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# Transfer of Property to Unborn Child

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## ABSTRACT

*Under Sec 5 of Transfer of Property act 1882, the term “transfer of property” is described. The term Transfer of property means: it is an act done by a ; who transfers his property either in present or in near future to one or other living individual. It is to be noted that, transfer of property to any individual would also include companies, association or body corporate whether incorporated or not.*

*However, Sec 13 of this act do act as an exception for the definition explained in Sec 5 of the same act. Sec 13 of TOPA,1882 discusses about the concept of “Transfer of an immovable property to an UNBORN CHILD”. Under this section the phrase “unborn child” means a child or a baby who is present in mother’s womb. A child who isn’t born yet there is an existence of such child in mother’s womb, then an immovable property can be transferred in to that unborn child. As stated in Sec 5, the transfer of property **would take place between two or more living individuals**. The same concept is applied in Sec 13. The Indian law determines that any living individual can transfer the property to the unborn child only if such **unborn child is present in mother’s womb**. The unborn child present in mother’s womb would be considered as a living individual and hence such transfer is held to be valid. If there is no presence of baby even in mother’s womb, then the property can’t be transferred to such a child by any living individual.*

**Keywords:** Property, Living individual, Immovable, Unborn child, Transfer.

## I. INTRODUCTION

Under Sec 5 of Transfer of Property act 1882, the term “**transfer of property**” is described. The term Transfer of property means: it is an act done by a living individual who transfers his property either in present or in near future to one or other living individual. It is to be noted that, transfer of property to any individual would also include companies, association or body corporate whether incorporated or not.

- Ex: A wants to transfer his 3 buildings to B (his daughter), C (his son) and E (his wife). Therefore, under Sec 5 of this act, the above transaction performed by A can be held valid.

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However, Sec 13 of this act do act as an exception for the definition explained in Sec 5 of the same act. Sec 13 of TOPA,1882 discusses about the concept of “**Transfer of an immovable property to an UNBORN CHILD**”. Under this section the phrase “unborn child” means a child or a baby who is present in mother’s womb. A child who isn’t born yet there is an existence of such child in mother’s womb, then an immovable property can be transferred in to that unborn child. As stated in Sec 5, the transfer of property **would take place between two or more living individuals**. The same concept is applied in Sec 13. The Indian law determines that any living individual can transfer the property to the unborn child only if such **unborn child is present in mother’s womb**. The unborn child present in mother’s womb would be considered as a living individual and hence such transfer is held to be valid. If there is no presence of baby even in mother’s womb, then the property can’t be transferred to such a child by any living individual.

This sec 13 of TOPA act, 1882 is an extract taken from taken from British from the concept called “The rule of Double Possibilities”. This rule defines that: “that a person disposing of property to another shall not shackle the free disposition of that property in the hands of more than one generation[1]. As we have read earlier that both the parties to a transfer of property must be living persons (including juristic person), but Section 13 is an exception to the general rule of transfer. Sec 13 is a transfer by born to the unborn. A property can be transferred to a child in the mother's womb but not to one who's not in the mother's womb<sup>1</sup>.

## **II. CONDITIONS TO BE FULFILLED WHILE TRANSFERRING A PROPERTY TO UNBORN CHILD**

1. **Prior Interest:** A property shall be transferred to an unborn child only via trusts and not directly. If there is no such presence of trust, then such a property shall first be transferred to any living individual and later the same shall be forwarded to the child.

**Ex:** For instance, A transfer property to B for life, and after him, to C, and then to D again for their lives and then absolutely to B’s unborn child UB.

A —————B (life interest)  
 —————C (life interest)  
 —————D (life interest)  
 —————UB (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.

**2. Before the death of the estate holder:** The baby must come into the world prior to the death of the last estate holder. Once the child is born, the child would be allotted with vested interest. Though the possession of the property isn't with the child immediately, yet there would be a vested interest created in the favour of the born child.

**3. Immediate transfer of rights:** All the rights shall be vested with the unborn child as soon as he comes into existence. Once the baby is born, he shall be the "Absolute owner" of that transferred property. In other words, it can be stated that once the baby's birth is taken place he/she shall be the sole owner of that property even though there is no immediate possession.

**4. Absolute Interest:** The property which is transferred to an living individual prior to the birth of the child, the same property shall be completely transferred to the child once he comes into in this world. This transfer of the property to the child shall be "absolute" and there shall be no further transfer from him. Also, as per the English doctrine, the transfer of the property to an unborn child shall be accepted only if the absolute interest is transferred and not merely the life estate.

**Ex:** For instance, A creates a life estate in favor of his friends B, and a life estate for the benefit of B's unborn first child UB1 and then absolutely to B's second child UB2.

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

The above figure is of 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 UB2 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.

**(A) From the above points and flow chart, the following conclusions can be dawn:**

- 1. To the individual to whom the property is transferred is to be vested with only "life interest".** The person who has is vested with the life interest shall have the right of possession of such transferred property. Such individual has to preserve the property

like a “trustee”. Once the child is born the whole interest towards such property shall be transferred to him/her.

2. Second condition states that, the unborn baby must come into life before the death of the trustee (I.e the individual who is vested with that property). If the baby doesn't come into existence and the trustee dies, then such property would be reverted back to the transferor or any of his existing legal heirs.

### III. LEADING CASE LAW: GIRIJA DUTT V. DATA DIN AIR 1934 OUDH 35. 147 I.C. 991

The above mentioned case do deal with Sec 13 of TOPA, 1882. It is a leading case where the concept of transfer of property to an unborn child has been discussed.

**(A) Facts:** A decided to transfer his property to B (daughter of her nephew), and later to her male descendants (sons) if any of them are born with absolute interest. Also, there was a clause stated that if there are no male descendants born to B then the same shall be forwarded B's daughters without any power of alienation. Lastly it was stated by A that if there are no issues to B (I.e neither male nor female) then to B herself. B died issue-less.

**(B) Issues:** The issues raised in this case was:

1. The question was raised whether the gift to unborn sons or daughters can be held as valid?
2. Whether the property transferred to B via gift can be held valid?

#### **(C) Decision**

1. The court held that, transfer of property to B in the form of gift shall be held **valid** since B was a living individual at the time of this transfer.
2. However, the court stated that transfer of property to B's sons or daughters was void under Sec 13 of TOPA,1882 because there was **No prior estate** and **No absolute transfer/ No absolute interest vested**. Hence any other subsequent transfers depending on this event would also be held **void**.
3. **Rule established in Whitby v/s Mitchell:** The rule established in this case is known as **“Rule against double Possibilities”** which is now abolished under British law. This rule states that, “If an interest in the realty is given to an unborn person, any remainder to his issue is void, together with all subsequent limitations. Thus, if land was limited to "A (a bachelor) for life, remainder to his son for life, remainder to A's son's son in fee simple, the remainder to the grandson would be void under this rule”<sup>2</sup>.

**4. Raja Bajrang Bahadur Singh v. Thakurain Bakhtaraj Kuer (AIR 1952 SC 7):** As discussed in the above case, there could be no transfer of property done in the favour of an unborn child if such child isn't even present in mother's womb. This leading case discusses about the transfer of property to an unborn child in the form of gift. The court in this case laid down that, when a property is transferred in the form of gift to certain individuals who are in existence and to others who aren't, then this transfer wouldn't completely fail. Such transfers are valid with regard to the individuals who are living and rest part of the transaction would be held as void.

#### **5. Transfer of Property According To Hindu Law And Mohammedan Law**

- As per Sec 2 of Hindu law any kind of transfer or gift to an unborn child is void. However, in recent times this rule has been modified and the word "Hindu" was omitted from this section, whereas the other sections are directly applicable to Hindus.
- As per Mohammedan law, any kind of property transfer to any individual who isn't in existence on the date and time of transfer shall be held as invalid except in the case of Waqf.

### **IV. DIFFERENCE BETWEEN INDIAN AND ENGLISH LAW IN TERMS OF TRANSFER OF PROPERTY**

1. As per Indian law, the minority period ends at the age of 18 whereas, in English law the minority period ends at the age of 21.

2. In case of Indian law, the property **is to be transferred** with the concept of **absolute interest**, whereas in English law transfer of property with the concept of **absolute Interest isn't mandatory**.

3. As per Indian law, the unborn child should come into existence before the death of the last estate holder. This isn't the case in English law. As per English law the unborn child should come into existence within 21 years from the death of last estate holder.

4. The period of gestation should be an "actual period" in case of Indian law. Whereas in case of English law it shall be termed as "gross period".

### **V. EXCEPTIONS TO THE ABOVE MENTIONED RULES AND CONDITIONS**

**1. Transfer for Public benefit:** Where any kind of property is transferred for the benefit of general public then it shall not be termed as invalid. Ex: for the advancement of knowledge, religion, health, commerce or anything beneficial to mankind.

**2. Covenants of Redemption:** This rule generally applies in the case of mortgages.

- 3. Personal Agreements:** Agreements that don't involve creation of interest shall not be effected by this rule. This rule shall be invoked only in those cases where transfer of interest is involved.
- 4. Pre-emption:** In this, there is an option of purchasing a land and there's no question of any kind of interest in the property, so this rule does not apply.
- 5. Perpetual lease:** It is not applicable to the contracts of perpetual renewal of leases.

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