Concept of Gift Under Muslim Law

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**Editor’s Note:**The concept of Gift, or Hiba in Muslim law has existed from the very inception of the religion, circa. 600 A.D. While Muslim Law has not been shown to recognise the differentiation of land into estates, it does recognise the difference between the ownership of the land and the right to enjoy it.

Unlike English Law, ownership comes only with the full deed of the land and not with the simple possession or temporary tenancy. Hiba is only one of the aspects covered by the Transfer of Property Act under the term ‘gift’. It is the transfer of the property and all rights along with it, without expectation of any compensation.

The term Hiba has been defined in several aspects by the courts of India and, pursuant to this, the term has also been seen to exclude all nature of services, for services do not exist at the time of the promise- they can only be performed after the promise to perform is made, which implies that the same cannot fall under the definition of Hiba which requires the object to be in physical existence at the time of the gifting. It has been widely construed that the term mal has to apply to the object so gifted for the laws of Hiba to apply.

Surprisingly enough, all gifts are revocable before the actual transfer of property is made (i.e.) any person can unilaterally revoke his or her promise to gift before the promise is fulfilled. After possession, the laws of revocation differ between Sunni and Shi’a laws.

**INTRODUCTION**

A 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. Rights in the land described as “estate” under English Law do not always imply only absolute ownership but it also includes rights which fall short of it and are limited to the life of the grantee or in respect of time and duration of use of the same[i].

Under Hindu Law, a gift is regarded as the renunciation of the property right by the owner in the favor of donee. According to Jimutvahana, under Hindu law’s concept of gift, ownership is not created by acceptance but by renunciation of the donor. But however, the Mitakshara school of Hindu law considers acceptance as an important ingredient for a gift. The donor can divest his interest by renunciation but cannot impose the same on the donee if he is not ready to accept[ii].

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, and there is no authoritative work on Muslim law, which affirms that Muslim law recognizes the splitting up of ownership of land into estates. 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. Limited interests in respect of property are not identical with the incidents of estates under the English law. Under the Mohammedan law, they are only usufructuary interest (and not rights of ownership of any kind). Thus, in English law a person having interest in the immoveable property for limited periods of time is said to be the “owner” of the property during those periods and the usufruct is also regarded as a part of the corpus.

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[iii].

Under Muslim Law, the religion of the person to whom a gift is made is not relevant. In India, there is a separate statute that governs the matters related to the transfer of property. The Transfer of Property Act, 1882 under Chapter VII talks about gifts and the procedure for making the same. Yet as per section 129 of the Act, the Transfer of Property Act, 1882 does not apply to the Muslims making the gift.

**CONCEPT OF HIBA UNDER MUSLIM LAW**

The 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 one of the kinds of transactions which are covered by the general term ‘gift’. 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[v].

A man may lawfully make a gift of his property to another during his lifetime, or he may give it away to someone after his death by will. The first is called a disposition inter vivos; the second, a testamentary disposition. Muhammadan law permits both kinds of transfers; but while a disposition inter vivos is unfettered as to quantum, a testamentary disposition is limited to one-third of the net estate. Muhammadan law allows a man to give away the whole of his property during his lifetime, but only one-third of it can be bequeathed by will.

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’. Muslim law allows a Muslim to give away his entire property by a gift inter vivos, even with the specific object of disinheriting his heirs[vi].

**ESSENTIALS OF HIBA**

Since Muslim law views the law of Gift as a part of the law of contract, there must be an offer (izab), an acceptance (qabul), and transfer (qabza).

In **Smt Hussenabi v Husensab Hasan[vii]**, a grandfather made an offer of a gift to his grandchildren. He also accepted the offer on behalf of minor grandchildren. However, no express of implied acceptance was made by a major grandson. Karnataka HC held that since the three elements of the gift were not present in the case of the major grandchild, the gift was not valid. It was valid in regards to the minor grandchildren.

Thus, the following are the essentials of a valid gift[viii]-

1. **A declaration by the donor**:

There must be a clear and unambiguous intention of the donor to make a gift. A declaration is a statement which signifies the intention of the transferor that he intends to make a gift. A declaration can be oral or written. The donor may declare the gift of any kind of property either orally or by written means. Under Muslim law, writing and registrations are not necessary.

In the famous case of **Ilahi Samsuddin v. Jaitunbi Maqbul[ix]**it was held that under Muslim Law, declaration, as well as acceptance of the gift, may be oral whatever may be nature of property gifted. When the gift is made in writing, it is known as **Hibanama[x]**. This gift deed need not be on stamp paper and also need not be attested or registered.[xi] In the famous case of **Md. Hesabuddin v Md. Hesaruddin[xii],**where the gift was made by a Muslim Woman and was not written on a stamp paper, Gauhati High Court held that the gift was valid.

The declaration made by the donor should be clear. A declaration of Gift in ambiguous words is void. In **Maimuna Bibi v. Rasool Mian[xiii],**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. His intention should be in express and clear words. According to Macnaghten, “A gift cannot be implied. It must be express and unequivocal, and the intention of the donor must be demonstrated by his entire relinquishment of the thing given, and the gift is null and void when he continues to exercise any act of ownership over it.”[xiv]

The declaration should be free from all the impediments such as inducement, threat, coercion, duress or promise and should be made with a bona fide intention.

1. **Acceptance by the donee[xv]**

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

* Father,
* Father’s Executor,
* Paternal Grand-Father, and
* Paternal Grand Father’s Executor.

1. **Delivery of possession by the donor and taking of the possession by the done[xvii]**:

In Muslim law, the term possession means only such possession as the nature of the subject is capable of. 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. If the donor is reaping the benefit then the delivery is not done and the gift is invalid.

The mode of delivery of possession depends completely upon the nature of the property. Delivery of possession may either be: Actual, or Constructive.

1. **Actual Delivery of Possession:**Where the property is physically handed over to the donee, the delivery of possession is actual. Generally, only tangible properties can be delivered to the done. Tangible property may be movable or immovable. Under Muslim law, where the mutation proceedings have started but the physical possession cannot be given and the donor dies, the gift fails for the want of delivery of possession[xviii]. However, in such cases, if it is proved that although the mutation was not complete and the done has already taken the possession of the property, the gift was held to be valid[xix].
2. **Constructive Delivery of Possession:** Constructive delivery of possession is sufficient to constitute a valid gift in the following two situations:

* Where the Property is intangible, i.e. it cannot be perceived through senses.
* Where the property is tangible, but its actual or physical delivery is not possible.

Under Muslim law, Registration is neither necessary nor sufficient to validate the gifts of immovable property.  A hiba of movable or immovable property is valid whether it is oral or in writing; whether it is attested or registered or not, provided that the delivery of possession has taken place according to the rules of Muslim Law[xx].

**Constitutional Validity of Hiba**

The question of whether the first exemption was constitutionally valid in regards to the right to equality (article 14 of the Indian Constitution) was rather rapidly solved by the Courts, validating the disposition on the grounds of ‘reasonable classification.

It is enough to say that it is now well settled by a series of decisions of this Court that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation, and in order to pass the test of permissible classification, two conditions must be fulfilled, namely[xxi]:

(1) That the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and,

(2) That differentia must have a rational relation to the object sought to be achieved by the statute in question.

The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. The decisions of this Court further establish that there is a presumption in favor of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional guarantee; that it must be presumed that the legislature understands and correctly appreciates the needs of its own people and that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds; and further that the legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest.

It is well known that there are fundamental differences between the religion and customs of the Mahomedans and those of others, and, therefore the rules of Mahomedan law regarding gift are based on reasonable classification and the provision of Section 129 of the Transfer of Property Act exempting Mahomedans from certain provisions of that Act is not hit by Article 14 of the Constitution.

The most essential element of Hiba is the declaration, “I have given”.  As per Hedaya, Hiba is defined technically as[xxii]:

“Unconditional transfer of existing property made immediately and without any exchange or consideration, by one person to another and accepted by or on behalf of the latter“.

According to Fyzee[xxiii], Hiba is the immediate and unqualified transfer of the corpus of the property without any return.

**SUBJECT MATTER OF GIFT UNDER MUSLIM LAW**

Now the question which we have in mind is what can be a subject matter of Hiba, under Muslim law. As per the provisions of **Transfer of Property Act, 1882**, the subject matter of the gift must be certain existing movable or immovable property. It may be land, goods, or actionable claims. It must be transferable under **Section 6**. But it cannot be future property. A gift of a right of management is valid, but a gift of future revenue of a village is invalid.

These cases were decided under Hindu and Mohammedan law respectively but they illustrate the principle. In a Calcutta case, it was said that the release of a debt is not a gift, as a gift must be of tangible property. It is submitted that the release of a debt is not a gift as it does not involve a transfer of property but is merely a renunciation of a right of action.

It is quite clear that an actionable claim such as a policy of insurance may be the subject of a gift It is submitted that in a deed of gift the meaning of the word ‘money’ should not be restricted by any hard and fast rule but should be interpreted having regard to the context properly construed in the light of all the relevant facts. Therefore in order to constitute a valid gift, there must be an existing property. In Mohammedan law, any property or right which has some legal value may be the subject of a gift[xxiv].

Under Muslim law, following constitute the subject matter of Hiba[xxv]:

1. It must be anything (moveable or immovable, corporeal or incorporeal) over which the right of property may be exercised or anything which exists either as a specific entity or an enforceable right, or anything designable under the term mal (property).
2. It must be in existence at the time when the gift is made. Thus, the gift of anything that is to be made in the future is void. For example, a donor makes a gift the fruits of his mango garden that may be produced this year. This gift is invalid since the mangoes were not in existence at the time of making the gift.
3. The donor must possess the gift.
4. A gift of a part of a thing which is capable of the division is not valid unless the said part is divided off and separated from the property of the donor, but a gift of an indivisible thing is valid. For example, A, who owns a house, makes a gift to B of the house and of the right to use a staircase used by him jointly with the owner of an adjoining house. The gift of A’s undivided share in the use of the staircase is not capable of division; therefore it is valid.
5. According to Hanafi law, the gift of an undivided share in any property capable of the division is, with certain exceptions, incomplete and irregular (fasid), although it can be rendered valid by subsequent separation and delivery of possession. For instance, A makes a gift of her undivided share in certain lands to B, and the share is not divided off at the time of the gift but is subsequently separated and possession thereof is delivered to B, the gift although irregular (fasid) in its inception, is deemed valid by subsequent delivery of possession.**Exceptions:** Gift of such undivided share is valid which is incapable of division:a)      Hiba by one co-heir to the other; For instance, A Muslim woman died leaving a mother, a son, and a daughter. The mother made a gift of her unrealized one-sixth share jointly to the deceased’s son and daughter. The gift was upheld by Privy Council.

b)      Hiba of a share in freehold property in a large commercial town; For instance, A wins a house in Dhaka. He makes a gift of one-third of his house to B. The property being situated in a large commercial town, the gift is valid.

c)      Hiba of a share in a zamindari or taluka; According to Ameer Ali, the doctrine of Musha is applicable only to small plots of land, and not to specific shares in large landed properties, like zamindaris. Thus, if A and B are co-sharers in a zamindari, each having a well –defined share in the rents of undivided land, and A makes a gift of his share to B, there is no regular partition of the zamindari, the gift is valid.

d)     Hiba of a share in a land company

Muslim law recognizes the difference between the corpus and the usufructs of a property. Corpus, or Ayn, means the absolute right of ownership of the property which is heritable and is unlimited in point of time, while, usufructs, or Manafi, means the right to use and enjoy the property. It is limited and is not heritable. The gift of the corpus of a thing is called Hiba and the gift of only the usufructs of a property is called Ariya.

In **Nawazish Ali Khan vs Ali Raza Khan[xxvi]**, it was held that gift of usufructs is valid in Muslim law and that the gift of corpus is subject to any such limitations imposed due to usufructs being gifted to someone else. It further held that gift of a life interest is valid and it doesn’t automatically enlarge into the gift of corpus. This ruling is applicable to both Shia and Sunni.

Hence critical scrutiny of the concept of Gift under Muslim law gives us the following instances regarding what can be the subject matter of Hiba:

* anything over which right of property may be exercised.
* anything which may be reduced to possession.
* anything which exists either as a specific entity or as an enforceable right.
* anything which comes within the meaning of the word mal.In **Rahim Bux vs Mohd. Hasen[xxvii]**, it was held that gift of services is not valid because it does not exist at the time of making the gift.

**Kinds of Gifts**

There are several variations of Hiba. These include[xxviii]:

* **Hiba bil Iwaz**
* **Hiba ba Shart ul Iwaz**
* **Sadkah**
* **Ariyat**

**HIBA- IL-IWAZ**

‘Hiba’ means ‘gift’ and ‘Iwaz’ means ‘consideration’. Hiba Bil Iwaz means a gift for consideration already received. It is thus a transaction made up of two mutual or reciprocal gifts between two persons. One gift from a donor to the donee and one from donee to the donor.

The gift and return gift are independent transactions. Therefore, when both i.e., hiba (gift) and iwaz (return or consideration) is completed, the transaction is called hiba-bil-iwaz. For example, A makes a gift of a cow to S and later B makes a gift of a house to A. If B says that the house was given to him by A by way of return of exchange, then both are irrevocable[xxix].

So a Hiba Bil Iwaz is a gift for consideration and in reality, it is a sale. Thus, registration of the gift is necessary and the delivery of possession is not essential and the prohibition against Mushaa does not exist. The following are requisites of Hiba bil Iwaz:

1. **Actual payment of consideration on the part of the donee is necessary**. In **Khajoorunissa vs Raushan Begam[xxx]**, it was held that adequacy of the consideration is not the question. As long as the consideration is bona fide, it is valid no matter even if it is insufficient.
2. **A bona fide intention on the part of the donor to divest himself of the property is essential**.

**Gift in lieu of dower debt** –

In **Gulam Abbas vs Razia[xxxi]**, the Hon’ble High Court at Allahabad held that an oral transfer of immovable property worth more than 100/- cannot be validly made by a Muslim husband to his wife by way of gift in lieu of dower debt which is also more than 100/-. It is neither Hiba nor Hiba bil Iwaz. It is a sale and must be done through a registered instrument.

**HIBA-BA-SHARTUL-IWAZ**

‘Shart’ means ‘stipulation’ and ‘Hiba ba Shart ul Iwaz’ means a ‘gift made with a stipulation for return’. Unlike in Hiba bil Iwaz, the payment of consideration is postponed. Since the payment of consideration is not immediate the delivery of possession is essential. The transaction becomes final immediately upon delivery. When the consideration is paid, it assumes the character of a sale and is subject to preemption (Shufa). As in sale, either party can return the subject of the sale in case of a defect.

It has the following requisites –

* Delivery of possession is necessary.
* It is revocable until the Iwaz is paid.
* It becomes irrevocable after the payment of Iwaz.
* Transaction when completed by payment of Iwaz, assumes the character of a sale.

In general, Hiba bil Iwaz and Hiba ba Shart ul Iwaz are similar in the sense that they are both gifts for a return and the gifts must be made in compliance with all the rules relating to simple gifts.

**REVOCATION OF GIFT**

Although there is a tradition which indicates that the Prophet was against the revocation of gifts, it is a well-established rule of Muslim law that all voluntary transactions, including gifts, are revocable. The Muslim law-givers have approached the subject of revocability of gift from several angles.

From one aspect, they hold that all gifts except those which are made by one spouse to another, or to a person related to the donor within the degrees of prohibited relationship, are revocable.

The Hedaya gives the reasons thus[xxxii]:

“The object of a gift to a stranger is a return for it is custom to send presents to a person of high rank that he may protect the donor; to a person of inferior rank that the donor may obtain his services; and to person of equal rank that the donor may obtain an equivalent and such being the case it follows that the donor has the power of annulment, so long as the object of the deed is not answered, since a gift is capable of annulment”.

The texts of Muslim law lay down a long list of gifts which are irrevocable. The contents of the list differ from school to school, and the Shias and the Sunnis have the usual differences. The Muslim law-givers also classify gifts from the point of view of revocability under the following two heads[xxxiii]:

* Revocation of gifts before the delivery of possession, and
* Revocation of gifts after the delivery of possession.

**Revocation of gifts before the delivery of possession[xxxiv]:**

Under Muslim law, all gifts are revocable before the delivery of possession is given to the donee. Thus, P makes a gift of his motor-car to Q by a gift deed. No delivery of possession has been made to Q. P revokes the gift.

The revocation is valid. In this case, it will not make any difference that the gift is made to a spouse, or to a person related to the donor within the degrees of prohibited relationship. The fact of the matter is that under Muslim law no gift is complete till the delivery of possession is made, and therefore, in all those cases where possession has not been transferred the gift is incomplete, and whether or not it is revoked, it will not be valid till the delivery of possession is made to the donee.

The revocation of such a gift, therefore, merely means that the donor has changed his mind and does not want to complete it by the delivery of possession. For the revocation of such gifts, no order of the court is necessary. Fyzee rightly says that this is a case of inchoate gift and it is not proper to apply the term revocation to such a gift.

**Revocation after the delivery of possession[xxxv]:**

Mere declaration of revocation by the donor, or institution of a suit, or any other action, is not sufficient to revoke a gift. Till a decree of the court is passed revoking the gift, the donee is entitled to use the property in any manner; he can also alienate it.

It seems that:

* all gifts after the delivery of possession can be revoked with the consent of the donee,
* revocation can be made only by a decree of the court.

The revocation of a gift is a personal right of the donor, and, therefore, a gift cannot be revoked by his heirs after his death. A gift can also not be revoked after the death of the donee.

According to the Hanafi School with the exception of the following cases, a gift can be revoked even after the death of the donee.

According to the Hanafi School, with the exception of the following cases, a gift can be revoked even after the delivery of possession. The exceptions to the same are[xxxvi]:

* When a gift is made by one spouse to another.
* When the donor and the donee are related within the prohibited degrees.
* When the donee or the donor is dead.
* When the subject-matter of the gift is no longer in the possession of the donee, i.e., when he had disposed of it by sale, gift or otherwise or, where he had consumed it, or where it had been lost or destroyed.
* When the value of the subject-matter has increased.
* When the identity of the subject-matter of the gift has been completely lost, just as wheat, the subject-matter of gift, is converted into flour.
* When the donor has received something in return (iwaz).
* When the object of the gift is to receive the religious or spiritual benefit or merit, such as sadaqa.

The Shia law of revocation of gifts differs from the Sunni law in the following respects: First, gift can be revoked by a mere declaration on the part of the donor without any proceedings in a court of law; secondly, a gift made to a spouse is revocable; and thirdly, a gift to a relation, whether within the prohibited degrees or not, is revocable.

**Conclusion**

The conception of the term gift and subject matter of gift has been an age-old and traditional issue which has developed into a distinct facet in property law. Different aspects related to gift in property act and its distinction with the Mohammedan law and its implications has been the major subject matter of this article.

In considering the law of gifts, it is to be remembered that the English word ‘gift’ is generic and must not be confused with the technical term of Islamic law, hiba. The concept of ‘hiba’ and the term ‘gift’ as used in the transfer of property act, are different. As we have seen in the project that Under Mohammedan law, to be a valid gift, three essentials are required to exist:

* Declaration of gift by the donor.
* Acceptance of the gift, express or implied, by or on behalf of the done.
* Delivery of possession of the subject of the gift.

The English law as to rights in property is classified by a division on the basis of immoveable and moveable (real and personal) property. The essential elements of a gift are:

* The absence of consideration.
* The donor.
* The done.
* The subject-matter.
* The transfer; and the acceptance.

Thus this striking difference between the two laws relating to gift forms the base of this project in understanding its underlying implications.

To conclude the researcher can say that, the gift is a contract consisting of a proposal or offer on the part of the doner to give a thing and acceptance of it by the donee. So it is a transfer of property immediately and without any exchange. There must be a clear intention by the donor to transfer the possession to the doner for a valid gift. It can be revoked by the doner. And the provisions for the same have also been mentioned.

**Formatted on March 14th, 2019.**

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