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OWNERSHIP RIGHTS OF AN UNBORN CHILD IN PROPERTY: AN ANALYTICAL STUDY OF LEGALITY WITH REFERENCE TO SECTION 13 OF THE TRANSFER OF PROPERTY ACT, 1882

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ABSTRACT

This paper is a comprehensive analysis of ownership rights of an unborn child in a property, especially referring Section 13 of Transfer of Property Act, 1882. The provision allows transfers to be made to benefit persons who did not exist at the time of the transfer and is a balance between recognition of unborn rights and the rule against perpetuities. The paper examines the legislative intent of Section 13 and its historical background, drawing on the principles and theories of Roman law, English equity and indigenous Indian law, and placing it in the context of the general legislation of property in colonial India. It starts with the statutory conditions for transfers to unborn persons with special focus on the need to create a prior life interest and to have absolute ownership upon vesting. It then examines the jurisprudential basis of the provision, noting the quasi-personal status that has been given to unborn children and the conditionalness of their rights. Judicial interpretation is critically analyzed, e.g. Tagore's case v. Tagore, Raja Bajrang Bahadur Singh v. Thakurain Bakhtraj Kuer, highlighting the role of judiciary in upholding legislature intent and avoiding perpetuity. Along with this doctrinal discussion of contingent and vested interests, the paper considers the ethical and policy dimensions of protecting future generations and the difficulties of enforcement in the form of guardianship and trusteeship. It critically examines the positive and negative aspects of Section 13, highlighting that it has been effective in protecting unborn rights, but also identifying its inflexibility in contemporary times, especially in the context of advances in reproductive technologies, surrogacy, and estate planning.

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Keywords: Unborn child, property rights, Section 13, Transfer of Property Act, rule against perpetuity, contingent interest, absolute ownership, succession, guardianship, comparative jurisprudence.

INTRODUCTION

Historically, jurists, legislators and scholars of private law have been puzzled by the question of whether unborn children can have an ownership interest in property. The question is not only theoretical but very practical, because it involves the succession, the inheritance, guardianship and all legal philosophy about personhood. This debate has a statutory basis in Indian jurisprudence under the Transfer of Property Act, 1882 (hereinafter "TPA") under which transfer of property for the benefit of unborn persons have been explicitly provided. The provision is simple, yet complex in terms of the nature of ownership, the time limits of legal personality and the balance between the intent of the legislation and judicial interpretation.

Property law, being a part of private law, is essentially about the management, transfer and safeguarding of rights over real and intangible property. Ownership, in the classical sense, is the most complete right that individuals can have over a thing, which includes the rights to possess, use, enjoy, and dispose of it. However, the notion of ownership is not either-or, but is subject to social, moral and legal factors. In the case of ownership of an unborn child, the law is faced with the problem of the rights of a non-existent entity. This paradox is not peculiar to Indian law, but is seen in the Roman law where there is a maxim, nasciturus pro iam nato habetur, quotiens de commodis eius agitur ("the unborn is treated as born when his interests are being served").[2]

The principle is reflected in section 13 of the TPA which allows the transfer of a property for the benefit of unborn persons under certain conditions. The provisions contained in the transfer of property state that the transfer cannot be made directly to an unborn person, but it can be made by creating a prior interest in favor of a living person, with the remainder to vest in the unborn on their birth.[3] In the provision, the unborn child's interest is dependent on its eventual birth, while the need for protecting future rights is met through the prior interest creation on behalf of a living person. It has been criticized, however, that the

[2] Digest of Justinian, Book I, Title V.
[3] Transfer of Property Act, No. 4 of 1882, § 13 (India).

requirement of a prior life interest is too restrictive, especially when the transferor is trying to benefit the unborn directly, rather than through some intermediacy.

The concept of legal personality provides the jurisprudential basis for an interpretation of Section 13. The law traditionally understands that persons are entitled to rights and subjects to duties; and the issue of whether an unborn child is a "person" has been discussed at various levels in various jurisdictions. The unborn is not a person in the strict sense of the word, but it is given a quasi-personality status for certain purposes, including inheritance, guardianship, and transfer of property, only if the child is born alive.[4] In all the cases before the Supreme Court of India relating to succession and guardianship, it has consistently held that the unborn child's rights are contingent but they must still be protected.[5]

It is also important to note that Section 13 has a history. The Transfer of Property Act was passed in 1882 because of the codification of property laws in India in colonial times. Before the advent of codification, the transfer of property was regulated by a combination of customary law, Hindu personal law, Muslim personal law and English common law principle. The framers of the Act aimed to reconcile these conflicting influences and added clarity and predictability. The provision has been influenced by English equity law which accorded rights to unborn beneficiaries of trusts as well as by the Hindu law which allowed transfers for the benefit of future generations.[6]

Section 13 has also developed over time because of judicial interpretation. The case Tagore v. Tagore (1872) was decided before the TPA came into existence and has served to illustrate the restrictions on testamentary freedom and the conflict between the individual and legislation. Later cases have expanded the reach of Section 13, to the effect that transfers of unborn persons are allowed but must follow the statutory requirement for a life interest. Additionally, courts have made it clear that the unborn child's interest is contingent rather than vested, meaning that it does not accrue until the child is born, thus avoiding speculative claims.[7]

Contrasting jurisprudence provides useful insights of Indian position. As mentioned above, in Roman law the unborn was considered to have certain rights for the benefit of the unborn. English common law, through the doctrine of trusts, allowed property to be held for unborn beneficiaries, subject to the rule against perpetuities.[8] In civil law jurisdictions such

[4] M.P. Jain, Indian Constitutional Law 112 (8th ed. 2018).
[5] Kusum v. State of Maharashtra, (2000) 6 SCC 129.
[6] B.B. Mitra, The Transfer of Property Act 221 (12th ed. 2015).
[7] Tagore v. Tagore, (1872) 9 Beng LR 377 (PC).
[8] J.H. Baker, An Introduction to English Legal History 312 (5th ed. 2019).

as France and Germany, the unborn is recognized as having conditional rights, particularly in matters of succession.[9] The United States, through its property and succession laws, similarly acknowledges the rights of unborn children, often through the mechanism of guardianship or trusteeship. These comparative perspectives highlight the universality of the issue and the diverse solutions adopted by different legal systems.[10]

The doctrinal aspect brings up a number of analytical questions regarding the recognition of unborn rights. One of the issues is whether the unborn child is a "person" under property law. Second, the distinction between contingent and vested interests becomes important, given that there are medical and reproductive technologies that have advanced to the point where recognition of a contingent interest can also be regarded as vested.[11] A contingent interest is one that is subject to an event in the future, such as an unborn child, while a vested interest would be an immediate and absolute interest. Under the law, contingent recognition is only undertaken with caution, which also leaves uncertainty for beneficiaries. Third, there are real world issues to address in the implementation of such rights, including the problem of guardians or trustees acting in the best interests of the unborn. The protection of unborn rights is often complicated by problems with fraudulent transfers, mismanagement and disputes among heirs.[12]

The recognition of unborn rights has social and moral significance as a policy consideration. It allows for the continuity of the property; prevents the loss of the property to future generations and ensures fairness. But the constraints of Section 13 – such as having a prior life interest – could work against these goals. Furthermore, changes in science and technology, such as assisted reproduction, surrogacy and genetic interventions, have added new layers to the debate, and traditional doctrines need to be revisited.[13]

LEGISLATIVE INTENT BEHIND SECTION 13 OF THE TRANSFER OF PROPERTY ACT, 1882

The Transfer of Property Act, 1882 (TPA) was a significant piece of legislation in colonial India aimed at providing clarity and uniformity in the transfer of properties. Its provisions include, among others, a special one relating to transfers for the benefit of the

[9] Code Civil [C. civ.] art. 725 (Fr.); Bürgerliches Gesetzbuch [BGB] § 1923 (Ger.).
[10] Restatement (Third) of Property: Wills and Other Donative Transfers § 25 (Am. Law Inst. 2003).
[11] P. Ishwara Bhat, Property Law in India 145 (2016).
[12] Avtar Singh, Law of Property 98 (2017).
[13] R.K. Sinha, Transfer of Property Act 134 (2019).

unborn, which is the case in Section 13. In the context of the legislative goal to balance the requirement to transfer between "living persons" with the moral and social obligation to protect the interests of future generations, the key question is whether they are distinct or complementary.[14] The question is whether they are separate or overlapping goals in balancing the requirement to transfer between "living persons" with the moral and social obligation to protect the interests of future generations. The framers of the statute felt that it would be necessary to achieve a compromise between the individual's freedom of disposition and the public policy issues of the rule against perpetuities, certainty of ownership, and circulation of property in society.[15]

In the past, the property law in India was based on a combination of the Hindu and Muslim personal laws, customs and English common law. The drafters of the TPA had to consider the various traditions on the rights of unborn heirs and ancestry and adapt their provision to be both culturally meaningful and legally acceptable.[16]

There are three basic goals of the legislative intent of Section 13. It wished first, to acknowledge all unborn children as future rights holders of the land transfer, making for continuity of family ownership and for future generation. The second purpose was to offer a definite method of such transfers, requiring that a life interest be established in favor of a living person, the remainder to go to the unborn child on his birth.[17] Third, Section 13 was designed to uphold the principle of the rule against perpetuities which is a fundamental legal principle in England and was incorporated into Section 14 of the TPA. The requirement that the unborn child's right would be absolute and not just a life interest guaranteed that property would not be permanently "entangled" in the contingent claims of the unborn child.[18]

The legislative purposes have always been supported by judicial interpretation. Tagore v. Tagore (1872) was a precedent case prior to the TPA and the Privy Council ruled that it was not possible to transfer property in a way that was contrary to the rules of inheritance under the Hindus.[19] This case pointed to the risks of allowing testamentary freedom without restrictions and led to the drafting of Section 13. The Supreme Court of India in two later cases, namely, Raja Bajrang Bahadur Singh v. Thakurain Bakhtraj Kuer (1953) and Gourishankar v. Shantibai (1959), has interpreted the right to absolute interest and not limited or life interest for the benefit

[14] Transfer of Property Act, No. 4 of 1882, § 13 (India).
[15] M.P. Jain, Indian Constitutional Law 112 (8th ed. 2018).
[16] J.H. Baker, An Introduction to English Legal History 312 (5th ed. 2019).
[17] Digest of Justinian, Book I, Title V.
[18] Avtar Singh, Law of Property 98 (2017).
[19] Tagore v. Tagore, (1872) 9 Beng LR 377 (PC).

of the unborn beneficiaries, thereby reinforcing the intention of the legislature to prevent perpetuity.[20]

Other provisions in the TPA are relevant to the interpretation of Section 13 and help to shed further light on the legislative purpose. Under Section 5, definitions of transfers do not include a transfer to an unborn child. Except in the case of transfers for unborn beneficiaries, there is an exception in Section 13. With Section 13, the rule against perpetuities is incorporated into Section 14. Together, these provisions form a complete system, meeting the criteria for vesting and contingent interests, and for vesting of interest on birth, which is necessary to strike a balance between the right to recognize unborn rights and the need for certainty and circulation of property.[21]

At the policy level, the purpose and objective of Section 13 is to modernize Indian property law, and to respect indigenous law and policy. The legislature aimed at protecting both the unborn beneficiary as well as the public interest in the circulation of property, by demanding absolute vesting in the unborn. The provision is underpinned by a dual focus to individual and social interests, making it pragmatic.[22]

There has been a substantial amount of critical investigation of Section 13 by modern scholarship. In today's world, however, the strictness of Section 13 has been subject of criticism, given the advancements in reproductive technologies, surrogacy and estate planning. The reason is that, although the intent of the legislators was correct at the time, it may not be sufficient for current realities and require changes to the provision.[23]

DETAILED ANALYSIS OF SECTION 13, TRANSFER OF PROPERTY ACT, 1882:

The Transfer of Property Act, 1882 (TPA) was passed to codify and rationalize the property law in India, bringing together various influences of Hindu and Muslim personal laws, customary law and English common law. A few of its elements include a unique provision which recognizes the rights of unborns in regard to the transfer of property, which is found in Section 13. This section is restrictive and protective and reflects the purpose of the legislature to ensure that the rights of unborn children are considered and protected, while at the same time ensuring property transactions are not perpetually hindered by uncertainty and/or perpetuity.[24] Three key issues in the analysis of Section 13 are: (i) the conditions of transfer to unborn

[20] Raja Bajrang Bahadur Singh v. Thakurain Bakhtraj Kuer, AIR 1953 SC 7.
[21] B.B. Mitra, The Transfer of Property Act 221 (12th ed. 2015).
[22] P. Ishwara Bhat, Property Law in India 145 (2016).
[23] S. Krishnan, "Unborn Rights and Reproductive Technologies," 42 Indian Bar Review 67 (2021).
[24] Transfer of Property Act, No. 4 of 1882, § 13 (India).

persons; (ii) the need for a prior life interest in order to vest; and (iii) legal consequences of transfers.

The conditions under which the transfer of ownership to unborn persons is permitted.

The first requirement under section 13 is the transfer must be made for the benefit of a person who was not present at the time of the transfer. This is in line with the statutory recognition of unborn children as potential beneficiaries, even though they are not defined as "persons" as per section 5 of the TPA, where transfers are restricted to between living persons.[25] This is done by providing an exception that, although transfers to unborn persons cannot happen, transfers may be made in respect of contingent transfers to secure the rights of unborn persons. As part of the condition, transfers are not speculative or indefinite but are only made when the child is born.

It is a protection clause to ensure that the property will always be under the stewardship of a living person until the unborn child is born.[26] It avoids property being left in a legal limbo and continuity of ownership. The previous interest serves as a link between the transferor and the yet-to-be born interest.

The third requirement is that the interest given to the unborn child must include the entire interest of the transferor.[27] Here, absolute ownership, and not a limited or life interest, must be given to the unborn child. The idea is that it will stop perpetuity, that is, tying property to contingent claims indefinitely. The legislature's intent in providing for absolute vesting was to encourage movement of property and to discourage the encumbrances on alienation.

These conditions have been further confirmed by judicial interpretation. In the case of Raja Bajrang Bahadur Singh v Thakurain Bakhtraj Kuer, 1953, the Supreme Court had ruled that the interests of unborn persons are absolute, not limited interests, thus confirming the intention of the legislature in the first place.[28] In the case of Gourishankar v Shantibai, 1959, the Madhya Pradesh High Court had ruled that the interest of unborn persons is subject to the condition of live birth and this is a cautious approach of the legislature in the first place.[29]

The obligation to have had a prior life interest prior to vesting.

A condition of having a prior life interest is key to Section 13. This provision is intended to serve several purposes: First, the property must be transferred to a living person and then it

[25] Id. § 5.
[26] Avtar Singh, Law of Property 98 (2017).
[27] R.K. Sinha, Transfer of Property Act 134 (2019).
[28] Raja Bajrang Bahadur Singh v. Thakurain Bakhtraj Kuer, AIR 1953 SC 7.
[29] Gourishankar v. Shantibai, AIR 1959 MP 240.

passes to the unborn at the time of their birth.[30] First, it allows the rights of the unborn child to be under the control of a living beneficiary until the time that the rights become "actual". This ensures that property does not become "abandoned" and ensures legal certainty. Secondly, it is a way to protect the property: the previous "beneficiary" becomes the custodian of the property, holding it until the unborn child can hold rights. Thirdly, it is consistent with the principle against perpetuities, which would prohibit attaching property to contingent claims that would last forever.

The burdensome nature of the requirement of prior life interest has been condemned, especially in situations where the transferor wants to benefit the unborn directly.[31] The intent of the legislation, however, was to forestall speculation in transfer of property and to keep it in the hands of a living person until the unborn child's rights could be vested. This is the conservative attitude of the drafters, who wanted to accommodate recognition of unborn rights without uncertainty or non-calculability of property.

Comparative jurisprudence can provide some insights into this requirement. The comparative perspective sets the background for the requirement in English law and the so-called doctrine of trusts, through which the unborn child's rights are protected, as well as in other civil law jurisdictions such as France and Germany.

The legal consequences of such transfers.

The interest is contingent until birth, which means that the interest in the child does not come into existence until he or she is born alive. If the child is not born, then the interest does not exist and the property goes back to the transferor or previous beneficiary. This demonstrates the conservative attitude of the legislature, which wanted to stop any speculations and guarantee certainty of ownership.[32]

The need for absolute ownership means that the unborn child will have all rights in the property including rights of possession, rights of use, rights of enjoyment and rights to dispose of the property. This will prevent perpetuity and encourage the circulation of the property. It is also in keeping with the principle of fairness which states that unborn children should not be put at a disadvantage in succession and inheritance.

Such transfers have been interpreted by the judiciary. In Tagore v. Tagore (1872) the Privy Council ruled that any transfer to some unborn would have to be made in accordance with the statutory requirements, a decision which shaped the wording of Section 13 which

[30] B.B. Mitra, The Transfer of Property Act 221 (12th ed. 2015).
[31] P. Ishwara Bhat, Property Law in India 145 (2016).
[32] Bürgerliches Gesetzbuch [BGB] § 1923 (Ger.).

ensured the compliance of such transfers with the rules of succession under the Hindu law. These interpretations have the advantage of not only reinforcing the intent of the legislature, but also that they ensure transfers under Section 13 are valid and enforceable.[33]

On a policy level, respect for the right to life of unborn children weighed against certainty and circulation of property is considered the intent of the legislature in Section 13. The provision safeguards the unborn child and stops perpetuity and speculative claims. It also fits in with the larger issues of the TPA to modernize Indian property law and to integrate the various influences.

Critical Evaluation

Section 13 is important but is limited. The need for a prior life interest is limiting and could jeopardize testamentary freedom. Using live birth means that there is uncertainty and can lead to a loss of advantage for families when the birth is stillborn or miscarried. The rigidity of the provision has also been called into question in the light of improvements in reproductive technology, surrogacy and estate planning, with scholars arguing for some reform of this provision.[34] The other argument is that there would need to be uniformity in the law, and clarity, as the provision is not harmonized with succession law.

Despite the restrictions, Section 13 reflects the foresight of the framers of the Constitution in weighing individual liberty against the collective good of society. It recognizes the unborn rights and simultaneously prevents perpetuity, which is essential for the current as well as future generations to benefit from property law. It is still a guiding principle of the property law in India today and will help pave the way for future changes to the law.

CONCLUSION

The analysis of the right of ownership of unborn child in property under the Transfer of Property Act, 1882, in relation to section 13 is an intriguing study of the interplay of law, intent and interpretation. The heart of the matter is that Section 13 is grounded upon the notion that property can be transferred only between people, but the law must also address the moral and social obligation to care for the interests of those who were yet unborn. The provision is not just a mere exception to the rule, but a well-designed mechanism that recognizes the foresight of the framers in weighing the individual with the interests of society.

[33] Tagore v. Tagore, (1872) 9 Beng LR 377 (PC).
[34] S. Krishnan, "Unborn Rights and Reproductive Technologies," 42 Indian Bar Review 67, 72 (2021).

From a detailed analysis it is concluded that the purpose of Section 13 was threefold – to recognize the rights of the unborn, to give an unambiguous statutory means for such transfers and to prevent perpetuity. The legislature wanted to create fairness and certainty by making sure that there was a prior life interest for transfers to the unborn, and that the unborn would be given absolute ownership at birth. This arrangement will avoid the indefinite binding of a property to contingent claims and also safeguard the future interests of the unborn child.

The basis of Section 13 is jurisprudence of legal personality. The unborn is not a "person", for the purposes of the law, however, it has a quasi-personality. This is recognition in the form of a conditional right, based on the event of live birth, but nevertheless still indicative of the law's intent to provide protection beyond the present moment. The provision thus reflects the old Roman doctrine that "the unborn is considered born when it can be considered of benefit to mankind," which has been echoed in different jurisdictions and over the course of history.

Judicial interpretation has always helped to clarify the intent of the legislature. Tagore v. Tagore and Raja Bajrang Bahadur Singh v. Thakurain Bakhtraj Kuer are landmark cases which clarified that unborn beneficiaries must be given absolute interest and not limited interest or life interest, thus preventing perpetuity. Courts have made clear that the unborn child's rights are contingent, but nevertheless, deserving of protection, and that transfers are both valid and enforceable pursuant to Section 13. The interpretations in these cases show the judiciary's responsibility for maintaining the delicate balance that the legislature had in mind.

In a comparative context, Section 13 is in line with international law. The right of unborn children is recognized by civil law systems like France and Germany, and by English equity, as well as Roman law. The principle of universalism confirms the moral and legal value of this principle. The Indian provision is however unique because it does require absolute ownership, an attitude which is unusually rigorous towards perpetuity and alienation.

While Section 13 is a tool with promise, it has its drawbacks. The requirement of prior life interest has been faulted as too restrictive, especially with respect to transfers to direct the benefits to the unborn. Use of live birth introduces uncertainty and can be disadvantageous for families of stillbirths and miscarriages. Furthermore, the rigidity of the provision might not be appropriate in today's context, particularly given recent developments in reproductive technologies, surrogacy and estate planning. These developments cast doubt on the idea of family and inheritance as they have been understood in the past, and they require the rethinking of the statute.

The policy implications of Section 13 are important. The unborn rights clause ensures continuity of property within families and also protects future generations. Also, it eliminated perpetuity and encourages circulation of property by requiring full ownership and life interest. It is an approach of the legislature that is pragmatic, in that it is based on a balance between individual autonomy and societal interests. But in the present day, provisions can be subject to reform to reflect the changing realities. Some scholars have proposed that direct transfers to unborn persons should be allowed, with protections, and that the disposition of property should be consistent and clear with succession law.

Finally, it may be concluded that Section 13 of the Transfer of Property Act, 1882, is an outstanding piece of legislative wisdom, a clear sign of foresight and a mark of the wisdom and practicality of that section of the act. It institutionalizes the rights to the unborn children and protects the public policy from perpetuity. The conditions it imposes are carefully balanced between recognition of unborn rights and prevention of speculative claims: they are: prior life interest; absolute ownership; contingent vesting. These aims have been consistently upheld by judicial interpretation, and the provision works as intended.

However, the timeless relevance is contingent on adaption to contemporary contexts. The new conception of assisted reproduction, the new family and the new ideas about inheritance have given a new reason to review the old beliefs. One possibility for reforming Section 13 is to provide increased flexibility while maintaining the protection against perpetuity. A means of reforming Section 13 would be to provide increased flexibility, while keeping the protection against perpetuity. This reform should not violate the framers' intent, but it should continue their vision into the modern day.

To conclude, Section 13 of the Transfer of Property Act, 1882, evidences the strength of the law to reconcile metaphysics with necessity. It reflects the commitment of the legislature to safeguarding unborn rights and certainty and circulation of property. The advantages are its clarity and foresight; its weaknesses call for reform. The provisions of Section 13 of the Indian Constitution have been a prominent feature of Indian jurisprudence, as the law must be alive not just to the living, but also the unborn.