CONVEYANCE OF PROPERTY TO UNBORNS: INTERPLAY OF SECTION 13 AND SECTION 14 OF THE TRANSFER OF PROPERTY ACT, 1882

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ABSTRACT

The Transfer of Property Act, 1882 generally contemplates transfers between living persons; however, Section 13 provides a specific mechanism for creating an interest in favour of an unborn person, subject to certain statutory conditions. The operation of Section 13 is closely interconnected with Section 14, which embodies the Rule against Perpetuity and seeks to prevent the indefinite restriction of the alienation and circulation of property. This research examines the legal framework governing transfers for the benefit of unborn persons, with particular emphasis on the interplay between Sections 13 and 14 and the related provisions contained in Sections 15, 16 and 20 of the Act. It further traces the historical development of the Rule against Perpetuity and examines the essential requirements governing such transfers, including the creation of a prior interest in favour of a living person and the requirement that the unborn beneficiary receive the whole of the remaining interest in the property. The paper analyses the judicial interpretation of these provisions through significant decisions including *Raj Bajrang Bahadur Singh v. Thakurain Bakhtraj Kuer*, *Girish Dutt v. Data Din, Mohamed Shah v. Official Trustee of Bengal*, *Javvadi Venkata Satyanarayana v. Pyboyine Manikyan* and *Sridhar v. N. Revanna*. The study demonstrates how statutory provisions and judicial decisions have collectively shaped the legal position concerning transfers for the benefit of unborn persons. It concludes that the combined reading of Sections 13, 14, 15, 16 and 20 provides a comprehensive framework for regulating such transfers while balancing the interests of beneficiaries with the policy against perpetuities.

Introduction

Section 5 of the Transfer of Property Act, 1882 (hereinafter referred to as '*the Act'*) defines the phrase 'transfer of property' to mean a conveyance of property by a living person to one or more other living persons or to himself or to both.[1] The provision essentially highlights the requirement of *inter vivos* transfer, a transaction specifically between living persons, where the phrase 'living persons' include within its ambit a company or an association of persons, whether incorporated or not.[2]

A combined reading of Section 5 and Section 3, which defines an 'instrument' within the meaning of the Act to not include a testamentary instrument, evinces that the Act does not purport to include any transfer of property by way of Wills, for it would tantamount to a transfer by a non-living person in favour of a living person, not covered under the Act. Similarly, the Act, in general, does not permit a transfer of property to an unborn person. Nevertheless, the same can be done in two ways – (a) by creation of a trust and transferring the property to trustees who hold it for the benefit of unborn beneficiaries, or (b) as per the procedure provided for under Section 13 of the Act, both being subject to the fulfilment of pre-requisites mentioned in the said provision.

Section 13 of the Act provides for the transfer of an immovable property by a living person to an unborn person, not directly, but through another living person acting as a link between the transferor and the unborn person, till the time such person is born.[3] It is pertinent to note that Section 13 of the Act is akin to Section 113 of the Indian Succession Act, 1925. However, there is a need to draw a conceptual differentiation between the two, for the former provides for transfer during the life time of the transferor whereas the latter provides for bequest of property to an unborn person pursuant to the death of a testator.[4]

Further, Section 14 of the Act describes the Rule against Perpetuity, meting out the conditions subject to which the transfer made in accordance with Section 13 of the Act will actually have

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[1] *Transfer of Property for the Benefit of Unborn Child*, LEGAL SERVICE INDIA, http://www.legalserviceindia.com/legal/article-1341-transfer-of-property-for-the-benefit-of-unborn-child.html#:~:text=When%20a%20property%20is%20transferred,absolute%20interest%20in%20that%20property.

[2] Diva Rai, *Transfer to Unborn Person: All You Need to Know*, IPLEADERS (Oct. 21, 2019), https://blog.ipleaders.in/transfer-to-unborn-person/#2_Prior_Interest.

[3] *Id*.

[4] Urwashi Ahuja, *Transfer for Benefit of Unborn Person*, LAW TIMES JOURNAL (July, 7, 2019), http://lawtimesjournal.in/transfer-for-benefit-of-unborn-person/.

effect. The provision aims at promoting advancement of the property and its unfettered circulation for the purposes of further transfers and for trade and commerce, benefitting the society-at-large.[5] Therefore, Section 13 shall always be read in combination with Section 14 of the Act for wholesome understanding of the transfer of property in favour of unborn persons.

Moreover, Section 15 and Section 16 of the Act provide for some additional incidental rules to the above-said transfer and the Rule against Perpetuity. The former states that in case of a transfer for the benefit of a class of persons, non-observance of Sections 13 and 14 fails the transfer merely for the respective persons under these provisions and not for the entire class of persons.[6] The same has been observed by the Hon'ble Supreme Court in the case of ***Raj Bajrang Bahadur Singh v. Thakurain Bakhtraj Kuer***, stating that a gift made to a class of persons comprising of both living and unborn persons is valid with regard to the former but is invalid with regard to the latter.[7]

Therefore, the law concerning transfer of property to unborn is complex and detailed, requiring an in-depth analysis for the purposes of a better and comprehensive understanding.

The Origin and Development of the Law

The law revolving around the transfer of property to unborn persons finds its origin in the 17th century in England, where the XXII Earl of Arundel attempted to transfer the titles that he possessed to his unsound son, followed by his second son, third son and eventually, by his fourth son.[8] Moreover, he conditioned that the title shall further vest with the future generations of the family. The contemplated indefinite transfers were struck down by the House of Lords, stating that the Earl was not entitled to control the rules of disposition of a property pursuant to his death.[9] Later, this came to be known as the Rule against Perpetuity and was duly incorporated in the Perpetuities and Accumulations Act of 1964.[10]

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[5] Shristhi Bose, *Transfer of Property to Unborn Child: A Section Analysis*, Lawchives (Nov. 20, 2018), https://thelawstudentsnetwork.wordpress.com/2018/11/20/transfer-of-property-to-unborn-child-a-section-analysis/.

[6] Aishvarya Gupta, *Property Laws for the Non-Existent: A Study on Transfer for the Benefit of an Unborn Person*, S.S.R.N. (July 22, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2115177.

[7] Raj Bajrang Bahadur Singh v. Thakurain Bakhtraj Kuer, 7 1953 SCR 232.

[8] George L. Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuity*, 126 U. PA. L. REV. 19, (1977).

[9] *Id*.

[10] Prem Rajani et al., *India: A Brief Write-Up on Transfer of Property For the Benefit of Unborn Person and Rule Against Perpetuity*, MONDAQ (Oct. 28, 2015), https://www.mondaq.com/india/wills-intestacy-estate-

Section 13 of the Act purports to extend to India the Rule of Double Possibilities as previously existed in England. The Rule was discussed and recognized in the case of ***Whitby v. Mitchell***.[11] It essentially conveys that no person shall fetter the right to free disposition or alienation for two or more generations of living persons.[12] The Hon'ble Bombay High Court, in the case of ***Edulji Framroj Dinshaw v. Sir Gawasji Jehangir***, has discussed the position of English Law prior to Law of Property Act, 1925 to be inclusive of two above-said two cardinal rules – the Rule Against Perpetuity and the Rule Against Double Possibilities. The latter does not stand anymore as a strict law.[13] Nevertheless, the introduction of the law in India by virtue of the Act greatly clarified the treatment of transactions concerning unborn persons.[14]

Initially, Hindu Law did not consider transfers or gifts in favour of unborn persons to be valid transfers. With the enforcement of the Act and its applicability on Hindus, the position was reversed by Section 13.[15] On the other hand, Muslim Law does not recognise transfers and gifts in the favour of unborn person. Considering this, Section 13 of the Act is not applicable to Muslims, for Section 2 of the Act provides for the prevailing effect of the Mohammedan Law in case of a conflict with the Act.[16]

Analysing the Concept and the Essential Qualifications for Transfer

The terms 'Unborn Person' under the Act refer to a person that is not in existence at the time of transfer of the property, whether or not such person is already in the womb of the mother.[17] An unborn child in the womb of its mother is considered to be 'born by law' as per the legal maxim *nasciturus pro jam nato habetur*. But for the purposes of the Act, a property vests in an infant *enventresa mere* only when such child is born alive.[18] Further, the said terms are also

planning/366482/a-brief-write-up-on-transfer-of-property-for-the-benefit-of-unborn-person-and-rule-against-perpetuity.

[11] Whitby v. Mitchell, (1890) 44 Ch D 85

[12] *Id*.

[13] Edulji Framroj Dinshaw v. Sir Gawasji Jehangir, (1955) 57 BOMLR 763.

[14] *Id*.

[15] Ankita Gupta, *Transfer of Property to an Unborn Child Explained*, Legal Bites (June 25, 2020), https://www.legalbites.in/transfer-of-property-to-an-unborn-child.

[16] Shristhi Bose, *Transfer of Property to Unborn Child: A Section Analysis*, Lawchives (Nov. 20, 2018), https://thelawstudentsnetwork.wordpress.com/2018/11/20/transfer-of-property-to-unborn-child-a-section-analysis/.

[17] *Can a Property be Transferred to an Unborn Person?*, LAW CORNER (Nov. 29, 2018), https://lawcorner.in/can-a-property-transferred-to-an-unborn-person/.

[18] Aarti Bhardwaj, *Transfer of Property to Unborn Child*, LEGAL SERVICE INDIA, http://www.legalserviceindia.com/legal/article-2055-transfer-of-property-to-unborn-child.html.

inclusive of unborn persons that have not been conceived yet.

Section 13 facilitates the transfer of property 'for the benefit' of an unborn person as against the transfer of property 'to' such person. In other words, the provision, as against vesting the property directly in the unborn person, vests the same in another living person, who acts merely as an interim holder until the birth of the said unborn person.[19] The interim holder is entitled to retain the possession of the property and to enjoy usufructuary rights over the same.[20] This is referred to as the transfer of a prior interest in the property, the nature of the interest being life interest. Although the ownership of the property vests with the unborn person as soon as the person is born, as is stated under Section 20 of the Act, the provision provides that the possession of such property transfers only at the time of the death of the interim holder or the life holder.[21] In case the life holder dies prior to the birth of the unborn beneficiary, the property reverts to the transferor.[22]

It is pertinent to note that the life interest can be created either for a single living person or for multiple living persons. In the latter scenario, the property is transferred successively to numerous people before it absolutely vests with an unborn person, implying that the possession will be transferred to a subsequent life holder in the event of the death of the present life holder, in accordance with the terms mentioned in the instrument making the transfer.[23]

Another pre-requisite under the provision is the transfer of absolute interest in the property for the benefit of the unborn person. The law clearly states that the interest transferred to the unborn must be the whole of the remaining interest of the transferor, and not merely a life interest.[24] In other words, the interest transferred shall not be fettered in the hands of the unborn person and shall be transferred in totality, as is remaining and vested with the transferor himself.[25]

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[19] Prem Rajani et al., *India: A Brief Write-Up on Transfer of Property For the Benefit of Unborn Person and Rule Against Perpetuity*, MONDAQ (Oct. 28, 2015), https://www.mondaq.com/india/wills-intestacy-estate-planning/366482/a-brief-write-up-on-transfer-of-property-for-the-benefit-of-unborn-person-and-rule-against-perpetuity.

[20] Raghav Ajmera, *Transfer of Property for the Benefit of Unborn Person and Rule Against Perpetuity*, LAW JAR (Mat 8, 2018), https://www.lawjar.com/transfer-of-property-unborn-person/.

[21] *Transfer of Property to an Unborn Child*, HELPLINE LAW, http://www.helplinelaw.com/real-estate-wills-probate-and-trust/TRANSFERP/transfer-of-property-to-an-unborn-child.html.

[22] *Transfer of Property to Unborn Person*, LAW CIRCA (Nov. 29, 2019), https://lawcirca.com/transfer-of-property-to-unborn-person/.

[23] Sai Krishnan, *Transfer of Property to an Unborn Child*, LAWORDO (Oct. 27, 2018), https://www.lawordo.com/transfer-of-property-to-an-unborn-child/.

[24] Vepa P. Sarathi, *Law of Transfer of Property*, (Eastern Book Company. Reprinted 2010).

[25] *Transfer of Property to Unborn Person*, LAW CIRCA (Nov. 29, 2019), https://lawcirca.com/transfer-of-property-to-unborn-person/.

This is also to say that a transfer of property cannot be made to the unborn child of an unborn person, such that the latter gets merely a life interest whereas the former receives an absolute interest in the same.[26] The law clearly contemplates that if such a transfer for the benefit of an unborn person fails or is invalid, any subsequent transfer of the property thereof will be rendered invalid. At the same time, relying on the case of ***Mohamed Shah v. Official Trustee of Bengal***, it is well-established that the invalidation of subsequent interest does not render the prior interest to be void.[27]

The aforementioned conditions can be observed and better construed through the landmark case of ***Girish Dutt v. Data Din***.[28] A gift of property was made by X to her nephew's ward Y for her life time pursuant to which, the property was to vest in her male descendants. The transaction was marked with a condition that in case Y does not have any male issue, the property was to vest with Y's daughter, but devoid of any rights of alienation. Further, in case of no issue of Y, the property was to vest with X's own nephew N. When Y died without any child, the matter went to the Court. The Court ruled that the transfer of property in favour of Y constituted transfer of prior life interest to a living person and hence, was valid, but the transfer made in favour of the daughter of Y was invalid, for the same was only of a limited interest, without the right of alienation. Moreover, the Court clarified that since the said transfer was void, the subsequent transfer made in favour of N was also rendered invalid.

Section 14 or the Act discusses the Rule against Perpetuity, stating that the interest created for favour of an unborn person will come into effect pursuant to the lifetime of the life holders, if the said unborn is living at the time of death of life holder(s) and is a minor.[29] Therefore, Indian Law contemplates perpetuity period to be the summation of life period of life holder(s) and the minority period (18 years) of the beneficiary. The transfer made to the beneficiary will not hold good unless it is made within the aforesaid period.[30]

Notably, Section 20 and Section 13 of the Act also observe a significant interplay. A combined reading of the provisions reveals that unless a contrary intention is adduced from the instrument

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[26] Sai Krishnan, *Transfer of Property to an Unborn Child*, LAWORDO (Oct. 27, 2018), https://www.lawordo.com/transfer-of-property-to-an-unborn-child/.
[27] Mohamed Shah v. Official Trustee of Bengal, 2 Ind Cas 292.
[28] Girish Dutt v. Data Din, AIR 1934 Oudh 35.
[29] Kush Bisht, *Property transferred to an Unborn Child under Transfer of Property Act, 1882,* PROCEJURELAW (May 29, 2020), https://procejurelaw.co.in/2020/05/29/property-transferred-to-an-unborn-child-under-transfer-of-property-act-1882/.
[30] *Id.*

of transfer, the property vests with the unborn person at the time of its birth. In the case of ***Javvadi Venkata Satyanarayana v. Pyboyine Manikyan*** wherein a life interest was created by X in favour of Y while vesting the absolute interest with unborn sons of Y, and wherein Y relinquished the life interest in favour of its father through an instrument, the Hon'ble Court held that the relinquishment deed did not have any effect on the rights of the unborn sons and that the property will vest with them from the very moment that they are born, for reference is to be made to the original transfer instrument and not to any subsequent act.[31]

In the recent judgment of ***Sridhar v. N. Revanna***, gift deed was executed by the great grandfather of the plaintiffs in favour of Revanna with the condition that donee and his brothers are not entitled to alienate the property. Further, the deed conditioned that the donee or his brothers shall act as life holders and that on their death, the property will devolve upon their living male children. Nevertheless, the property was alienated. Consequently, the case was brought by the appellants against Revanna, claiming the declaration of them as the absolute owners of the property. The Hon'ble Court held that Revanna did not have the right to alienate the property, for he merely had a life interest in the same and not an absolute interest.[32] Therefore, the case law clarifies the position of law with respect to transfer of property to an unborn person.

Conclusion

A thorough perusal of all the aforementioned case laws and principles clearly evinces that the legislature and the judiciary have worked hand-in-hand to establish a comprehensive legal scenario regarding transfers under Section 13 of the Act, while reading other provisions including Sections 14, 15, 16 and 20 into and along with the same. The law, before its incorporation in the Transfer of Property Act, 1882, had long been in existence, governing the transfers other than *inter-vivos* transfers. The legal position has minimal loopholes and ambiguity, thus reflecting the commendable efforts of the organs of the government in developing the same. After all, simple, clear, unambiguous and fool-proof laws are a basic and cardinal need of the day.

[31] Javvadi Venkata Satyanarayana v. Pyboyine Manikyan, AIR 1983 AP 139.
[32] Sridhar v. N. Revanna, AIR 2020 SC 824.