

# Hiba or Gift

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- **Essentials of Gift Under Muslim Law;**
- **Capacity for making a gift;**
- **Capacity to receive a gift**
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# Hiba or Gift

- A man may lawfully make a transfer of his property to another during his lifetime; this transfer should be made immediate and without consideration or exchange of money or anything. Such kind of transfer is called hiba under Muslim Law. Gifts or hibas are lawful, for the Prophet has said "Send ye presents (gifts) to each other for the increase of love". The person who makes the gift is called the donor and to whom the gift is made is called a donee.

# Definition

- Muslim Law defines hiba or gift as a transfer of a determinate amount of property without any exchange from one person to another, and accepted by or on behalf of the latter. According to *Hidaya*: Hiba is the immediate and unqualified transfer of the corpus of the property without any return. The *Durr ul Mukhtar* defines hiba as the transfer of the right of the property in the substance by one person to another without any return. By the decision of the leading case on hiba the court observed that, to make a person owner of the substance of a thing without consideration is a hiba (***Mohammad Faiz Ahmad Khan vs. Ghulam Ahmad Khan*** 1881 3 All 490, 492.). Bailie defines hiba as: Hiba is a transfer which confers the right of property, in something specific, without an exchange.
- Hedaya, page. 482
- A A Fayzee: *Outlines of Muhammadan Law*, Oxford University Press, 1974, page: 218.
- Ammer Ali, I , page : 40.
- Baillie : *Digest on Muhammadan Law*: Part I, 1957, page: 515.

# Case reference

- It is not necessary that actual physical possession should be given, as the law considers constructive possession to be sufficient. If the donor vacates possession in pursuance of the gift, though the donee may not take actual possession, the gift will be held to be perfected.

A gift may be made in writing or verbally. The Transfer of Property Act IV of 1882 is not attracted. The Privy Council in the case of ***Qamrunnisa Bibi v. Hussaini Bibi*** upheld a verbal gift when it appeared to be supported by all the attendant circumstances.

# Essentials for valid gift

- Under Muslim law, three essentials are required for a valid gift:
- (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.
- Courts have consistently held that when there is no compliance of any of the above three essential conditions the gift renders itself as invalid. Another characteristic of Muslim law is that writing is not essential to the validity of a gift either of movable or immovable property. In another case the Patna High Court held that under the Muslim Law for validity of the deed of gift four elements are necessary:
- declaration of gift by the donor
- relinquishment by donor of ownership and dominion
- acceptance of the gift by donee, and
- delivery of possession of the property by donor.

# Capacity for making a gift

- Like any other contract, the requisite conditions are the age of majority, understanding, free consent and ownership of the subject matter of the disposition. A person must be major, able to understand the nature of the act, be subject to no undue influence, coercion and must be the owner of the property to be gifted.
- **Capacity to receive a gift**
- Any person can receive a gift if he or she is in existence at the time of the gift. An absolute gift to an unborn child is invalid, but if the child is born within six months of the date of gift, it will be valid on the presumption that the child was actually existing in the womb of the mother

# Capacity to receive a gift

- **Gifts of Usufruct(Ariat) to unborn persons** -a hiba stands on a different footing from a gift of a limited interest in usufruct a gift of future usufruct to unborn persons is valid provided that the donee is in being at the time when interest opens out for heirs  
**Child in the womb** - 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.
- **Juristic persons** - a gift to juristic persons or any other institution is valid. So a gift to corporate units, e.g. a tauazhi (consisting of a mother and of all her children and not descendants in the female line governed by Marumakkathayam law) are valid. Such a gift will be valid as being one for the whole body. It has been held that a mosque is recognized by the Mohammedan jurist as a juristic person, and that a valid gift can be made in favour of a mosque. 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.

# Revocation of a gift

- According to Hanafi law, the gift is revocable except under the following circumstances:
- 1. When the subject-matter of a gift has gone out of the possession of a donee by gift, sale or any other form of alienation by which the right of property is transferred.
- 2. When the gift is to any of the donor's ascendants or descendants, brothers or sisters or their children, uncle or aunt, The Prophet has said, "When a gift is made to prohibited relations, it must not be resumed."
- 3. When the gift is made during coverture to the husband of wife, of the donor as the case may be.
- 4. When the donor has died -- the donor's heirs do not have the power of revocation.
- 5. When the thing given has perished or is lost.
- 6. A gift given to charity or sadqa.
- 7. When the gift is for consideration.
- 8. When the subject-matter of the gift has altered in substance in the possession of the donee. It makes no difference to the irrevocability of the gift whether the increase be in consequence of an act of the donee or without such act and whether it has issued from the thing itself (such as the fruit on trees) or an accession to it (such as recreation by growth). Natural growth of the subject-matter of the gift debars the donor from revoking it. Transfer from one place to another, when it adds to the value and has occasioned an expense it is sufficient to prevent revocation.



# Doner's Qualification

- 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. Trustees cannot make a gift out of trust property unless authorized by the terms of the contract.
- 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. Such acceptance would amount to recognition by the natural guardian of the nominated person as the manager or the agent of minor for the purpose of such property.

# 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 words 'accepted by or on behalf of the donee' show that the donee may be a person unable to express acceptance. A gift can be made to a child in favour of him and could be accepted on his behalf. The donee must be an ascertainable person and be a donee under this section; nor can a gift be made to an unregistered society.

# Subject matter of Gift:

- 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 s 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 Muslim 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.

# Revocation

- **A Muslim on the other hand can revoke a gift even after delivery of possession except in the following cases:**
  - (1) When the gift is made by a husband to his wife or by a wife to her husband;
  - (2) when the donee is related to the donor within the prohibited degrees;
  - (3) when the gift is Sadaka (i.e. made to a charity or for any religious purpose).
  - (4) when the donee is dead;
  - (5) when the thing given has passed out of the donee's possession by sale, gift or otherwise;
  - (6) when the thing given is lost or destroyed;
  - (7) when the thing given has increased in value, whatever be the cause of the increase;
  - (8) when the thing given is so changed that it cannot be identified, as when wheat is converted into flour by grinding; and
  - (9) when the donor has received something in exchange for the gift
- Except in those cases, a gift may be revoked at the mere will of the donor, whether he has or has not reserved to himself the power to revoke it, but the revocation must be by a decree of court.

# Hiba-bil-Iwaz

Hiba-bil-Iwaz is such a hiba which is made in return of payment of money. In fact, it is sale of property and it contains all ingredients of 'sale deed', therefore, in such hiba transfer of possession is not necessary as it is required in the case of hiba. In hiba through imbursement the undivided portion of divisible property can also be transferred which act is not possible in normal hiba.

There are Two prerequisites for this kind of hiba;

1. Factual payment of the sum involved.
2. Immediate abandonment of donor's right to title and honest intention of transfer of possession.

The amount for such hiba can be fixed with mutual understanding of parties, but, such amount must be fixed with honest intentions and paid factually.

## *Hibb'a Ba-Shart-ul-Iwaz*

- *On Conditional Disbursement (Hibb'a Ba-Shart-ul-Iwaz):*

When hiba is made on the condition of payment of amount such hiba is called Hiba Ba-Shart-ul-Iwaz. In this type of gift possession must be transferred. This type of gift made is cancellable but if the amount mentioned as condition is paid then this gift cannot be cancelled.