

Hiba under Islamic Law

Gift is a transfer of property where interest is transferred from one living person to another, without any consideration. It is a gratuitous and inter vivos in nature. This is the general definition that is accepted by all the religions, including Muslim law. As per the Muslim Law, a gift is called as Hiba. Under English laws, right in property is classified by a division on the basis of immoveable and moveable (real and personal) property.

CONCEPT OF HIBA

Under Muslim Law, the concept of Gift developed much during the period of 610 AD to 650 AD. In general, Muslim law draws no distinction between real and personal property. What Muslim law does recognize and insist upon, is the distinction between the corpus of the property itself (called as Ayn) and the usufruct in the property (as Manafi). Over the corpus of property, the law recognizes only absolute dominion, heritable and unrestricted in point of time. In English law a person having interest in the immoveable property for limited periods of time. On the other hand, in Muslim law, a person can be said to be an “owner” only if he has full and absolute ownership. If the use or enjoyment of property is granted to a person for life or another limited period such person cannot be said to be an “owner” during that period.

The English law thus recognizes ownership of the land limited in duration while Muslim law admits only ownership unlimited in duration but recognizes interests of limited duration in the use of the property. This basically differentiates Muslim Law’s concept of property and gift from that of English Law. Conception of the term ‘gift’ as used in the Transfer of Property Act, 1882 is somewhat different from the practice under the Muslim Law.

Under the Muslim Law, a gift is a transfer of property or right by one person to another in accordance with the provisions provided under Muslim law. Hiba (Tamlik al ain), is an immediate and unconditional transfer of the ownership of some property or of some right, without any consideration or with some return (ewaz); and the term ‘hiba’ and ‘gift’ are often indiscriminately used but the term hiba is only

The other types of gifts include Ariya (Tamlik al manafe), where the only usufruct is transferred and Sadqah where the gift is made by the Muslim with the object of acquiring religious merit. The Hanafi lawyers define hiba as ‘an act of bounty by which a right of property is conferred in something specific without an exchange’. The Shias hold that ‘a hiba is an obligation by which property in a specific object is

transferred immediately and unconditionally without any exchange and free from any pious or religious purpose on the part of the donor'.

REQUISITES OF A GIFT PARTIES TO THE GIFT SUBJECT OF GIFT EXTENT FORMALITIES OR MODE OF GIFT

1. PARTIES PARTIES DONOR and DONEE

- The age of majority
- Sound mind
- Free from coercion
- Free from undue influence
- Must be the owner
- May be made to juristic person
- Sex, creed, religion no bar
- In case of minor or lunatic- to the guardian
- Gift to unborn is void

2. SUBJECT OF GIFT

Anything over which a dominion, or right of property may be exercised (including right of equity of redemption) Which can be reduced to possession (includes incorporeal property and actionable claims)
ØWhich exists as either scientific entity or enforceable right Within the meaning of word 'Mal' / 'Ayn'
ØWhich is in existence right now- No future Gifts Gift Hiba- Gift of Corpus (Mal/Ayn) Ariyat- Gift of usufructs (Manafi) Sadqah- Religious gift

3. EXTENT OF DONOR'S RIGHT

Donor's power to gift his property is unrestricted. Ø he may not only give his whole property but also any portion he likes irrespective of the fact that the disposition of property will adversely affect on the inheritant's right to inherit. ØException: (during Marzulmaut) 1. He cannot gift more than 1/3 of his whole property in will

4. FORMALITIES

Declaration ijab must be clear and acceptance qubo ol delivery kabza real test is to see whether donor or essentials of hiba

DECLARATION BY DONOR:

1. There must be a clear and unambiguous intention of the donor to make a gift.
2. A declaration is a statement which signifies the intention of the transferor that he intends to make a gift.
3. declaration can be oral or written. (Ilahi Samsuddin v. Jaitunbi Maqbul) In Maimuna Bibi v. Rasool Mian, it was held that while the oral gift is permissible under Muslim law, to constitute a valid gift it is necessary that donor should divest himself completely of all ownership and dominion over the subject of the gift.
4. The donor may declare the gift of any kind of property either orally or by written means.

ACCEPTANCE BY DONEE:

1. A gift is void if the donee has not given his acceptance.
2. The legal guardian may accept on behalf of a minor.
3. Donee can be a person from any religious background.
4. Hiba in favor of a minor or a female is also valid.
5. A child in the mother's womb is a competent donee provided it is born alive within 6 months from the date of declaration.
6. A juristic person is also capable of being a donee and a gift can be made in their favor too.
7. On behalf of a minor or an insane person, any guardian as mentioned under the provisions of Muslim law can accept that gift.

DELIVERY OF PROPERTY:

1. In Muslim law, the term possession means only such possession as the nature of the subject is capable of.
2. Thus, the real test of the delivery of possession is to see who – whether the donor or the donee – reap the benefits of the property.
3. If the donor is reaping the benefit then the delivery is not done and the gift is invalid.
4. The mode of delivery of possession depends completely upon the nature of the property.

EXCEPTIONS TO DELIVERY

1. Gift by father to minor/lunatic son/daughter or by guardian
2. When donor and donee reside in the same house which is to be gifted

3. Gift by husband/wife
4. Gift by one co-sharer to another
5. Part Delivery 6. Zamindari Villages
7. Subject matters
8. Subject matter in the occupation of tenant.
9. Incorporeal Property
10. Where done is already in possession

VOID GIFTS

1. Gift to unborn
2. Gift in future
3. Contingent Gift
4. Gift with a Condition
5. Gift of 'Mushaa' is irregular but can be validated once separated

REVOCAATION

The donor has unrestricted right to revoke the gift before the delivery is complete θ Even after the delivery the donor can revoke either by consent of the donor or by the order of court (Mahbob v Abdul, 1964) The following gifts are absolutely irrevocable:

1. When donor is dead
2. When done is dead
3. When done is consanguine to donor
4. When the donor and done are in marital relation
5. When the subject of gift is transferred 6. When the subject of gift is lost, destroyed

7. Where subject of gift has increased its value 8. When gift is a sadqaah 9. When anything is accepted in return

GIFT FOR CONSIDERATION (IN REALITY A SALE) Hiba-bil- iwaz

- a. Exchange of two reciprocal gifts
- b. Actual payment of consideration
- c. Bona fide intention on part of donor
- d. No express agreement for a return i.e. the return is voluntary
- e. Delivery of possession is not necessary
- f. Irrevocable from the moment of its making
- g. It is like contract of sale Hiba-ba-shartul-iwaz Transfer of ownership for consideration With express condition for return Delivery of possession is necessary Consideration is post poned When consideration is done it assumes the character of sale Irrevocable on payment of iwaz.