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TRANSFER FOR THE BENEFIT OF UNBORN PERSON

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ABSTRACT

The Transfer of Property is the right which is intended for the benefit of a person and for their interest. The transfer for the benefit of unborn person is the right intended for the benefit of unborn person and to secure their future interest. It also ensures that they are granted rights and benefit after their birth. And this concept is rooted in both Equity and the Law of trusts. It came into effect when a person i.e., transferor makes a transfer of property or gift with the intention that it will benefit an unborn individual i.e., a child or legal heir of that person who is not yet born at the time of transfer. This type of legal mechanism is one of the important aspects regarding the rights and benefits of the unborn person.

INTRODUCTION

Section 5 of the Transfer of Property Act 1882, deals with the transfer of property between two living persons in present or future or more than one living persons. The term “Living persons” includes a company or association or body of individuals. This section helps us understand that the transfer of property should be between two living persons, however an exception to this section is section 13 which facilitates the transfer of immovable property in favor of an unborn person. The meaning of the term unborn person in this case is the person who does not exist but may be born in the future is considered to be an unborn child or person. Even though a child in mother’s womb is simply not a person in existence, but has been treated as a person under both Hindu Law and English Law. The concept and other provisions comprising of this act are clearly defined in this article with related case laws.

SECTION 13 OF TRANSFER OF PROPERTY ACT 1882

Section 13 of Transfer of Property Act, 1882 provides that when a person created an interest in transferring his own property for the benefit of unborn person at the date of transfer.

A prior interest should be created in respect of transferring the property and interest created for the benefit of unborn person shall not take effect, unless it extends to the whole of remaining interest of the person transferring the property in the property to be transferred.

In order to transfer a property for the benefit of unborn person on the date of transfer, it is imperative that the said immovable property must vest in some other living person from the date of transfer until the child comes into existence as the property cannot be transferred directly in favor of an unborn person.

The underlying principle in section 13 is that person disposing of the property to another person shall not cause free disposition of that property in the hands of more than one generation.

This section doesn't provide any restriction for successive interest being created for several persons at the time of transfer of property.

But the only restriction is the grant of interest limited by time or otherwise to an unborn person.¹

For Example:

- i. A Hindu undivided family owned a certain property governed by the Mitakshara school of Hindu law. A member of that family created a will attempted to dispose of ancestral property. He also attempted to create a gift for the benefit of his unborn great grandsons who were not in existence at the time of the testator's death.
- ii. This was challenged under section 13 of transfer of property act for the violation of Hindu law principles, particularly alienation of ancestral property and the rules concerning transfer of property under Hindu law.
- iii. Court held that alienation of ancestral property is impermissible without the consent of the coparceners, i.e., other members of the joint Hindu family. The disposition in favor of the unborn great grandsons is invalid since they were not in existence during the time of the testator's death and also it is consistent with the principle that property could

not vest in an unborn unless prior interest created upon a living person.¹

LEGAL MECHANISMS FOR BENEFITING THE UNBORN: UNDERSTANDING PROPERTY TRANSFERS

3(a) NO DIRECT TRANSFER:

A direct transfer of property for the transfer of unborn person is not permissible. Such transfer can be brought into existence by the mechanism of trust.

It is an important principle of property law that every property will have an owner, so if the property is transferred to an unborn person it will lead to property without owner from the date of transfer until the unborn come into the existence.

However, the property can be transferred for the benefit of unborn person, subject to certain specific conditions:

3(a)(i) PRIOR LIFE INTEREST

Transfer to an unborn person to be valid, it must be preceded by a life interest in favor of a person who is alive at the time of the transfer. This conveys that a living person holds the property during their lifetime until the unborn person or child comes into existence.

After the termination of this life interest only the property will pass to the unborn person, who by that time must be in existence (alive) or else it will revert back to the actual transferor.

For Example:

- i. A testator attempted to create a life estate for a living person and then transfer to an unborn person through a will.
- ii. whether the property be validly transferred when the interest is contingent on the life estate upon the unborn person.
- iii. The court held that the transfer to unborn person failed because property must vest in a living person at the time of transfer.²

3(b)(ii) ABSOLUTE INTEREST

Transfer to an unborn person should be in an absolute interest. Only an Absolute Interest in the property may be transferred to an unborn person and there should be no further transfer from

¹ Girjesh Datt v. Data Din (1934)

² Tagore v. Tagore (1872)

him to any other person. Limited or life interests cannot be granted to an unborn person.

Section 13 stipulates that the interest given to the unborn person must be given entirely including the remaining interest of the transferor in the property. An interest remains only for the lifetime cannot be conferred to an unborn person. The transfer of interest to an unborn person permitted only if it is absolute and not just the life estate.³

PROVISIONS AND CHALLENGES IN TRANSFER FOR BENEFIT OF UNBORN PERSON

The some of provisions and challenges faced during the transfer of property for the benefit of unborn person under section 13 of Transfer of Property Act, 1882 are as follows:

4(1) Rule against perpetuity

4(2) Doctrine of Conditional Vesting

4(3) Bequest to the person not in existence at the time of testator's death subject to prior interest

4(4) Gift Deed for unborn Person

4(5) Wills and Trusts for the benefit of unborn person

4(1) Rule against perpetuity:

The term perpetuity means indefinite period or endless time, but this provision is against the perpetuity which means the period of time is specified for the transfer to unborn person.

When a life interest is created for an unborn, the vesting of such interest cannot be post ponded beyond the life time and also until the person attains majority.⁴ The right of enjoyment of the property can be post pond until the child attains majority.

For example:

A is transferring a property to C (unborn) but prior interest is with B vesting with condition that C can enjoy the property and get absolute interest only after the lifetime of B in addition to 1 year.

Till then C cannot enjoy or alienate the property. Whether this condition is void?? No, it applies

³ Transfer of property act – S.N. Shukla New edition – ALLAHABAD LAW AGENCY

⁴ Raja Bajarang Bahadur Singh v Thakurain Bakhtraj kuer (AIR 1953 SC 7)

rule against perpetuity where the unborn will definitely get the absolutely interest after that condition is fulfilled.⁵

For Example:

- i. A executed a will regarding the devolution of his estate. The will created successive life interest in favor of his certain family members. The first interest is in favor of his wife after her death only the interest will transfer to his son. Then after the death of son, the remainder was intended for son's unborn descendants.
- ii. whether the will created by the testator is valid this was challenged under section 14 Rule Against Perpetuity.
- iii. 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.⁶

4(2) Doctrine of conditional vesting

The rights of the unborn person in a transferring of the property do not vest until they are born and have legal personality. However, under the doctrine of condition precedent a transfer may be considered to vest upon birth, provided certain conditions such as creating prior and absolute interest.

For example:

- i. A creates a will in favor of a living person which is his wife for life interest, with remainder to vest in the unborn children of him.⁷
- 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.

4(3) Bequest to person not in existence at the time of testator's death subject to prior bequest:

Section 113 of Indian succession Act 1952 defines When a bequest made in a person not in existence or unborn at the time of testator's death, subject to a prior bequest contained in the will, the later bequest shall also be void, unless it comprises the whole of the remaining

⁵ Transfer of property act – S.N. Shukla New edition – ALLAHABAD LAW AGENCY

⁶ Raja Suraj Baksh Singh v Rani Raghunath Kunwar (1916)

⁷ Sopher v Administrator – General of Bengal AIR 1944 PC 67

interest of the testator in the thing bequeathed.

The intent is to safeguard the unborn child's right to inherit the property once they are born.

If incase a person dies without writing a will in Hindu estate then its meant to be inherited by an unborn heir.

The bequest should be made in favor of an unborn person at the time of transfer. It should be made in favor of more than one generation.

For example:

- i. If a bequest or transfer is made for the benefit of an unborn person, the actual enjoyment or interest of the property takes place only after the unborn person is born.⁸

4(4) Gift deed for unborn person

A Gift deed for the benefit of unborn person refers to a transfer of property or the assets by the donor to the beneficiary who is yet to be born. A gift deed is a voluntary transfer of property during a person's lifetime.

The gift deed must be structured in a way that the gift takes effect only after the child is born. A gift deed can be conditioned upon the birth of the child. This means that the property is not actually transferred until the child is born and becomes a legal person.

This type of gift deed creates a contingent interest for the unborn person, i.e., the property is transferred but the right to enjoy, alienate or having possession is transferred only after the birth of the person.

The considerations required for gift deed for the benefit of unborn person:

Registration:

If a gift deed involves immovable property, it should be registered with the local sub-registrar under the Indian Registration Act, 1908. i.e., in case of land or house.

Possession and Title:

Even though the gift is made in favor the unborn person, the possession and Title of the

⁸ K. K. Verma v. Union of India (1955) AIR 1955 SC 114
<https://indiankanoon.org>

property will still remain with the donor. until the birth of the unborn person.

Validity of the gift:

If in case the unborn person is not born or dies before he was born or the condition is not fulfilled, the gift would become void unless there is any alternative provision in the deed for such an event.

For example:

- i. If a person made a bequest in favor of an unborn child and the enforceability of such a bequest
- ii. whether such enforceability of such a bequest is valid
- iii. The supreme court held that while a bequest to an unborn is valid, the gift or transfer takes effect only after the birth of the unborn.⁹

4(5) Wills and Trusts for the benefit of unborn person**Transfer through trust:**

One of the most common methods for making a transfer of the property in the benefit of unborn person is through trust. The transferor may create a trust that trust holds the property or assets for the future benefit of the unborn person. The trust is typically structured to come into effect once the child is born or attains certain age i.e., majority.

The condition for the validity of this trust is the unborn person must have been conceived at the time of the transfer, even if they are not yet born. In some jurisdiction, if the person is born alive only the transfer or trust is valid; or else if the unborn is not born alive, then the transfer or trust may fail.

Transfer through wills:

A person leaves his property through a will to a trust for the benefit of the unborn person i.e., his grandchildren. This allows the grandchildren to benefit once they are born.

Section 113 of Hindu Succession Act, 1956 provides that if an heir is born at the time of death of testator, the property can be transferred for their benefit, but the transfer will only effect

⁹ Jeev raj v. Gopinath (1950) AIR 1950 SC 42

when the unborn heir is born alive.

For example:

- i. whether the unborn person can inherit property through a will. The supreme court upheld the validity of the bequest made in favor of an unborn child, as long as the unborn is born alive.
- ii. 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.¹⁰

CHALLENGES IN TRANSFERRING OF PROPERT FOR THE BENEFIT OF UNBORN PERSONS

The legal system do generally allow for transfers for the benefit of unborn persons, they do not always make such transfer in a straight forward manner, it should be always vested upon a living person before the birth of the unborn person.

The complexity arises in proving the intention behind the transfer of such property for unborn person and ensuring the unborn person eventual entitled to the property.

Uncertainty of Birth:

There is always the possibility that the unborn person may not Born alive during their birth, which can create ambiguity in the transfer. Legal doctrines such as “gestation” period or “Live birth” requirements can complicate the issue more.

Dispute over the intent property:

In some cases, the family members or heirs may dispute the validity of a transfer made for the benefit of an unborn person, particularly if the conditions of the transfer are vague or unclear. This can lead to litigation regarding the interpretation of the transferor’s intentions.¹¹

¹⁰ S. Krishnan v. K. Krishnamurthi (1998) 4 SCC 415

¹¹ Transfer of property act S.N. SHUKLA’S- ALLAHABAD LAW AGENCY

CONCLUSION

Transfer for the benefit of an unborn person is common and useful tool in estate planning and trust law, ensuring that future generations are provided for even before their birth. However, such transfers must be carefully structured to comply with legal requirements, such as the rules surrounding the vesting of rights, the rule against perpetuity, and the status of the unborn person in legal terms. With proper legal advice and documentation, transfers for the benefit of an unborn person can serve as a secure and lasting means of providing for future heirs. Thus, the validity of a transfer in favor of an unborn person, it is important that the property should be transferred including the whole of the remaining interest of the transferor upon the property should be conveyed to the unborn person. However, as soon as the transfer of property comes into effect, the vested interest is also transferred to the unborn person. The transfer of property to benefit of unborn persons, take effect only according to the provisions discussed above. Or else, the transfer will be declared as void.

