindly email your Manuscript at legallockjournal@gmail.com.

HANDICAPPED TO SELL: THE CASE OF TRIBAL COMMUNITY

Manav Gupta¹

Tribal communities in India are the poorest and most vulnerable. On a socio-economic level, they are impoverished and marginalized. The fundamental cause of socio-economic marginalization is indigenous people's separation from their land, territory, and resources. Tribal land rights have not been adequately acknowledged by the nation's people or leaders, despite so-called progressive land reform legislation and political readiness to implement it. Wouldn't it seem odd that our legislators and bureaucracy are continuously pushing for tribal land rights, yet tribals are unable to transfer their property to a person or entity of their choosing and desire (which, in essence, also deprives them of their legal title to the property under Article 300A)? This paper aims to address the peculiar conundrum created by the law throughout time and propose answers while keeping the constitutional component and natural justice principles in mind. In addition, a few examples from various states will be cited to support the claim while also acknowledging a wider issue: The legal framework is being used in secret to de-regulate the socio-legal process of property transfer.

ABSOLUTE RESTRAINT UNDER SECTION 10, TPA, 1882

The main concept which applies to the present paper is absolute restraint along with exceptions explained under Section 10 of the Transfer of Property Act, 1882.² An absolute constraint prevents the transferee from alienating or disposing of the property in any way. The transferee no longer has the ability to transfer his interest in the property to another person, and he no longer has the freedom to do anything he wants with it as the owner. The case *Zoroastrian Co-Operative...vs District Registrar Co-Operative*³ can be used to understand this concept better.

There are certain exceptions given under section 10⁴. This explains the conditions which absolutely restrain alienation and hence, are void. The first is the lease and the second is where a property is transferred to a married woman.

- Lease

A lease is a restricted interest transfer in which the lessor (transferor) retains ownership and merely conveys the right of enjoyment to the lessee (transferee). A lessor can require that the lessee not assign or sublease his interest in the property to anybody else. Such a condition would be a valid condition. Although there is a restriction against alienation, such a condition is legitimate, and the lessee (transferee) cannot transfer his interest without the lessor's consent.

¹ The author is a student at OP Jindal Global University.

² The transfer of Property Act, 1882, § 10, No. 4, Acts of Parliament, 1882.

³ *Zoroastrian Co-Operative ... vs District Registrar Co-Operative*, AIR 1997 Guj 136.

⁴ *supra* note 1.

In *Raghuram Rao v. Eric P. Mathias*⁵, the Supreme Court declared that any restriction preventing the lessee from detaching leasehold property is not illegal or void in the context of perpetual leases. The court stated that in light of the explicit exception carved out in the situation of the lease, there is no validity in the allegation that any restriction preventing the lessee from alienating leased property is neither illegal nor void. As a result, a condition in a perpetual lease stating that the lessee's rights are not transferable is a legal condition. Accordingly, it could be gathered from this reasoning that the condition in the lease that the lessee was not sublet or assign his interest to anyone else throughout the lease term is lawful. If the lessor does not specifically state that breaking this condition would result in the lease being terminated, the lessor's remedy is not a complaint about eviction. The lessor can only sue the lessee for an injunction and damages if the condition is violated.

- Married Women

When a property is conveyed to a married woman who is not a Hindu, Muslim, or Buddhist, the transferor can legally apply an anti-alienation condition. Section 10⁶ will not make such a condition void. The Married Women's Right to Property Act, 1874, contains similar restrictions that apply to married women who are not Hindu, Muslim, or Buddhist. The legitimacy of restraint on alienation of married women of various communities is already provided for in the personal laws of Hindus, Muslims, and Buddhists. The two basic requirements are that the woman is married and that she not be Hindu, Mohammedan, or Buddhist. As a result, a property can be given to a married non-Hindu lady for the rest of her life with the restriction that she cannot transfer it. This particular exception sounds logical because if certain conditions or limitations are not being imposed on the property of a woman, then the relatives or even her husband would put undue pressure on her. The other pertinent reason is not to open the floodgates of litigation, though the Indian courts are already bombarded with cruelty, domestic violence cases, and many more. This is because when a husband or any relative forcefully takes the property or interest under it, then wives would ultimately move to the courts. Hence, the basic purpose of this restriction is to protect the interests of married women who may be easily exploited by their unscrupulous husbands.

WHY MANY TRIBAL ACTS ARE COUNTERPRODUCTIVE?

Before moving to the crux of the arguments, it would be helpful to focus on some pertinent legislations and their implications in two states of India, Karnataka, and West Bengal. The tribal population of the latter is not doing any better when compared to the national average. Surprisingly, the WBLR Act of 1955⁷ restricts tribal land transfers to non-tribal persons unless the particular authority allows it and only for a few purposes like investment and land improvement. It is one of the few pieces of legislation that promotes tribal land rights and protects their access to the property but also restrains them to sell or dispose of their property according to their needs and benefit. Section 14 C of the act regulates the process of acquiring

⁵ *Raghuram Rao v. Eric P. Mathias*, AIR 2002 SC 797.

⁶ *supra* note 1.

⁷ West Bengal Land Reforms Act, 1955, § 49, No. 10, Acts of West Bengal, 1955.

consent from the competent authorities for the transfer of such property, while section 14 E of the same act allows the state to rescue lands that were unlawfully alienated. Section 10 (1) of the Homestead Act of 1975⁸, and section 49 (1A) of the WBLR Act of 1955⁹, which prohibit the transfer of patta land, safeguard all patta holders, including tribals, from land alienation.

Even in cases of re-allocation, states have failed to grant a sufficient quantity of land to tribal people on an individual basis which further aggravates socio-economic problems in the society. Many tribals acknowledge that no appropriate transfer of property took place when the land was assigned to them, titling them as the rightful owners of the land.¹⁰ Even if there is a reasonable probability of title conveyance, the property will not create interest.¹¹ Due to the limitations set by section 63 of the Bombay Tenancy Act¹² and section 73 AA of the Bombay Land Revenue Code¹³, the occupancy rights of a tribe member cannot be transferred or even bequeathed to a non-tribal member.

The disputed and essential question here is whether this constraint should be regarded as partial and legally recognised, or is such property alienation restriction impermissible, even if it is for the benefit of a social class.¹⁴ The more important point is: "does it infringe the freedom to effectively transfer property, or is the legislation justified under Art 46, which gives the state the responsibility to safeguard SCs from social exclusion?" This, as per my understanding, is an infringement on the tribals' property disposal rights, and thus constitutes an absolute constraint. An important question arises due to the above fact that in case of any unavoidable circumstances or family emergency, what will a poor tribal landowner do when he wants to sell his land for cash as soon as possible but no other tribal member is ready to buy it? Moreover, given powers to a particular authority itself raises many questions with regards to fairness in the systems and their biasness towards someone. Hence, by giving land to the tribal people, the government is putting absolute restraint on alienation. This conclusive statement would also be explained better in the subsequent paper as well.

TRIBAL LAND RIGHTS IN WEST BENGAL: CONSTITUTIONAL ASPECT

Land access is crucial for any agriculture-based economy like India's rural population. For the tribal people, this property is much more than just a source of income. It is necessary for their economic well-being and cultural identity. Forest, river, mountain, subsurface, and natural resources, as well as the lands they use, are all included in the concept of indigenous or tribal land rights.

⁸ The West Bengal Acquisition of Homestead Land For Agricultural Labourers, Artisans And Fishermen Act, 1975, No. 47, Acts of West Bengal, 1975.

⁹ West Bengal Land Reforms Act, 1955, § 49 (1), No. 10, Acts of West Bengal, 1955.

¹⁰ Mumbai International Airport Pvt Ltd v Regency Convention Centre and Hotels Pvt Ltd, (2010) 7 SCC 417 (LNIND 2010 SC 552): 2010 AIR (SCW) 4222 25.

¹¹ Biswas Sudipta, Pal Sukumar, Tribal Land Rights: A Situational Analysis in the Context of West Bengal (Journal of Land and Rural Studies, Article, 2020).

¹² The Bombay Tenancy and Agricultural Lands Act, 1958, § 63, No. 99, Acts of Bombay, 1958.

¹³ Bombay Land Revenue Code, § 73, 1879, No. 5, Acts of Bombay, 1879.

¹⁴ Harish Chandra Hegde v State of Karnataka, (2004) 9 SCC 780

The Indian Constitution acknowledges all the citizens of the country equally, regardless of gender, caste, creed, or other factors, and also bans discrimination¹⁵ of any sort. The state is responsible under Article 46¹⁶ of the Constitution to safeguard Scheduled Tribes from social injustice and all sorts of discrimination against them. After a few years of Independence, development policies formed by the government gave the tribal population due respect and priority. It formed special budgetary allocations (e.g., the Tribal Sub Plan), and gave direction to all the states to prioritise the tribal population, as well as other marginalised groups in the society, when developing economic development and social justice plans. In the 1950s, the national government gave pro-poor land distribution a high priority in its development programme, based on the distributive justice principle. Because land comes under the purview of state subject, most Indian states, including West Bengal, have implemented land reform laws and programmes to implement them.¹⁷

The tribes, who were cogitated economically and socially marginalised, were prioritised in West Bengal's land reform programmes. Depending on social category requirements, Section 49(1) of the WBLR Act¹⁸ bestows for the priority transfer of any surplus vested land to the landless. Rule 194 of the West Bengal Land Reforms Manual, 1991, lays the groundwork for creating a priority list. As a result, STs are always given first priority, with SCs, OBCs, minorities, and others following in that order.

In its guidelines, the NGNB Scheme explicitly defines the procedure of putting landless households on priority, with tribal people remaining at the top of the list. Furthermore, the Forest Rights Act of 2006, which was passed by the union government, recognises the legitimate interests of forest inhabitants, including tribes, by giving land and forest rights. Forest rights are described as "forest dwelling STs and other traditional forest dwellers' ownership and access to acquire, utilise, and dispose of minor non-timber forest products (NTFPs) under Section 3(1) of the FRA."¹⁹

CHINK IN THE ARMOR: ABUSE OF LAW

More significantly, the improper interpretation of this rule can block property alienation and result in unnecessary litigation, which is why it is not a lucrative law, as evidenced by the case law explained below-

In *Narahari Mondal and Others v. State of West Bengal & Ors*²⁰, According to the court, the petitioners bought the land in question from the respondent no.1 listed in paragraph 2 of the writ application, who were classed as "Chasi Kurmee," a sub-caste that does not belong to SC or ST. They further discovered that the private respondents obtained illegally a

¹⁵ INDIA CONST. art. 15.

¹⁶ INDIA CONST. art. 46.

¹⁷ Aparajita Bakshi, *Social Inequality in Land Ownership in India: A Study with Particular Reference to West Bengal*. *Social Scientist* 36, 9/10, 95–116 (2008).

¹⁸ West Bengal Land Reforms Act, 1955, § 49 (1), No. 10, Acts of West Bengal, 1955.

¹⁹ The Forest Right Act, 2006, § 3 (1), No. 10, Acts of Parliament, 2006.

²⁰ *Narahari Mondal and Others v. State of West Bengal & Ors*, 8 1959 SCR 1276.

Scheduled Tribe Certificate claiming to be representatives of the "Badiya" community after making such a purchase, and that this certificate was obtained to invalidate the petitioners' sale because Section 14B of the West Bengal Land Reforms Act, 1955²¹ strictly forbids any transfer of land belonging to Scheduled Tribe members. If the court does not close this legal loophole, the socio-legal process of property transfer will be hampered.

Coming to the most pertinent precedent *Zoroastrian Co-Operative ... vs District Registrar Co-Operative*²², the Supreme Court upheld the appeal, ruling that when a person chooses membership in a co-operative society by agreeing to abide by its statutes, he sets a qualified constraint on his ability to transfer property. It stated that it would be transferred with the society's prior approval to a person entitled to be a member of the society, but this cannot be construed as an absolute restraint on alienation in contravention of Section 10 of the TPA²³. As a result, the High Court's ruling that a restriction on a society's members' rights to sell property granted to non-Parsis was an unsustainable restriction on alienation was overruled. The SC laid that the bylaws' restriction on selling it only to Parsis and not to non-Parsis was a partial rather than an absolute restriction. However, as mentioned earlier this is a very old judgement and in today's progressive time, this judgement has been criticized a lot. In my humble opinion, this is absolute restraint under section 10²⁴ of the TPA. When tribal people need cash on an urgent basis, say for a family emergency, how would they manage to get that? Another problem with this is when the tribal person is getting more profit by selling it, and no tribal person is available then again, he would not be able to sell it and deprive of all the profits. This would also lead to an economic deficit in the economy.

Racism, casteism, and discrimination are not uncommon when there is house hunting common in India. The refusal of prospective residents or tenants in India is a bizarre social reality that is both nasty and allowed because of their religion, area, caste, or marital status. According to the SC, the limitation on the registration of societies whose actions are likely to be in violation of public policy in terms of a specific organisation must be established in the statute that creates or administers the institution. Byelaws that restrict membership to a specific community are not considered anti-public policy because the statute does not prohibit them. Property rights are not a fundamental right but a legal one. Society is neither a legal entity nor a citizen capable of enforcing fundamental rights. The byelaw was upheld by the highest court, which found that nothing in the Gujarat Co-operative Societies Act, 1961 prohibited the society from imposing membership restrictions and that the society was within its rights to establish byelaws limiting membership to Parsi community members. The SC ruling now leads to the inference that it was only apprehensive with interpreting the respective cooperative organisation Acts and did not apply a constitutional test. Article 15(2)²⁵, which forbids private discrimination, was not mentioned by the Court in this case. The Supreme Court stated that one of the grounds for preserving the Parsi housing society's byelaws is that they provide the benefit

²¹ West Bengal Land Reforms Act, 1955, § 14, No. 10, Acts of West Bengal, 1955.

²² *Zoroastrian Co-Operative ... vs District Registrar Co-Operative*, AIR 1997 Guj 136.

²³ *supra* note 1.

²⁴ *supra* note 1.

²⁵ INDIA CONST. art. 15, cl. 2.

of living with like-minded individuals, hence it is legitimate to prohibit non-Parsis from purchasing the property. The Parsis' inherent freedom of association involved the right to prohibit such a sale, according to the court. The court, on the other hand, not only mixed-up contracting freedom, and fundamental freedom of association, but also ignored Article 15 (2)²⁶. On the surface, Article 15(2)²⁷ appears to have a limited scope. However, the word "shops" is meant to be taken in a broad sense. The founders meant to limit any economic activity that attempted to exclude specific groups, according to talks in the Constituent Assembly about the clause's interpretation. For instance, if a person refuses to lease her home to someone else because of the customer's religious convictions, this is a clear violation of the equality guarantee.

The Supreme Court recently ruled against cooperative societies, finding geographic, religious, and marital status-based membership limits "illegal." The SC ruled that "cooperative societies cannot exclude single women, members of a specific society, or those who consume a specific food from participating while exercising their right to join associations under Article 19²⁸." While overturning the *Zoroastrian judgement*²⁹ is desirable, it is unlikely to be curative. India is the only democracy in the world where a basic guarantee of equality is not backed by comprehensive legislation. In South Africa, for instance, a constitutional guarantee is complemented with a thorough regulation prohibiting open discrimination by both the government and private organisations and individuals.

CONCLUSION

A law designed to assist a marginalised population is now being used to de-regulate the socio-legal mechanism of property transfer. When the law is used to fulfil personal interests and ambitions, it betrays the values on which it was founded — equity, justice, and moral conscience. The current restrictions on land rights are severe and absolute, creating a difficult situation for the native group. The laws must be altered in such a way that they benefit the disadvantaged and prove to be equitable for the marginalised, rather than being subject to misuse, erroneous interpretation, and ineffective application. That is the only solution. Restraining the rights of tribal people absolutely would create more difficulty for their survival. Moreover, seeing the situation around us, it is high time for judges to overrule the *Zoroastrian Co-Operative*³⁰ case to save people from unwanted exploitation.

²⁶ *Id.*

²⁷ *Id.*

²⁸ INDIA CONST. art. 19.

²⁹ *Zoroastrian Co-Operative ... vs District Registrar Co-Operative*, AIR 1997 Guj 136.

³⁰ *Zoroastrian Co-Operative ... vs District Registrar Co-Operative*, AIR 1997 Guj 136.