

BEYOND THE LIVING: PROVISIONS AND IMPLICATIONS OF TRANSFERRING PROPERTY TO UNBORN PERSONS

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ABSTRACT

Property comes to the hands of the people by operation of law and act of parties. The law of succession prescribes the provision relating to the transfer of property by operation of law. Transfer of Property Act, 1882 is a general law on the transfer of property by act of parties. Transfer of property by act of parties otherwise known as transfer inter vivos is defined under Section 5. It prescribes that only a living person can convey property to another living person. However, there is an exception prescribed under Section 13 by which a living person can convey property to an unborn. S.13 prescribes a provision relating to the transfer of property for the benefit of an unborn person. Sections 14-16 provide provisions relating to it. This research paper has made an attempt to explain the provisions of S.13 along with leading cases on the subject. The paper also outlines the relationship between S.13 and other related provisions of the Transfer of Property Act, 1882.

Keywords: Property, Inter-Vivos, Unborn, Benefit.

INTRODUCTION

The preamble to the Transfer of Property Act, 1882 lays down that the Act has been enacted because it was ‘expedient to define and amend certain parts of the law relating to the transfer of property by act of parties.’ This Act was therefore enacted because it was necessary to give a definite meaning and make changes in some of the rules which at that time regulated the transfer of properties by act of parties. The law of succession prescribes the provision relating to the transfer of property by operation of law. In contrast, the Transfer of Property Act, 1882, prescribes a provision relating to the transfer of property by act of parties. Transfer ‘by act of parties’ is a transfer which takes place between two living persons. Such transfers are also called ‘transfer inter vivos’. Transfer of property under will, inheritance, or by order of the

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Court is a transfer by 'operation of law'. It is not a transfer by act of parties because in such transfers the transferor is not a living person.

Section 5 of the Transfer of Property Act, 1882, prescribes the meaning of 'transfer of property'. According to Section 5 of the Transfer of Property Act, 1882, 'transfer of property' means an act by which a living person conveys property, in present or in future, to one or more living persons, or to himself, or to himself and one or more other living persons; and; 'to transfer of property' is to perform such act. In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to the transfer of property to or by companies, associations or bodies of individuals.

The section we're talking about makes it clear that when someone transfers property to another person, both parties involved must be alive. This means that if one person is making a transfer and the other person is supposed to receive it, both of them need to be living. The reason for this requirement is that the section doesn't cover transfers that happen through a will. A will is a legal document that comes into play after a person passes away. So, since the section is focused on living individuals, transfers through a will (which only happens after someone's death) don't fall under its rules.

There's an exception to this rule mentioned in another section, namely section 13. This exception allows the transfer of land or buildings to benefit someone who hasn't even been born yet. So, even though the general rule is about living people, this exception makes room for special cases involving property transfers to unborn individuals.

MEANING OF UNBORN

Before delving deeper into the topic, it is crucial to grasp the significance of the term "unborn person" within the context of this act. An unborn person refers to an individual who currently does not exist but is specifically identified and has the potential to be born in the future. This includes not only a child in the mother's womb, who is not yet born but is acknowledged as a person in both Hindu Law and English Law. The term 'unborn' encompasses not just those who have been conceived but not yet born, such as a child in the womb, but also those who have not even been conceived. It's important to note that whether these individuals will be born is uncertain, but the transfer of property is permitted for their benefit.

Having clarified the meaning of the term "unborn person," let's now explore the concept outlined in section 13 of the Transfer of Property Act, 1882. This section allows for property transfers that benefit individuals who are not currently in existence but may come into being in the future. The legal provision extends its scope not only to the unborn children in the womb but also to those who have not even been conceived. This means that the law permits property transfers for the potential benefit of individuals whose existence is uncertain, emphasizing the inclusive nature of the term "unborn person." After understanding the meaning of the phrase "unborn person", now let us examine the provisions enshrined under the Transfer of Property Act, 1882.

PROVISIONS UNDER TRANSFER OF PROPERTY ACT, 1882.

Transfer of Property Act, 1882, deals with the provision of transfer inter-vivos, that is transfer of property by one living person. There is a rule by which a living person can convey property to an unborn person. Section 13 prescribes a provision relating to the transfer of property for the benefit of an unborn person. Sections 14-16 provide provisions relating to it.

CHILD IN WOMB

According to Section 13 of the Transfer of Property Act, 1882, "when on a transfer of property, an interest is created for the benefit of a person, not in existence at the date of the transfer, subject to the prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect unless it extends to the whole of the remaining interest of the transfer in the property"¹. Section 13 is an exception to transfer inter vivos, which authorizes the transfer of property to a person not in existence.

CONDITIONS TO BE FULFILLED WHILE TRANSFERRING A PROPERTY TO AN UNBORN PERSON

Property cannot be transferred directly to an unborn person but property can be transferred for the benefit of an unborn person. Section 13 provides that property can be transferred for the benefit of an unborn person subject to the following conditions:

- I. Prior Life-Interest:** The transfer for the benefit of an unborn must be preceded by a life interest in favor of a living person is in existence at the date of the transfer. But

¹ Transfer of Property Act, 1882, S.13

since such an unborn is not in existence at the date of the transfer the property cannot be transferred directly. There must be a prior life interest in favor of a living person so that such a living person holds the property during his life and till that time the unborn would come into existence.

II. Only Absolute Interest may be given: Transfer of property to an unborn is valid only if it extends to the whole of the remaining interest of the property. Only absolute interest can be transferred to an unborn, limited interest cannot be transferred. For example, A transfers his property to B for life and then to an unborn C absolutely. This transfer is valid.

EN VENTRE SA MERE

According to Section 13 property can be transferred to an unborn person only by creating a life interest. It is the rule of property law that property shall not remain in a vacuum. Therefore, an unborn person must take birth within the lifetime of the prior interest holder. Generally, if the unborn is not born during the lifetime of the life holder, the property shall be enjoyed by the life holder during his lifetime after which it would revert back to the transferor or his heirs as the case may be. But, according to the rule of *En ventre sa mere*, it is shown that, if the child is in the womb of his mother at the time of death of the life interest holder, then the property shall not revert back and shall go to the unborn after his birth. If the child takes birth alive the property shall be vested in him and if he dies in the womb of the mother the property will go to his heirs.

PERSON NOT EVEN IN THE WOMB

Section 14 of the Transfer of Property Act, 1882, deals with the rule against perpetuity. Perpetuity means an indefinite period. The rule against perpetuity is the rule that is against an indefinite period or forever. According to Section 14 of the Transfer of Property Act, 1882, "No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person how shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong"². For example, if A transfers property to B for life then unborn C, on condition that the transfer shall take effect on attaining 25 years the such transfer is void.

² Transfer of Property Act, 1882, S.14

MAXIMUM REMOTENESS OF VESTING

Section 14 prescribes a rule that the vesting of the property can be postponed or suspended on an unborn person till the date of his attainment of majority and the postponement for any time thereafter (i.e. after 18 years) is void. Now the question arises, for what maximum duration the vesting can be postponed? This principle is known as the maximum remoteness of vesting. Maximum remoteness of vesting can be calculated according to the following equation.

Maximum remoteness of vesting when the unborn takes birth: The remaining lifetime of the prior interest holder + 18 years = The maximum remoteness of vesting.

Maximum remoteness of vesting in case of En ventre sa mere (i.e. when the child is in the womb of the mother): The remaining lifetime of the prior interest holder + The remaining gestation period + 18 years = The maximum remoteness of vesting.

IN FAVOUR OF CLASS

Section 15 of the Transfer of Property Act, 1882, prescribes the rule of transfer to a class that comes under Sections 13 and 14. According to Section 15, "If, on a transfer of property, an interest therein is created of the benefit of a class of persons with regard to some of whom such interest fails by reason of any of the rules contained in Section 13 and 14, such interest fails in regard to those persons only and not in regard to the whole class"³.

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It states that, when on the transfer of property an interest is created for the benefit of a class of unborn and out of such unborn some are not entitled to get the property being barred by S.13 and 14 then the unborn those are not so barred shall get the property. For example, A transfers the property to B for life and then unborn C for life and the transfer to property to C is void by Section 13. But the transfer of property to D is valid.

TRANSFER TO TAKE EFFECT ON FAILURE OF PRIOR INTEREST

Section 16 of the Transfer of Property Act, 1882, "Where, by reason of any of the rules contained in Section 13 and 14, an interest created for the benefit of a person or a class of unborn persons fails in regard to such person or the whole of such class, any interest created in

³ Transfer of Property Act, 1882, S.15

the same transaction and intended to take effect after or upon failure of such prior interest also fails⁴.

This provision of the Transfer of Property Act, 1882, refers that when such prior interest fails the disposition of property to an unborn person shall not take effect at all. For example, A transfers his property to B then to unborn C for life, and thereafter to unborn D absolutely. Here, D gets the property through B. The prior interest created in favor of C is barred by S.13 and accordingly fails. Therefore, D will not be entitled to any property right.

LEADING CASE LAWS

Girjesh Dutt v Data Din:⁵ In this case, the legal scenario unfolded as follows: A executed a gift deed, endowing her property to her nephew's daughter, B, for the duration of B's lifetime. Subsequently, the property was intended to pass to B's male descendant unconditionally, contingent upon the birth of a male child. If B failed to have a male offspring, the property would then devolve to B's daughter, albeit with the restriction of non-alienation. In the event of B's demise without issue, whether male or female, the property was stipulated to revert to A's nephew. Following B's demise without leaving any offspring, the court adjudicated that the initial transfer of property to B was legally valid. However, the subsequent provision allocating the property to B's daughter was deemed void under Section 13. This determination arose due to the unborn status of B's daughter at the time of the property transfer and the imposition of a restricted interest (without the power of alienation). Section 13 stipulates that transfers to unborn individuals with limited interests are rendered void. Consequently, the nullification of the interest in favor of B's daughter under Section 13 has a cascading effect. Any subsequent interests or claims emanating from her entitlement also stand invalidated. Consequently, A's nephew is precluded from asserting any right or entitlement to the property, as the foundation of his claim is contingent upon the valid transmission of interests through B's daughter, whose interest has been deemed void by the operation of Section 13. This legal interpretation underscores the meticulous scrutiny applied to property transfers and the subsequent implications for succeeding interests in intricate legal scenarios.

⁴ Transfer of Property Act, 1882, S.16

⁵ Girjesh Dutt v. Data Din AIR 1934 Oudh 35.

P. Venkata Subanna v D. Chinna Panayya:⁶ In this case, the husband made a settlement of his property creating life interest in favor of his wife and an absolute interest in favor of the children which may take birth. It is held the transfer of property in favor of the wife is valid.

CONCLUSION

The general principle governing the transfer of inter-vivos stipulates that only a living person can convey property to another living person. Nevertheless, an exception to this rule exists, allowing for the transfer of property to an unborn person under specific conditions. This can be achieved by establishing a prior interest holder or life interest holder, whereby the remaining interest of the transferor (i.e., absolute interest) is designated for the unborn person. It is crucial to note that an unborn person cannot serve as a life interest holder; rather, the unborn individual must come into existence during the lifetime of the prior interest holder. In accordance with the rule of "En ventre sa mere," if the unborn person has not been born at the time of the death of the prior interest holder, the unborn person is treated as a living child. When transferring property to an unborn person, an additional condition may be imposed, specifying that the transfer shall take effect upon the unborn person attaining a particular age. It is imperative that this age is set before 18 years. Notably, a transfer of property to an unborn person with the condition that they will inherit the property upon reaching the age of eighteen years is deemed void. The unborn person, barred by Sections 13 and 14, will not be entitled to receive the property. In cases where property is transferred to an unborn person with a condition tied to attaining a specific age, the unborn person holds a contingent interest at birth, which becomes vested upon reaching the designated age. However, an additional condition may exist, stipulating that the rent or benefit of the property shall be utilized, with the benefit for the unborn person becoming effective upon their birth. In such instances, the unborn person acquires a vested interest in the property rather than a contingent interest.

⁶ P. Venkata Subanna v. D. Chinna Panayya AIR 1989 A.P.34.