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**TRANSFER FOR BENEFIT OF UNBORN PERSON AND THE RULE
AGAINST PERPETUITY**- Durga. S¹**Abstract**

Transfer of Property Act generally permits transfer inter-vivos which means transfer should be made between the living persons. A person who transfer his rights in the property is termed as a transferor and the person to whom such rights is transferred is known as transferee. Both the parties to the transfer must be a living person at the time of the transfer. This is the general rule. But in certain circumstances transfer is made between a living person to unborn person. Unborn person means a child who is not in existence even in mother's womb. Earlier it was a rule that no gift or inheritance is made to an unborn person. It is not permitted. But now transfer to an unborn person is permitted by law subject to the provisions of sections 13 and 14 of the Transfer of property Act. No direct transfer is made to an unborn person, but property can be transferred to an unborn child by way of creation of trust or creating prior interest and thereafter subsequent transfer can be made to an unborn child. Prior interest is a person who lives during the time of the transfer and take care of the property till the child comes into existence. On the birth of an unborn person he acquires vested interest in the property even though he is not entitled to the enjoyment of the property immediately on his birth. Thereafter the whole remaining interest in the property vested to an unborn person which the transferor has in the property.

Introduction

Section 5 of the Transfer of Property Act, 1882 defines the term "transfer of property". The section provides that "transfer of property" means an act by which a living person conveys

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property, in present or in future, to one or more other living persons or to himself, and one or more other living persons, and “to transfer property” is to perform such act².

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 transfer of property to or by companies, associations or bodies of individuals.

So as per section 5 conveyance of the property must be from one living person to another living person, i.e., transfer inter-vivos. In the Transfer of Property Act, 1882 there are two sections which runs together with respect to transfer made for the benefit of unborn person, i.e., section 13 and 14. Section 13 deals with “Transfer made for the benefit of unborn person” and section 14 deals with “Rule against perpetuity”. These two sections are exceptions to the general rule that the transferee must be in existence at the time of transfer.

Sometimes it is natural for a man to adopt a device to retain the property with in his own family. So this section provides provision to such persons to sustain the property within their family members who will come into existence in future. So they can retain the property within their family only by satisfying the conditions in sections 13 and 14.

Section 13 of the Transfer of Property read as follows:

Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a 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 transferor in the property³.

The first requirement is that there must be a transfer of property and the transferor must create an interest in the property in favour of a person not in existence.

With this respect we have to see who is an unborn person. An unborn person is a person -

❖ Who is not in existence

² Section 5 of Transfer of Property Act, 1882.

³ S.13 of Transfer of Property Act, 1882.

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- ❖ Who is yet to born
- ❖ Who may born in future, but now the child is not having any kind of existence ever he/she is not in the womb of the mother.

Regarding child in the womb of the mother different personal laws have different opinion. In case of Hindu joint family property a child in the womb of the mother can ask for his shares. A gift to a person not in existence is void except in the case of a Waqf under Mohammedan law.

Pre-requisites for a valid transfer of property to an unborn person:

- No direct transfer of property to an unborn person
- Prior interest must be created
- Transfer of absolute interest in favour of unborn person
- Unborn person must come into existence before the death of last life estate holder
- The whole remaining interest must be vested to unborn person the moment he comes into existence.

1. No direct transfer of property to an unborn person:

As per section 13 of Transfer of Property Act, where, on a transfer of property, an interest is to be created for the benefit of unborn person not in existence at the date of the transfer no direct transfer of property is possible. The reason behind is that if the property is directly transferred to an unborn person, the property will be left without owner after the death of testator and before coming into existence of unborn transferee. Property should never be in abeyance i.e., ownership of real property being undetermined. No property can remain without owner. If direct transfer is made to an unborn person, there will be an abeyance of ownership between the date of transfer till the birth of unborn person. But such transfer is possible through the machinery of trust.

2. Prior interest must be created:

No direct transfer of property is possible in favour of an unborn person. It can be created by way of trust or by creating prior interest/intermediate estate to some living person in the same transfer. A person in whose favour a prior interest is created is going to take care of the

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property till the unborn person comes into existence. He owes certain responsibilities towards the property. A person who is willing to transfer the property to an unborn person may appoint number of life interest, there is no limit but all should be in existence at the time of transfer. Prior interest holder can enjoy limited interest one after another or collectively. Prior interest holder will enjoy possession of the property and will be entitled to the benefits from the property. The same can be enjoyed by his legal heirs till his death. Life interest includes the right to enjoy the property and does not confer the right to alienate the property.

3. Transfer of absolute interest:

No life interest or limited interest should be created in favour of unborn person. It is not at all permissible. A person who is willing to transfer the property to an unborn person must confer absolute interest in the property. In English Law, it is possible to give an estate to an unborn person for life. But this aspect of English Law was subject to a restriction called the rule against double possibilities, recognised in *Whitby vs. Mitchell*. Under these rules, it was not permissible to confer life interest to an unborn person. It was called rule against double possibilities for the reason that there existed two possibilities: one, the birth of the unborn person to whom the life estate was given and, second, the coming into existence of issues of that unborn person⁴.

As per section 13 if life interest or limited interest is created for the benefit of unborn person, then such transaction will not take effect. In such case transfer up to the living person/persons is valid and thereafter it becomes void. In such case the ownership remains only with the first transferor, as he has transferred the property to the living person/persons only for life.

4. The unborn person must come into existence before the death of last life estate holder:

Number of prior interest can be created one after another or collectively. Unborn person must come into existence before the death of the last life estate holder. It is not necessary that the unborn person must come into the actual world, but it is enough that if he is in the

⁴ Transfer of Property Act, S.N. Shukla pg.64

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mother's womb. "a child inventre sa mere is equals to a child in esse" which means a child in the mother's womb is equal to a child in existence.

5. The whole remaining interest must be vested to unborn person the moment he comes into existence:

Section 20 lays down that where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appears from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

When an unborn person comes into existence he acquires vested interest in the property although his enjoyment rights is postponed during his minority, such vesting should not beyond the period of majority.

Girjesh Dutt v. Data Din⁵

In this case, A made a gift to B. Here B is A's nephew daughter. After B, then to her son or male descendants. If there is any then it will be absolutely. If there is no male descendants then, to B's daughter without the power of alienation. That means, limited interest was created regarding B's daughter. If there is no son or daughter of B, then the property will go to C. But B dies issueless.

Here two issues arise in the court:

1. Whether the gift to B's unborn daughter was valid or not?
2. Whether a gift to C was valid or not?

The court held that gift to B's unborn daughter was not valid. As there was limited interest created which is contrary to Section 13 of Transfer of Property Act. Regarding C, the court also held that, further subsequent gift will also be void according to Section 16 of Transfer of Property Act.

⁵ Girjesh Dutt V. Datadin AIR 1934 OUDH 35

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Section 16 runs as follows:

Transfer to take effect on failure of prior interest- Where, by reason of any of the rules contained in section 13 and 14, an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

In other words, a valid transfer which is subsequent to and dependent upon a void transfer is itself rendered void.

E.g.: A settles a property in trust for B and his intended wife successively for their lives and then on their eldest son for life and then on the eldest son of such eldest son for his life and then to C. The prior interest of the son and grandson of B fails under section 13 and 14 and therefore, the subsequent interest of C also fails.

Sopher v. Administrator General of Bengal⁶

A testator directed that his property was to be divided after the death of his wife into as many parts as there shall be children of his, living at his death or who shall have predeceased leaving issue living at his death. The income of each share was to be paid to each child for life and thereafter to the grandchildren until they attained the age of 18, when alone the grand children were to be absolutely entitled to the property.

The bequest to the grand children was held to be void by Privy Council as it was hit by Section 113 of the Indian Succession Act which corresponds to section 13 of Transfer of property Act. Their Lordships of the Privy Council observed that: "If under a bequest in the circumstances mentioned in section 113, there was a possibility of the interest given to the beneficiary being defeated either by a contingency or by a clause of a defeasance, the beneficiary under the later bequest did not receive the interest bequeathed in the same unfettered form as that in which the testator held it and that the bequest to him did not therefore, comprise the whole of the remaining interest of testator in the thing bequeathed."

⁶ Sopher V. Administrator General of Bengal Decided on 6th March 1944 At, High Court of Judicature at Bombay

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RULE AGAINST PERPETUITY

Section 14 of the Transfer of Property Act deals with the rule against perpetuity. This rule is an extension of section 13 of the same Act. Perpetuity means permanency, eternity or indefinite period. Generally there is a tendency among humans to retain their properties within their own family from generation to generation for indefinite period. But the purpose of law is to permit free alienation of property from one person to another. So law does not permit to tie up property for an indefinite period. Section 14 of TP Act runs as follows:

No transfer of property can operate to create an interest which is to take effect after the life time of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong⁷.

The object of this rule is to cut down the power of the owner to control the passing of the property in perpetuity. Under the old English Law Estates in tail were permitted i.e., A transfer his property to B for his life, his son for life, his grandson for life and so on. This practice was abolished by this rule and so this is called Rule against perpetuity.

The following are essentials for rule against perpetuity:

- 1.The vesting cannot be postponed beyond the lifetime of any one or more persons living at the date of the transfer.
- 2.The vesting of absolute interest in favour of an unborn person may be postponed until he attains full age i.e., minority period. For example, an estate may be transferred to A, a living person, and after his death to his unborn son when he attains the age of 18. Such transfer would not be violate the rule against perpetuity.

The extent of perpetuity period under Indian law and English law

Indian Law:

⁷ S.14 of Transfer of Property Act, 1882.

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Life or any number of lives in being + period of gestation + minority period of the unborn beneficiary.

Example A,B,C are the life estate holders who enjoyed the property. In that A enjoyed for 15 years, then B enjoyed for 20 years and C enjoyed for 10 years and died then the unborn person came into existence. Now perpetuity period is

A B C M.P.

$15+20+10+18 = 63$ Years

In this case if the vesting of an absolute interest to an unborn person is more than 63 years, that is void on the basis of the rule against perpetuity.

English Law:

Life or lives in being + period of gestation + minority period

If we apply this rule to the above example, the perpetuity period is

$15+20+10+21 = 66$ years

$15+20+10+280 \text{ days}+21$

Difference between English Law and Indian Law

English Law

- 1.Minority period is 21 years
- 2.Period of gestation is a gross period of 280 days
- 3.Property need not be given absolutely to unborn person
- 4.The unborn person must come into existence within 21 years of the death of last life estate holder.

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Indian Law

- 1.Minority period is 18 years
- 2.Period of gestation should be actual period.
- 3.Property should be given absolutely
- 4.He must come into existence before the death of the last life estate holder.

Exceptions to the rule against perpetuity:

- The rule against perpetuity does not apply in case where a property is transferred for the benefit of the public i.e., advancement of religion, knowledge, commerce, health and safety.
- The rule does not apply to an agreement for pre-emption i.e., a contract that gives someone the first right to buy a property before others does not violate this rule
- The rule is not applicable to mortgagor's right of redemption.
- When a direction is given that the income of the property shall be accumulated for the payment of debts and it does not tie up the property totally because the person indebted can discharge the debt at any time.
- Rule against perpetuity does not apply to personal agreements. It is not concerned with contracts as such, or with contractual rights ns obligations as such.
- The rule is not applicable to the contracts of perpetual renewal of leases.

CONCLUSION

As per section 13 transfer can be executed for the benefit of unborn person but it cannot be made directly to the unborn child. It is possible by way of trust or creating prior estate in favour of any person/persons who lives at the date of making the transfer. On the birth of a child he acquires vested interest in the property. Further for a valid transfer the whole of the remaining interest which the transferor has should be transferred to and unborn person. So the transfer for the benefit of unborn person can be done only in the manner as mentioned under section 13 of the Transfer of Property Act. The rule against perpetuity ensures that the

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property is not tied up forever. However, there are some exceptions where this rule does not apply.

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