
TULK V. MOXHAY [1848] EWHC J34 (CH)

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INTRODUCTION

Leicester Square is an area in West London that holds great historical significance, not only to the culture of the city but also with regards to the development of property law. Decided in 1848, the case of *Tulk v. Moxhay*¹ is the very reason why Leicester Square exists even today. In the year 1808, Tulk, the plaintiff, was the owner of a vacant piece of land in Leicester Square and other houses forming the square.² Tulk sold this land to Elms in fee and the deed of conveyance included a covenant by Elms, for himself, his heirs and assigns, with Tulk, his heirs, executors and administrators, that Elms and the other aforementioned parties shall “at their own costs and charges, keep and maintain the said piece of ground and square garden and the iron railing round the same in its then form and in sufficient and proper repair as a square garden and pleasure ground, in an open state, uncovered with any buildings, in neat and ornamental order; and that it should be lawful for the inhabitants of Leicester Square, tenants of the Plaintiff, on payment of a reasonable rent for the same, to have keys at their own expense and the privilege of admission therewith at any time of times into the said garden and pleasure ground”.³ The said piece of land was then sold to Moxhay, the defendant, whose purchase deed did not contain the aforementioned covenant. However, Moxhay had notice of the covenant at the time of his purchase. Moxhay had the intention to alter the property he purchased in a manner that would be contrary to the covenant, which led Tulk to file for an injunction to prevent Moxhay from doing so. The injunction was granted by the Master of the Rolls to restrain Moxhay from converting or using the ground for any other purpose than as a square garden. The counsel for the defendant contended that “the covenant did not run with the land, so as to be binding at law upon a purchaser from the covenantor”.⁴ They said that the notice or knowledge of a covenant did not give enable the Court of Equity to enforce it by way of an injunction against the purchaser.

¹ *Tulk v. Moxhay* [1848] EWHC J34(Ch).

² *Tulk v. Moxhay* [1848] EWHC J34(Ch).

³ *Tulk v. Moxhay* [1848] EWHC J34(Ch).

⁴ *Tulk v. Moxhay* [1848] EWHC J34(Ch).

JUDGEMENT

The main issue of this case was whether a restrictive covenant can ‘run with the land’ and be binding on future owners of the property who were not party to the original agreement. The case was tried in the Chancery Division of the High Court of England and Wales, by the Lord Chancellor. He began by addressing the primary argument of the defendant, which was based on the precedent laid down in *Keppell v. Bayley*,⁵ which said that the notice of a covenant did not give a Court of Equity the jurisdiction to enforce it by passing an injunction against the purchaser, because it would create a burden upon the property which was “inconsistent with the nature of that property and unknown to the principles of the law- could not bind such assignee by affecting his conscience”.⁶ To understand this, we must examine the difference between a Court of Equity and a Court of Common Law.

Common law was derived from customs and precedents and included both substantive and procedural rules, which can be superseded by legislation.⁷ Common law was historically administered in the King’s Courts, while Equity “developed as a separate system of mainly discretionary remedies administered by the Lord Chancellor, often as a way of ameliorating the injustice done by inflexible rules of the common law”.⁸ Although the Judicature Acts of 1873-1875 combined the systems of law and equity and are no longer treated as separate jurisdictions, at the time of this case, they were independent in nature. The Lord Chancellor affirmed that the Chancery Division of the High Court of England and Wales had the jurisdiction to enforce a contract between the owner of a property and the purchaser of a part of that property. However, the scenario in the present case was the first of its kind since the Court had not known of a case where the purchaser must use or abstain from using the purchased property in a particular way. He says that if the vendee who was party to the covenant sells it to the purchaser who may violate the agreement, “it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless”.⁹ The Lord Chancellor further states that the question in this case is not whether a covenant which does not run with the land is enforceable by the Court or not, but “whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor

⁵ *Keppell v. Bailey* [1834] 39 ER 1042.

⁶ *Keppell v. Bailey* [1834] 39 ER 1042.

⁷ *The English Legal System* (2018) *ICLR*. Available at: <https://www.iclr.co.uk/knowledge/topics/the-english-legal-system/> (Accessed: April 24, 2023).

⁸ *The English Legal System* (2018) *ICLR*. Available at: <https://www.iclr.co.uk/knowledge/topics/the-english-legal-system/> (Accessed: April 24, 2023).

⁹ *Tulk v. Moxhay* [1848] EWHC J34(Ch).

and with notice of which he purchased”.¹⁰ Lord Cottenham said that if there was a mere agreement and no covenant, the Court would enforce it against a party purchasing the property with notice of the said covenant, since “if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased”.¹¹ The Court therefore held in favour of Tulk, and passed an injunction to prevent Moxhay from using the land in any way contrary to the covenant.

THE DOCTRINE OF TULK V. MOXHAY

The Lord Chancellor of the Chancery Division of the High Court of England and Wales granted an injunction against Moxhay from building on the part of the land he purchased from Tulk, in order to honour the agreement made with his predecessor. Lord Cottenham did so on the grounds that Moxhay had purchased the land being aware of the existence of such covenant, and therefore should be bound by it. This principle has been coined as the Doctrine of Tulk v. Moxhay and is the leading case usually cited on the subject of covenants. The result of this doctrine is that “restrictive conditions can now be effectively attached to land as against all successive owners who have notice of them”.¹² The doctrine which was established as a simple, almost straight-jacket formula for disputes on this subject has evolved into a complex, multi-faceted principle, which came to be limited to preventing breaches of restrictive covenants only; whereas if the covenant required the covenantor to perform a task or do something, the doctrine could not be used by a plaintiff seeking to compel a successor to the covenantor to carry out the terms of the covenant.¹³ Additionally, Equity would only grant relief against a person violating a restrictive covenant on the free use of land only when the land is purchased with notice of the covenant. “An innocent purchaser for value and without notice takes free from the burden of such covenants”.¹⁴ The interpretation of ‘notice’ in the doctrine has also been widened by subsequent cases; it may be a constructive notice, which relies on the presumption of knowledge, whether the purchaser actually possesses that knowledge or not. Inevitably, this aspect of the doctrine is inequitable, and typically upholds the covenant, often rendering the purchaser restricted by an agreement he was not even aware of. “It has been said that restrictive covenants will be enforced regardless of the amount of damage suffered by the

¹⁰ Tulk v. Moxhay [1848] EWHC J34(Ch).

¹¹ Tulk v. Moxhay [1848] EWHC J34(Ch).

¹² James Edward Hogg, *Tulk v. Moxhay and Chattels*, 28 L. Q. REV. 73 (1912).

¹³ Alan Dowling, *Sublessees, Mortgages and the Doctrine of Tulk v Moxhay*, 57 N. IR. LEGAL Q. 465 (2006).

¹⁴ James F. Kirby, *Restrictive Covenants in Deeds*, 3 NOTRE DAME LAW. 127 (1928).

complaining party”.¹⁵ The final development of the doctrine is the similarity between the evolved doctrine and the law of easements. There can be no easement in gross, i.e., selling the rights to the land to another party without giving the purchaser legal ownership of that property, similarly, a plaintiff seeking to enforce a covenant under the Doctrine of *Tulk v. Moxhay* “would not be able to succeed in the absence of land benefited by the covenant”.¹⁶ Therefore, the modern interpretation of the doctrine would “prevent lessors and mortgagees from obtaining injunctions”.¹⁷ Absolute ownership of the property is now an essential requisite to obtain relief in the form of an injunction, which can be somewhat of a double-edged sword, since it restricts the rights of the tenants or lessors while protecting the ownership and absolute authority of the owner of that property.

APPLICABILITY OF THE DOCTRINE IN INDIAN LAW

The Doctrine of *Tulk v. Moxhay*, being laid down in 1848, had a significant impact on the development of Indian Property Law. The Transfer of Property Act, 1882, contains provisions pertaining to both, positive and negative covenants. Section 11 of the Act reads, “Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction”.¹⁸ Section 40, on the other hand, states that, where, for the more beneficial enjoyment of his own immovable property, a third person has, independently of any interest in the immovable property of another or of any easement, a right to restrain the enjoyment in a particular manner.¹⁹ It further states that if the third person is entitled to the benefit of an obligation arising out of a contract and annexed to the ownership of the immovable property, but not amounting to an interest or easement, such right or obligation “may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his hands”.²⁰ According to the case, *Princy and Ors. v. Jose*, “Indian law follows the law in England relating to enforceability of covenants as laid down in *Tulk v.*

¹⁵ James F. Kirby, *Restrictive Covenants in Deeds*, 3 NOTRE DAME LAW. 127 (1928).

¹⁶ Alan Dowling, *Sublessees, Mortgages and the Doctrine of Tulk v Moxhay*, 57 N. IR. LEGAL Q. 465 (2006).

¹⁷ Alan Dowling, *Sublessees, Mortgages and the Doctrine of Tulk v Moxhay*, 57 N. IR. LEGAL Q. 465 (2006).

¹⁸ The Transfer of Property Act, 1882, §11.

¹⁹ The Transfer of Property Act, 1882, §40.

²⁰ The Transfer of Property Act, 1882, §40.

Moxhay".²¹

CONCLUSION

Tulk v. Moxhay is considered a landmark judgement, not only in the United Kingdom, but across all common law jurisdictions. Although the doctrine has evolved from the initially simple formula to decide whether an equitable covenant can be enforced on a purchaser who was not party to the initial agreement to a multi-faceted, complex principle which can be applied not only on purchasers of immovable property but also lessors and tenants of the property, in order to protect the interest of the owner of the property and the covenant.

Despite the seemingly unjust aspect of constructive notice, the Doctrine laid down in this case by Lord Cottenham laid the foundation for various disputes arising from the sale of immovable property.

²¹ Princy and Ors. v. Jose [2009] AIR 2010 Ker 1.