

GIFT [HIBA]

- Gift is called 'Hiba' in Muslim law.
- Unconditional transfer of ownership in an existing property, immediately and without any consideration
- In gift the transfer of property by act of the parties and not a transfer which take place by operation of law
- Chapter VII of transfer of property act does not apply to Hiba. The formalities of Hiba are different from that of gift made by a non Muslim
- A Muslim can devolve his property in various ways. Muslim law permits the transfer of property inter vivos (gift) or through testamentary dispositions (will).
- A disposition inter vivos is unrestricted as to quantum and a Muslim is allowed to give away his entire property during his lifetime by gift, but only one-third of the total property can be bequeathed by will.
- A Muslim can gift any property self acquired, ancestral, movable immovable, corporeal, incorporeal.
- Gift may be conditional or unconditional
- Muslim law though has a distinction for the gift. It differentiates between the **corpus (ayan)** and **usufruct (maufi)** of the gift.
- Corpus is the main body of gift, usufruct is 'the right to enjoy the use and advantages of another's property'
- There can be condition over usufruct but not on the corpus.
- **Nawab umjab ally khan v. Mohumadee begum (privy council.1867)**
- ✓ Nawab of awadh endorsed in the name of his son government promissory notes worth rs. 7, 35,000 and the same were handed over to his son.
- ✓ But there was a condition that whatever income of interest comes out of those notes the nawab would have right over that income for religious and charitable endowments during his lifetime.
- ✓ Here this gift and conditions is held to be valid because there is no condition over the corpus (promissory notes) but the conditions are only on the interest of the corpus.

Conditions of valid gift

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).

- 1- Donor's declaration (with real and bonafide intention)**
- 2- Donee's acceptance (express or implied, done by himself or on his behalf)**
- 3- Delivery of subject matter of gift (actual or constructive)**

Donor's declaration

- Declaration signifies the intention of the transfer to make a gift. Person declaring is called a donor
- The person in whose favour the gift is made is called donee.
- Hiba may be oral or in writing. Writing is not necessary whether the property is movable or immovable. **Md. Hesabuddin v Md. Hesaruddin, 1983** 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 gift made under Muslim in writing is known as **hibanama**. It need not to be in stamp paper, attested or registered. In the case of **Kamarunnissa Bibi vs. Hussaini Bibi 1880** A openly declared a gift of certain landed property to B in presence of large gathering. When B accepted the gift and A handed over the possession of the said property to B, the gift was completed. It was held that oral gift was valid and need not to be registered.
- Declaration must be in clear and unambiguous words. Ambiguous declaration is void.
- Declaration of gift must be made voluntarily and with free consent. **Hussaina Bai vs. Zohra Bai 1960**, a pardanashin lady coerced to sign a gift deed which she believed would not take effect until her death. She had no opportunity to take advice from others. It was held by the court that woman had signed the gift deed under compulsion and it was not voluntary act of her. So the gift made was declared by court as void.

- For a valid hiba the donor must be an adult, Muslim and sound mind
- Donor must also have capacity to make the gift.
- **Capacity to make gift**
 - ✓ Muslim (**male or female**)
 - ✓ Major (**18+, 21+**(if under a certifies guardian), rule of puberty doesn't apply here)
 - ✓ **Sound mind**

Donee's Acceptance

- Under Muslim law gift is a contract therefore there must be proposal (declaration) and acceptance (Qabul). It's a bialateral transaction which will not be effective until and unless other party accepts it. Even if gift is made through registered instrument, it requires acceptance of donee.
- The acceptance of gift must be made before the death of the donor
- A child in mother's womb is a competent donee provided his won a lie within **six months** from the date of Hiba
- Muslim men can make a hiba in favor of a non-Muslim
- The donee may be a **juristic person**. He may be a person of unsound mind also. If he is a person of unsound mind the gift must be accepted by his guardian

Delivery of possession

- Gift is complete only after delivery of possession. The gift takes effect from the date on which the possession of the property is delivered to the donee and not from the date when the declaration was made.
- The delivery of possession may be:
 - a. Actual delivery of possession
 - b. Constructive delivery of possession
- ✓ **Actual delivery of possession-** In case the subject matter of the gift can be physically handed over to the donee it is being known as actual delivery of

possession. The actual delivery of possession is possible in case the gifts are of tangible and movable property.

- ✓ **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 it's actual or physical delivery is not possible.
 - In case donor handed over the keys of the house which was subject matter of gift it will be construed that constructive delivery of possession is made and the gift will be completed.

- delivery of possession is **not needed** in the following circumstances
 1. where the donor and donee live jointly in the gifted house
 2. gift by husband to wife or by wife to husband
 3. Gift by guardian to ward
 4. gift of property already in possession of donee

- Though it is not mandatory in muslim law to make the transaction of gift in writing, but it is not prohibited also, gifts can be made orally or in writing under muslim law.

General rules regarding gift

- If gift is not made with bona fide intention and is made with fraudulent intention to defraud creditors then the qazi can declare it void.
- A gift in contemplation of death (causa mortis) or death bed gift (**marz-ul-maut**) is partly a gift and partly a bequest and has to adhere to the conditions.
- Of bequest i.e., not more than 1/3rd property can be given without consent of heirs.
- Gift to unborn person is void, unless the person is in womb of the mother and is born within 6 months, though a trust can be created in favor of an unborn person.
- Actionable claims can be gifted

Kinds of Gifts

- There are several variations of Hiba:

1. **Hiba bil Iwaz**
2. **Hiba ba Shart ul Iwaz**
3. **Sadkah**
4. **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.
- 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.
- 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.

✓ **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 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.

- **Ariya (Tamlik al manafe)**, only usufruct is transferred and
- **Sadqah** the gift is made by the Muslim with the object of acquiring religious merit

Doctrine of Mushaa

- The word ‘Mushaa’ has an Arabic origination which literally means ‘**confusion**’. Under Islamic law, Mushaa denotes an undivided share in joint property. It is, therefore, a co-owned or joint property. If one of the several owners of such property makes a gift of his own share, there may arise confusion in regard to what part of the property is to be given to the donee.
- To circumvent such confusion, the Hanafi Jurists have developed the doctrine of Mushaa. Gift of Mushaa i.e. gift of a share in the co-owned property is invalid without the partition and actual delivery of that part of the property to the donee. If the co-owned property is not capable of partition, the doctrine of Mushaa is impertinent. A Mushaa or undivided property is of two kinds:

1. Mushaa Indivisible

- It includes the property in which the partition is not possible. The doctrine of Mushaa is not applicable where the property constituting the subject-matter of the gift is indivisible. All the schools of Islamic law accept the view that a gift of Mushaa indivisible is valid without partition and the actual delivery of possession.
- **For example**, a staircase, a cinema hall, a bathing ghat etc. comprises indivisible Mushaa properties.

2. Mushaa Divisible

- Mushaa divisible is the property which is capable of division without affecting its value or character. If the subject-matter of a Hiba is Mushaa divisible, the doctrine of Mushaa is applied and the gift is valid only if the specific share which has been gifted, is separated by the donor and is actually given to the donee.

However, a gift without partition and the actual delivery of possession is merely irregular and not void ab initio.

- **For example**, a co-owned piece of land or a garden or a house is a.
- **Shia law** does not recognize the principle of Mushaa. According to Shia law, a gift of a share of divisible joint property is valid even if it is made without partition

Revocation of gifts

- The Muslim Law givers also classify revocation of gifts under the following two heads:
 1. Revocation of gifts before the delivery of possession, and
 2. Revocation of gifts after the delivery of possession

1. Revocation of gifts before the delivery of possession: -

- All gifts are revocable before the delivery of possession is given to the donee. For such revocation, no orders of the court are necessary. As discussed above that under Muslim law, no Hiba is complete till the delivery of the possession is made, and therefore, in all those cases where possession has not been given to the donee, the gift is incomplete and whether it is revoked or not, it will not be valid till the delivery of possession is made to the donee.

2. Revocation after the delivery of possession

- In this situation, a Hiba can be revoked in either of the following ways:
 1. With the consent of the donee
 2. By a decree of the court.
- Mere declaration of revocation by the donor or filing a suit in the court or any other action is not enough to revoke a gift. The donee is entitled to use the property in any manner until a decree is passed by the court revoking the gift.
- The revocation of gift is the personal right of the donor and a gift cannot be revoked by his/her heirs after his/her death. A gift can also not be revoked after the death of the donee.

According to Hanafi School, a gift can be revoked even after the delivery of possession:

- When the 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 not gift is no longer in possession of the donee it means that he may have disposed of it by sale, gift or where he had consumed it or where it has been lost or destroyed.
- When the value of the subject matter has increased.
- When the value of the subject matter is completely lost.
- When the donor has received something in return.
- When the object of the gift is to receive religious or spiritual benefits or merit such as sadaqa.

The Shia law of revocation of gifts differs from Sunni law in the following respects: -

- Gift can be revoked by mere declaration on the part of the donor without any proceedings in a court of law.
- A gift made to a spouse is revocable.
- A gift made to the relation whether within the prohibited degrees or not is revocable.