

Divorce in India

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ABSTRACT

Section 13 of the Transfer of Property Act 1882 states the transfer of property for the benefit of an unborn child. This section states that a person can transfer his ownership to an unborn child whose prior life interest should be created. The phrase unborn child simply means 'a child or a person who is not yet born but exists'. A child who isn't born but exists in the form of a mother's womb. Such a child is recognised by law. So, basically, the law recognises an unborn child as a person. The legal rights or status of an unborn child are undeniable, as they influence or directly imply the rights of others. So, the Indian law gives a right to any living individual to transfer immovable property to an unborn child only if the unborn child exists in the mother's womb. There is also a major concept in this section: as property cannot be transferred directly to an unborn child, it should be created in the interest of an unborn child must be preceded by prior interest. As property transfer to an unborn child consists various rules and regulation. There are also conditions that are needed to look up.

Keywords: transfer, property, unborn child, immovable.

I. INTRODUCTION

Section 5 of the Transfer of Property Act 1882 defines the transfer of property.

It states that a living individual can transfer his or her property, in the present or in the future, to one or other living persons, or to himself and one or more other living persons. "living person" includes a company, association, or body corporate, whether incorporated or not. There is a legal process by which the right of possession of a property or asset is transferred from one person to another. This process involves specific legal formalities, documentation, and some payment of consideration. The transfer of property implies various means, such as sale, gift, inheritance, or other legal mechanisms. In other words, one may transfer rights in things such as a mortgage on a house or the transfer of a debt.

However, there is an exception to Section 5 of the Transfer of Property Act, which is Section

13 of the same act. Section 13 defines the transfer of immovable property to an unborn child. An unborn child who is not yet born but exists means it is present in the form of a mother's womb. An unborn child should be considered a person as a child that keeps developing inside the mother's womb until its birth. As it showed, the heartbeat of a child can be heard between the second and third weeks of pregnancy.

UNDERSTANDING ON UNBORN

The rights of an unborn child on the property are recognised and codified in Indian law.

In the case of *Tagore vs. Tagore*, it was held that a child in the womb is a person in existence for proprietary rights. Therefore, these transfers are legally valid, but the property is not directly transferred, as a transfer of property deals with *inter vivos*; it is transferred between two living persons.

Section 13 of the Transfer of Property Act is as states, '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 property.'

Section 13 of the same act deals with the transfer of property to an unborn child. So there is a need to create an interest in favour of the unborn child. It is important to establish an interest in an individual who is alive at the time before transferring to an unborn.

Unborn is a term mostly used in Section 13 of the Transfer of Property Act, but there are still terms that are limited interest and absolute limited. These terms are mostly used and most important as well.

Limited interest means that if any person transfers his or her property to an unborn person, they must create an interest to an individual who is alive. The individual has the right to enjoy the property but cannot provide the right to sell or transfer it to another. A transfer to a living person should be made on the date of the transfer and

confer the right to enjoy the property until the person's death.

If A wants to transfer his property to an unborn child. He appointed B as a trustee. When the baby is born, the property will transfer to him absolutely.

As A has appointed B as a trustee, he has limited rights to the property until birth.

It means a trustee cannot sell, gift, or mortgage that property, but when the child is born, the absolute transfer should be passed.

However, in the case of agriculture land, *Rukhamanbai v. Shivram*, it was held that an individual who is entrusted with the life interest of agricultural land is permitted to lease it, but only if there is no other intention.

Absolute interest means that if any living individual passes in property to an unborn child by creating life interest, then property will wholly transfer to the child. If the person created any conditional terms in the transfer, the transfer should be void. But not the whole transfer is void.

Example: A person wants to transfer his property to his daughter's children. He created a will that said if his daughter's child is a male, the property will transfer absolutely; if any female is born, the property will transfer, but they can't sell it; or if there is no child of his daughter, the property will transfer to his brothers.

As he created a will, a male child to his daughter, will get the property absolutely; however, there is a condition on the birth of a female child that a girl child has limited rights, and if there are no children born, then property will transfer to his brother. But there is a condition that applies to the birth of a girl child where they have limited interest, so that condition is void. After every condition is null,

As in the similar case of *F.M. Devaru Ganapati Bhat v. Prabhakar Ganapathi Bhat*, the transfer of property is held with the condition that if any male children are born to her brother, then his brother and children will be joint holders of the property. It states that it is not invalid as Section 20 of the same act also permits to create interest in the favour of an unborn child, as in this situation the right of the unborn child is unaffected.

As a consideration of Section 13, the transfer of property to an unborn child has some conditions as well.

1. Immovable property can only be transferred.
2. The property needed to transfer absolutely to the unborn. An unborn person cannot be granted an interest that only lasts for a lifetime.
3. There should be no direct transfer to an unborn child.
4. If a child dies before the age of majority, then property will transfer to the transferee.

In *Sahebzadi Oalia Kalsum Trust vs. CED*, the court states that creating a trust is not the same as creating a life interest—a life interest that can be transferred to an unborn individual.

As section 14 prohibits the inalienable status of property for an unlimited period, including transferring to future generations.

II. CONCLUSION

As discussed above, the transfer of property to an unborn person is more extensive than the transfer of property defined in Section 5 of the Act. There are rules and laws needed to carry over the validity of a transaction to an infant. It is important to create the mechanism of trusts so that the trustee can only enjoy the property. This also defines the difference between life interest and absolute interest. In India, the existence of unborn children is recognised by law, as seen in past cases. Rights of unborn person is also recognized by Hindu succession act, that states if a child is in womb of the mother at the time of the death of the intestate, has the same right of inherit as intestate. As recognition of this law is topic of controversy, as person is not born yet in existence, has right to inherit is need to understand precisely.

REFERENCES

- [1]. Transfer of property act, 1882
- [2]. [Scconline.com/blog/post/2021/10/01/transfer-of-property/amp/#_ftn14](https://scconline.com/blog/post/2021/10/01/transfer-of-property/amp/#_ftn14)
- [3]. Hindu succession act, 1956.
- [4]. [Property-law-and-the-legal-friction-right.pdf](#)