

DR. Ajit Kumar Gond, Assistant professor of Law, YBN University, Ranchi



YBN UNIVERSITY

Established by the Act of Government of Jharkhand Act 15, 2017
Gazette Notification No. 505, Dated 17th July 2017
As per Section 2(f) of UGC Act. 1956



RAJAUlatu, NAMKUM, RANCHI, JHARKHAND-834010

MUSLIM LAW

GIFT (HIBA)

Ch. 6,1 Gift: **Definition:** A gift or hiba is a transfer of property, made Immediately, and without any exchange, by one person to another, and accepted by or on behalf of the latter (Mutfa), Gift is a wide term, but Hiba is much narrower. As the object of Hiba is to earn love and affection. The Prophet had recognised it.

Essentials: There are three essentials:

(i) Declaration of the gift by the donor (ijab) (ii) Acceptance by the donee (qabul) (iii) Delivery of possession of the gift property (qabda) All these must be complied with.

Formalities: Writing is not essential under Muslim law, to make a gift of movable or immovable property. Sns. 123-129 of the transfer of property Act state that a gift of immovable property must be in writing and must be registered.' *But gift by the Muslims is exempted* (Sn. 129). It may not be in writing; if in writing it may not have been attested; if attested it may not have been registered. Even then the gift is valid.

(i) *Declaration:* A Muslim making a gift, must be of sound mind. He must not be a minor. A gift to an unborn person is void. A gift with intent to defraud the creditors is *voidable* at the option of the creditors.

A gift may be made to an heir, it may extend to the whole of the donor's property or interest } but it must be made during his life-time.

(ii) *Acceptance by the donee* (Kabul): it is essential that the donee must accept the gift made by the donor. The acceptance may be express or tacit. The gift becomes void, if not accepted by the donee.

(iii) *Delivery of possession:* Delivery of the possession of the movable or immovable property is an essential requisite to complete the gift. Without delivery the gift becomes void. The delivery may be actual, or constructive. The donor must divest himself of the possession of the gift-property, to complete the gift. Registration, (though not necessary) will not cure the want of delivery of the gift property.

Immovable property : When a donor who is in possession of his immovable property makes a gift of it to the donee; he must vacate his property and deliver the same to the donee. When both the

donor and the donee are in possession, there must be some overt act by the donor to show that he has divested himself of that property. Giving possession (Quabda) is essential.

M executed a gift deed in favour of her son S. Both M and S were living in the house and S continued to live after making the gift deed and municipal taxes were paid by S. Held, there was delivery of possession.

The leading case is Nawab Am/'ad AH Khan Vs. Md. Begam. The Nawab of Adam province had given by hiba his houses and villages to the sons of P. But, he had retained the usufruct (use) of the property. Question was, whether the hiba was valid or not. The privy council held that the hiba was valid. Another case: Md. Abdul Ghani Khan Vs. Fakr Jahan Begam.

Revocation of Gift:

A gift made by the donor may be revoked by him at any time, but before the delivery of possession of the property. But, if possession is delivered, the gift cannot be revoked. A gift cannot be revoked in the following cases:

1. Gift by a husband to his wife and vice versa.
2. Donee within prohibited degree of the donor.
3. Death of donee.
4. Gift property passing out of donee by sale, gift etc.
5. Gift property is lost or destroyed.
6. Property converted to other forms.
7. Donor receiving something in exchange (Hiba bil iwaz).
8. Property given to religious or charitable purposes.

Oh, 6.2 Hiba bil iwaz

In Islamic law, hiba is the absolute gift of the corpus (Ayn) of the property without any return.

Hiba bil iwaz is a transaction consisting of two separate and distinct parts.

- (i) Hiba—Original gift by the donor to the donee and
- (ii) Iwaz—Return gift by the donee to the donor. Therefore Hiba bil iwaz means 'gift with return'.

Eg.: A makes a gift of his horse to B, B makes a gift of his camel to A. All the formalities of the law of hiba are followed. The transaction becomes Hiba bil iwaz.

*•» Two conditions must be fulfilled:

(i) There must be the actual consideration (iwaz) paid by the donee, (ii) The donor must have acted with bonafide intention to divest himself of the property and to vest that in the donee.

The consideration may be adequate or not. A copy of Koran, a prayer carpet are good considerations.

This transaction is in reality a sale. Hence, in Hiba bil iwaz giving of possession is not essential. Even an undivided share (mushaa) may be transferred under this.

M executed a deed in favour of his wife W giving her some immovable property in lieu of her dower. Held, this was Hiba bil iwaz and hence valid, even though possession had not been given to the wife (Mohamad Yousoff Vs Ammal).

There are two kinds : True Hiba bil iwaz has two acts : Hiba and return iwaz. While making the gift the iwaz is not mentioned.

In Indian Hiba bil iwaz: There is only one transaction a gift followed by a return. It is a sort of an exchange and this has created a great confusion,

Oh, 6,3 Hib bi shardul iwaz

If gift is made with stipulation (shart) for a return (twaz), the transaction is called 'HSI' [Hiba bi shardul iwaz.] But Hiba bil iwaz (HBI) is a voluntary gift followed by voluntary return. In HSI the gift itself is made with a stipulation. All formalities of a hiba should be followed. If delivery of possession is given the gift cannot be revoked. Eg.: D makes a gift of a house to S. He puts S in possession. As Iwaz, S gives his fine horse to D and D accepts it.

D now purports to sell the house to T. The sale is void.

This is not in vogue in India,

Ch. 6.4 Marzul Maut (Death bed gift) J

Marzul Maut is a gift of an amphibious nature. It is not exactly a gift nor a legacy. In Muslim law the rules are to be taken from the law of gifts and the law of wills. Marzul Maut means 'the disease death'. The person under disease must have an apprehension of death or cause of death.

Conditions:

(i) It must cause apprehension of death in the mind of the person. (ii) There must be some external indication of a serious illness. The above is a question of fact. (iii) The illness must cause the death.

Gift takes place only when the donor dies. If the donor lives after making the gift, the question may be whether it is an ordinary valid gift or not.

The gift must have been made under pressure of imminent death. The crucial test is the subjective apprehension of death in the mind of the donor.

The nature of the illness cannot be specified with exactitude. If a person had suffered for a year, he had become familiar with the disease, therefore his gift will not be *niyazul maut* (Hedaya).

Essentials:

(i) The gift must satisfy all the formalities of Hiba. Delivery of possession is necessary. If no delivery is given the gift is void, (ii) It must satisfy all the restrictions laid down for wills.

Hence ; (a) Not more than the bequeathable third can be given. (b) No gift can be made to an heir if the other heirs do not

consent. *Cases ; Ibrahim Gulam Ariff Vs. Saiboo Safia Begam Vs. Abdul Razak,*

Ch. 6.5 Areeat:

This is defined as the grant of a licence to take and to enjoy the usufruct (use) of the property or thing.

Hiba is a simple gift made without consideration. In areeat, there is no transfer of the ownership of the property, but only the temporary usufruct or use or enjoyment of the property is given. The donor may revoke at any time. There is no *iwaz* (return gift). Areeat of rent of a building is an example.

Ch. 6.6 Sadaquah :

This is a gift made by the donor with a view to acquiring religious merit "in the sight of the Lord". Delivery of possession is essential. *Mushaa* (undivided interest) cannot be given.

DR. Ajit Kumar Gond, Assistant professor of Law, YBN University, Ranchi

Sadaquah once given, is not revocable. In Sadaquah the Corpus (property) may be used up; but, in Wakf, only the income is utilised and

the corpus is preserved, in Sadaquah delivery of possession is essential-Wakf can be created by declaration (Nabi Hussain Vs. Gajadhar Singh).

Ch. 6,7 Mushaa ; (Undivided Share)

Mushaa comes from Shuyuu, which means "confusion", Mushaa is "undivided share in the property, movable or immovable. Gift of mushaa in the property is valid according to Muhammedan law,

K, the owner of a house, gifts his house to G, and also his right to use a staircase which he (K) was using jointly with the adjoining owner. Held the mushaa was valid. Kasim Russian Vs. Shariffunnissa.

Gift of mushaa in a property which is divisible is irregular (fasid), and not void, it can be regularised by making the partition and delivering of the share property to the donee. In the following circumstances a gift of undivided share (mushaa) is valid even if partition and delivery are not made.

(i) Gift by one coheir to another, (ii) Gift of a share in zamindari. (iii) Gift of property situated in large commercial areas etc.

Limitation:

1. Mushaa does not apply to progressive societies,

It does not apply when there is consideration.