

COURSE NAME - LAW
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TOPIC- HIBA (GIFT)

By :-GURU DUTT
ASSISTANT PROFESSOR
SARASWATI INSTITUTE OF LAW
PALWAL

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 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.

MEANING OF HIBA

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 is an immediate and unconditional transfer of the ownership of some property or of some right, without any consideration or with some return (ewaz);

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 , where the only usufruct is transferred and

Sadqah where the gift is made by the Muslim with the object of acquiring religious merit

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)

Smt Hussenabi v Husensab HasanAIR 1989 Kant 218.

a grandfather made an offer of a gift to his grandchildren.

He also accepted the offer on behalf of minor grandchildren. However, no express or 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.

a gift is a transfer of certain existing movable or immovable property made voluntary and without consideration by one person called the donor, to another, called a donee and accepted by or on behalf of the donee. The essential elements of a gift are-

- (a) The donor;
- (b) The donee;
- (c) The subject-matter;
- (d) the transfer; and the acceptance
- (e) The absence of consideration;.

The donor

The donor is the person who gives. Any person who is sui juris can make a gift of his property. A minor, being incompetent to contract is incompetent to transfer, and a gift by the minor would therefore be void

Soundness of mind and majority are the only qualifications required for making a gift. A gift to be valid must be made by a person with his free consent and not under compulsion

On behalf of a minor, a natural guardian can accept a gift containing a condition that the person nominated in the gift deed shall act as a manager of the gifted property.

The age of majority as regards matters other than marriage, dower, divorce and adoption, is now regulated by the Indian Majority Act IX of 1875. Section 3 of the Act declares that a person shall be deemed to have attained majority when he shall have completed the age of eighteen years

Donor's powers

Donor's powers are unrestricted in Mohammedan law

Mohammedan 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 from that of a will a gift may be made to a stranger wholly excluding the heirs

The donee

The donee is the person who accepts the gift, by or on behalf of a person who is not competent to contract. A minor therefore may be a donee; but if the gift is onerous, the obligation cannot be enforced against him while he is a minor. But when he attains majority he must either accept the burden or return the gift.

The donee must be an ascertainable person and be a donee under this section. a gift to juristic persons or any other institution is valid.

a hiba in favour of a child in the womb is valid if the child is born within six months from the date of the hiba because in that case it is presumed that the child actually existed as a distinct entity in the womb of his mother.

Gifts to Non-Muslims - a gift may be made to a non-Muslim but in such a case the property will, after the completion of the gift, be subject to the personal law of the donee and not that of donor.

SUBJECT MATTER OF GIFT

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).

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.

The donor must possess the gift.

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.

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

The absence of consideration

A gift is a transfer. But it does not contain any element of consideration. Complete absence of monetary consideration is the main, hallmark, which distinguishes a gift from a grant or any other transactions for valuable or adequate consideration.

The transfer; and the acceptance

Under Mohammedan law, to be a valid gift, three essentials are required to exist:

(a) declaration of gift by the donor

(b) an acceptance of the gift, express or implied, by or on behalf of the donee, and

(c) delivery of possession of the subject of gift

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.

Maimuna Bibi v. Rasool Mian[], AIR 1991 Pat 203

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

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 and clear words.

Acceptance by the donee

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 donee 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:

Father,

Father's Executor,

Paternal Grand-Father, and

Paternal Grand Father's Executor

Delivery of possession by the donor and taking of the possession by the donee

The mode of delivery of possession depends completely upon the nature of the property.

Delivery of possession may either be: Actual, or Constructive.

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 donee. 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 donee has already taken the possession of the property, the gift was held to be valid.

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

Conclusion

A man may lawfully make a gift of his property to another during his lifetime, or he may give it away to some one after his death by will. The first is called a disposition inter vivos and the second a testamentary disposition. Mohammedan law permits both kinds of dispositions, but while a disposition inter vivos is unfettered as to quantum and testamentary disposition is limited to one-third of the net estate.

To conclude we 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 donee for a valid gift