

## **TRANSFER OF IMMOVEABLE PROPERTY FOR THE BENEFIT OF UNBORN PERSON**

- B. Swathi\* & Dr. P. Brinda\*

### **Abstract**

*The Transfer of Property involves creating rights for the benefit and interest of a person. When property is transferred for the benefit of an unborn individual, the intention is to protect that person's future rights and secure their interest once they are born. This principle ensures that an unborn child or future legal heir receives the advantages and rights meant for them after their birth. The idea is grounded in equitable principles as well as the law of trusts. Such a transfer takes effect when a person (the transferor) conveys property or makes a gift with the purpose of benefiting a person who is not yet in existence at the time of the transfer. This legal arrangement plays an important role in safeguarding the future claims and benefits of unborn persons.*

### **INTRODUCTION**

Section 5 of the Transfer of Property Act, 1882 states that a transfer of property must take place between two living persons, either in the present or the future, and may involve more than one living individual. The expression "living persons" is broad and includes not only natural persons but also legal entities such as companies, associations, and bodies of individuals. This provision establishes the general rule that property can only be transferred between persons who are legally in existence.

However, Section 13<sup>1</sup> of the Act provides an important exception to this rule. It allows immovable property to be transferred for the benefit of an unborn person. An unborn person,

---

\*1<sup>st</sup> Year LL.M., Department of Property Law, The Tamil Nadu Dr. Ambedkar Law University, School of Excellence in Law

\*Associate Professor, Department of Property Law, The Tamil Nadu Dr. Ambedkar Law University, School of Excellence in Law

<sup>1</sup> 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

For general queries or to submit your research for publication, kindly email us at [ijalr.editorial@gmail.com](mailto:ijalr.editorial@gmail.com)

in this context, refers to someone who is not yet in existence not even in the mother's womb but may come into existence in the future. Although a child in the mother's womb is not technically considered a living person for the purpose of Section 5, both Hindu Law and English Law recognize such a child as a legal person for certain purposes.

### **SECTION 13 OF TRANSFER OF PROPERTY ACT,1882:**

Section 13 of the Transfer of Property Act, 1882 establishes conditions for transferring property for the benefit of an unborn person.

It mandates that to facilitate such a transfer, a prior interest must be created in favour of a living person before extending it to the unborn beneficiary. This prerequisite prevents a direct transfer to the unborn person and ensures that the interest granted to them encompasses the entire remaining interest of the transferor.

The section aims to maintain the unobstructed flow of property disposition across generations, restricting the creation of time-limited interests solely for unborn individuals. While successive life interests can be granted to living beneficiaries, absolute interests are required for those not yet born.

In *Girjesh Dutt v. Data din*, the court held that the gift for life to B was valid because B was a living person at the date of transfer but the gift in favour of B's daughter was void under Section 13 TPA because she was given only limited interest, she had not given absolute interest. Since this transfer was invalid, the subsequent transfer depending on it also failed.<sup>2</sup>

The Court highlighted that while direct transfer is impermissible, the law does allow for valid transfer for unborn persons, provided they are structured correctly and comply with section 13, not creating undue impediments to property clearance.<sup>3</sup>

### **LEGAL MECHANISMS FOR UNBORN BENEFICIARIES IN PROPERTY TRANSFERS**

While transferring a property to an unborn the following essentials to be complies with it namely,

---

such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

<sup>2</sup>*Girjesh Dutt v. Data din* AIR (1934)Oudh35.

<sup>3</sup>*J.Ramkumar v N.Chandrasekaran* ,2023

For general queries or to submit your research for publication, kindly email us at [ijalr.editorial@gmail.com](mailto:ijalr.editorial@gmail.com)

<https://www.ijalr.in/>

1. No Direct transfer
2. Creation of a prior interest
3. Requirement of absolute interest

### **NO DIRECT TRANSFER**

Property cannot be transferred directly to an unborn individual. To ensure the property is not left ownerless until the unborn person is born, the law requires the creation of a trust or similar arrangement. A gift to a class including existing and non-existing persons is valid for existing persons and invalid for the rest, but the principle supports indirect transfers to the unborn.<sup>4</sup>

### **CREATION OF A PRIOR INTEREST**

For a transfer intended to benefit someone who is yet to be born, the law mandates that an earlier interest must first be granted to a living person. This prior interest operates from the time of transfer until the unborn beneficiary comes into existence. The court held that the transfer to an unborn person failed because property must vest in a living person at the time of transfer.<sup>5</sup>

For example:-

A \_\_\_\_\_ B (life interest)  
\_\_\_\_\_ C (life interest)  
\_\_\_\_\_ D (life interest)  
\_\_\_\_\_ Unborn (Absolute interest)

On B's death, the possession would be taken by C and on C's death, by D. On D's death, the possession would go to B's child, who should have come in existence by this time. If he not there, the property would revert back to A, if he is alive, else to his heirs<sup>6</sup>.

### **REQUIREMENT OF ABSOLUTE INTEREST**

The unborn beneficiary must receive complete ownership of the property once they are born. Section 13 does not permit only a life interest to be given to an unborn person, as restricted

<sup>4</sup>Raja Bajrang Bahadur Singh v. Thakurdin Bhakhtrey Kuer (AIR 1953 SC 7).

<sup>5</sup>Tagore v. Tagore (1872).

<sup>6</sup>International journal of law management and humanities Volume 4 2021.

For general queries or to submit your research for publication, kindly email us at [ijalr.editorial@gmail.com](mailto:ijalr.editorial@gmail.com)

under the English rule of double possibilities. Therefore, the transfer must confer full and absolute rights in the property.

The transfer for an unborn person, specifically focusing on whether a gift deed giving an absolute interest to unborn child, following the interest to the mother, was valid or void. The court ultimately ruled the transfer valid and upholding that the prior life estate followed by complete transfer of remaining interest to the unborn child (the son) satisfies sec 13 conditions, allowing the child to get the full property interest.<sup>7</sup>

For example:-

A ————— B (Life interest)  
————— UB1 (Life interest)  
————— UB2 (Absolute interest)

The limited interest in the property for the benefit of an unborn person and would therefore be void and incapable of taking effect in law.

After the death of B, here, the property would revert back to A or his heirs as the case may be, as even though the transfer for the benefit of Unborn 2 appears to be proper, as it is dependent on a void transfer that cannot take effect in law; a transfer subsequent to, or dependent on a void transfer can also not take effect.

## **PROVISIONS AND CHALLENGES IN TRANSFER FOR BENEFIT OF UNBORN PERSON**

The provisions and challenges in transfer for the benefit of unborn person under Section 13 of the Transfer of Property Act 1882 are as follows,

- 1 Rule against perpetuity
- 2 Doctrine of Conditional Vesting
- 3 Gift Deed for an unborn Person
- 4 Wills and Trusts for the benefit of an unborn person

### **RULE AGAINST PERPETUITY:**

---

<sup>7</sup>Sivakamasundari v. T.S.Muthukrishnan, 2022

For general queries or to submit your research for publication, kindly email us at [ijalr.editorial@gmail.com](mailto:ijalr.editorial@gmail.com)

The term perpetuity refers to an unlimited or endless duration, the legal rule actually restricts perpetuity by fixing a definite time limit within which a transfer in favour of an unborn person must take effect.

If a life interest is intended to be created for an unborn individual, the vesting of that interest cannot be delayed beyond the lifetime of the existing beneficiary and the unborn person's attainment of majority.<sup>8</sup> However, the actual enjoyment or possession of the property may legally be postponed until the child reaches the age of majority.

For example: The court held that the transfer to unborn descendants was void because it violated the rule against perpetuity where the interest for the unborn extended beyond the limited period of time.<sup>9</sup>

### **DOCTRINE OF CONDITIONAL VESTING:**

The unborn individual does not obtain any legal rights in the property until birth, as legal personality begins only once the child is born alive. Nevertheless, under the principle of condition precedent, the transfer can be treated as vesting at the moment of birth, so long as the transferor has fulfilled the necessary requirements such as creating a prior interest and ensuring that the unborn person receives the property absolutely.

#### **For example:**

- i. A creates a will in favour of a living person which is his wife for life interest, with remainder to vest in the unborn children of him.<sup>10</sup>
- ii. The court upheld the transfer stating that the interest should vest in the unborn person once they were birth, so condition vested here is valid.

### **GIFT DEED FOR AN UNBORN PERSON:**

A gift deed made for the benefit of an unborn child involves the donor transferring property or assets in favour of a beneficiary who is not yet born. Such a deed represents a voluntary transfer carried out during the donor's lifetime.

---

<sup>8</sup>Raja Bajarang Bahadur Singh v Thakurain Bakhtrajkuer (AIR 1953 SC 7).

<sup>9</sup>Raja Suraj Baksh Singh v Rani Raghunath Kunwar (1916).

<sup>10</sup>Sopher v Administrator – General of Bengal AIR 1944 PC 67.

For general queries or to submit your research for publication, kindly email us at [ijalr.editorial@gmail.com](mailto:ijalr.editorial@gmail.com)

For the gift to be legally valid, the deed must be drafted so that it comes into effect only once the child is born. In other words, the gift may be made subject to the condition that the child is born alive; until then, no actual transfer of ownership takes place because legal personality arises only after birth.

This arrangement creates a contingent interest for the unborn beneficiary. Although the property is for the child, the rights relating to use, enjoyment, possession, or alienation arise only after the child's birth.

## **WILLS AND TRUSTS FOR THE BENEFIT OF UNBORN PERSON**

### **TRUST**

One of the most widely used ways to transfer property for the benefit of an unborn child is by creating a trust. Through this method, the transferor places the property or assets into a trust, which is then managed for the future benefit of the unborn beneficiary. The trust is usually designed to take effect once the child is born or reaches a specified age, such as the age of majority.

For such a trust to be valid, the unborn beneficiary must at least be conceived at the time the transfer is made, even if the birth has not yet occurred. In many legal systems, the trust becomes effective only if the child is born alive. If the child is not born alive, the transfer or trust is considered void or fails to take effect.

### **WILLS**

A person may choose to leave his property through a will to a trust created for the benefit of an unborn beneficiary, such as his future grandchildren. This arrangement ensures that the grandchildren can receive the benefits of the property once they come into existence.

Under Section 113 of the Indian Succession Act, 1925<sup>11</sup>, when an heir is conceived but not yet born at the time of the testator's death, property may be bequeathed for their benefit. However, the transfer becomes effective only if the unborn heir is subsequently born alive.

---

<sup>11</sup>Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

For general queries or to submit your research for publication, kindly email us at [ijalr.editorial@gmail.com](mailto:ijalr.editorial@gmail.com)

The gift would not vest unless and until the child was born alive. If the child was not born alive then the property would revert back to the actual owner or to their legal Heir descendants or lapse.<sup>12</sup>

The court held that, constructed the word “extends to the whole of the remaining interest of the transferor in the property” as directed to the extent of the subject matter and to the absolute nature of the estate conferred and not to the certainty of its vesting.<sup>13</sup>

## **DIFFERENCE BETWEEN INDIAN AND ENGLISH LAW IN TERMS OF TRANSFER OF PROPERTY<sup>14</sup>**

### **Minority Age -**

Under Indian law, a person attains a majority upon completing 18 years<sup>15</sup>, if a guardian appointed by the court for a minor person or property the wardship lasts until the child turns 21 years old. In contrast, English law considers an individual a minor until the age of 21.

### **Requirement of Absolute Interest -**

Indian law mandates that when property is transferred for the benefit of an unborn person, the interest granted must be absolute. English law does not impose this strict requirement; a transfer need not necessarily create an absolute estate.

### **Time of Birth of the Unborn Beneficiary -**

According to Indian law, the unborn beneficiary must be born before the death of the last life estate holder for the transfer to remain valid. English law differs by allowing the unborn child to be born within 21 years after the death of the last person entitled to the prior interest.

### **Duration of Gestation -**

Indian law recognises only the actual period of gestation when determining validity. However, English law adopts a presumed or fixed period of gestation often referred to as the “gross period.”

## **CONCLUSION**

---

<sup>12</sup>S. Krishnan v. K.Krishnamurthi (1998) 4 SCC 415.

<sup>13</sup>Ardeshir v. Dadabhoy, 1945 ILR Bom 493, p 503.

<sup>14</sup>International journal of law management and humanities Volume 4 2021.

<sup>15</sup>Section 3 of Majority Act, 1875- Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before.

For general queries or to submit your research for publication, kindly email us at [ijalr.editorial@gmail.com](mailto:ijalr.editorial@gmail.com)

Transfers made for the benefit of an unborn person are a widely used and effective mechanism in estate planning and trust law, allowing individuals to secure the financial interests of future generations even before their birth. However, these arrangements must be drafted with precision to ensure compliance with legal principles, including rules on the vesting of interests, the rule against perpetuity, and the legal status of an unborn child. When properly documented and supported by sound legal guidance, such transfers can offer a reliable and enduring method of providing for future beneficiaries.

For a transfer in favour of an unborn person to be legally valid, the entire remaining interest of the transferor must be conveyed to the unborn beneficiary. Once the transfer becomes operative, the vested interest also passes to the unborn child, subject to the condition that the child is born alive. Transfers intended for unborn persons take effect only when the conditions prescribed by law are satisfied; otherwise, the transfer is rendered void.

For general queries or to submit your research for publication, kindly email us at [ijalr.editorial@gmail.com](mailto:ijalr.editorial@gmail.com)

<https://www.ijalr.in/>