



FACULTY OF JURIDICAL SCIENCES

COURSE: BALLB &BBALLB

SEMESTER: VI

SUBJECT: LAW OF PROPERTY

SUBJECT CODEB A L 603

&BBL 603

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Lecture-7



Transfer of property To Unborn Person

Section 5 of the Transfer of Property Act, 1882 defines the phrase “transfer of property”. The section provides that “transfer of property” means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more than one living persons; and “to transfer property” is to perform such act. Further provision to the section mentions that “living person” includes a company or association or body of individuals, whether incorporated or not, but nothing mentioned here shall affect any law which is operational in India relating to transfer of property to or by companies, associations or bodies of individuals.

Thus, bare reading of the above mentioned section helps us understand that the conveyance of the property must be from one living person to another living person. When it is said that both the individual must be living, it is implied that transfer by will does not come within the scope of section 5 as such transfers come into effect only after the death of the person who is executing the will. However an exception to this section is section 13 which facilitates the transfer of immovable property in favour of an unborn person.

The provisions of Transfer of Property Act, 1882 in general do not allow the transfer of property directly to an unborn person. Before discussing the concept further, let us understand the meaning of unborn person in reference to this act. A person who does not have any current existence but has a specific reference to one and who 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. Therefore, it should be noted that the term ‘unborn’, refers not only to those, who might have been perceived but not yet born, that is a child in womb, but also includes those who are not even perceived. Whether they will be born at all or not is all possibility, but a transfer of property is admissible to be effected for their benefit. After understanding the meaning of the phrase “unborn person”, now let us examine the concept enshrined under section 13 of the Transfer of Property Act, 1882.

Provision under Transfer of Property Act, 1882

Section 13 of the Transfer of Property Act, 1882 provides that when for the transfer of property, an interest therein is created for the benefit of an unborn person at the date of the transfer, a prior interest is to be created in respect of the same transfer and 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 person transferring the property in the property to be transferred.

Thus, in order to transfer a property for the benefit of an unborn person on the date of the transfer, it is imperative that the property must first be transferred by the mechanism of trusts in favour of some person living other than the unborn person on the date of transfer. In simpler terms, it can be said that the immovable property must vest in some living person between the date of the transfer and the coming into existence of the unborn person as the property cannot be transferred directly in favour of an unborn person.

In other words it can be said that the interest of the unborn person must in all cases be preceded by a prior interest. Moreover, when an interest is created in favour of an unborn person, such interest shall take effect only if it extends to the whole of the remaining interest of the person transferring the property in the property, thereby making it impossible to confer an estate for life on an unborn person. The interest in favour of the unborn person shall constitute all of the entire remaining interest in the estate. The underlying principle in section 13 is that a person disposing of property to another person shall not cause obstruction in the free disposition of that property in the hands of more than one generation. Section 13 does not apply restrictions on the successive interest being created in favour of several persons living at the time of operation of the transfer. What is provided as a restriction under section 13 of the Transfer of Property Act, 1882, is the grant of interest, limited by time or otherwise, to an unborn person.

Thus, it can be said that if the persons for whose benefit the transfer is to take effect are living, any number of successive life interests can be created in their favour. However, an important point to note here is that if the interest is to be created in favour of persons who have yet not taken birth, then in that case absolute interest must be granted to such unborn persons.

Essential Elements of Section 13:

The essential elements of section 13 have been discussed below. They are as follows:

1. No Direct Transfer :

A transfer cannot be directly made to an unborn person. Such a transfer can only be brought into existence by the mechanism of trusts. It is a cardinal principle of property law that every property will have an owner. Accordingly, if a transfer of property is made to an unborn person, it will lead to a scenario wherein the property will remain without an owner from the date of transfer of property till the date the unborn person comes into existence.

2. Prior Interest

If the circumstances are such that there is no creation of trust, then in that case the estate must in some other person between the date of transfer and the date when the unborn person comes into existence. In simpler words we can say that the interest in favour of an unborn person must always be preceded by a prior interest created in favour of a living person.

3. Absolute Interest

The entire property must be transferred to the unborn person. The transfer to an unborn person must be absolute and there should be no further transfer from him to any other person. An interest which remains only for the lifetime cannot be conferred on an unborn person. Under the English law, an unborn person can be conferred an estate only for his lifetime. This concept of English law, however, is subject to a restriction known as the rule of double possibilities. This rule was recognised in the case of *Whitby Mitchell*. The rule states that life interest to an unborn person should not be transferred as doing so will give rise to existence of two possibilities. The first possibility will be the birth of the unborn person to whom the life estate was to be transferred and the second possibility will be the coming into existence of issues of that unborn persons. Thus, the transfer of property to an unborn person can be permitted only if the absolute interest is transferred and not just the life estate.

Illustration

“A” owns a property. He transfers it to “B” in trust for him and his intended wife successively for their lives. After the death of the survivor, it is to be transferred to the eldest son of the intended marriage for his life, and after his death, it is to be transferred to A’s second son. The interest so created for the benefit of the eldest son does not take effect because it does not extend to the whole of A’s remaining interest in the property.

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1. Whether a transfer can be made in favor of an unborn person?

- (a) Yes, by machinery of trust
- (b) Yes
- (c) Guardian has got to be appointed first
- (d) None of the above

2. For creating an interest in favor of an unborn person, which one of the following is essential?

- (a) Creation of absolute life interest in favor of living persons
- (b) Absolute interest is to be given to unborn person
- (c) Unborn person must be born before the termination of last prior interest
- (d) All of the above

3. 'A' transfers his property to 'B' for life and thereafter to his unborn son for life. In this case transfer of property to the unborn son is?

- (a) Valid
- (b) Illegal
- (c) Voidable
- (d) Void

4. Which out of the following does not constitute exception to the rule against perpetuity?

- (a) Where a property is transferred for the benefit of the public
- (b) A lease with renewal
- (c) It does not apply to vested interests
- (d) A fund is bequeathed to next seven generations yesn

50. In which section the rule against perpetuity was propounded?

- (a) Section 12
- (b) Section 13
- (c) Section 14
- (d) Section 15

