Prof.Rakesh Kr. Singh

Law of Hiba

Definition of Hiba

The Muhammadan Law defines the 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.[1]

it is clear that under Muslim law, a gift is called Hiba. When a Muslim transfers his property through gift, the transfer is called Hiba. The religion of the person to whom the gift is made, is not relevant. If the transferor is Muslim, the gift is Hiba. Thus, where a Muslim makes a gift of his properties in favour of a Hindu, the gift is nonetheless a Hiba. In India, the subject of gifts is governed by the Transfer of Property Act, 1872. Chapter VII of this Act is applicable to gifts made by any person in India, irrespective of religion, caste or creed. But, Chapter VII of the Transfer of Property Act does not apply to Muslim gifts or the Hiba.[2]

Constitutionality of Hiba :

The Transfer of Property Act, 1882 contains besides general principles relating to transfer of property-the laws relating to sale, mortgage, charge, lease, and exchange, transfer of actionable claims and gifts of property. All the Chapters of this Act except that on gifts are applicable to the Muslim. As regards the general principles relating to disposition of property contained in Chapter 2 of the TPA, the Act declares that 'nothing in the second Chapter of this Act shall be deemed to affect any rule of Mohammedan Law.[3]

This exemption may appear to be discrimination on the ground of religion which is against the Article 14 (i.e., right to equality) of the Indian Constitution. But in Bibi Maniran v. Mohd. Ishaque,[4]court now made it clear that this exemption is constitutional and lawful. Muslim gift or the Hiba has been associated and has also been included in the Shariat Act, 1937, to be regulated only by Muslim personal law. Therefore, the exemption under Section 129 of the Transfer of Property Act does not violate Article 14 of the Constitution of India.

Essentials of a Valid Hiba

1. Qualifications for the Parties
2. Subject matter of a Hiba
3. Formalities of a Hiba

1. Qualifications for the Parties :

A. Capacity for a Donor (Wahib) :

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[1] Hedaya, p. 482

[2] Section 129 of Transfer of Property Act, 1872 says, 'Nothing in this Chapter (i.e.,Chapter VII on gifts) shall be deemed to affect any rule of Mohammadan law'.

[3] Section 2 (d) of Transfer of Property Act, 1882

[4] AIR 1963 Pat 229

A donor, who has the following qualifications, has capacity to make a Hiba[5] :

i. Mohammedan : A donor must be a Mohammedan.

ii. Sex : A donor may be a male or female.

iii. Status : A donor may be married or unmarried.

iv. Age of Majority : A donor must have attained the age of majority. The age of majority is the age prescribed under Section 3 of the Indian Majority Act, 1875 as amended in 1999, which now means eighteen years.

v. Ownership of Property : The person making a Hiba must be the owner of the property which is the subject matter of the Hiba. In other words, the ownership of the property must be with the donor, at the time of making a gift.[6] A gift by a widow who is in possession of the property of her husband in lieu of dower cannot make a gift of such property.

vi. Free Consent : A gift made under compulsion is not valid but voidable. Free consent of the donor must be associated with the gift when a gift is made by a pardanasheen lady, the proof of independent outside advice is the usual mode of discharging the burden by the donee that the gift was free from compulsion.[7] The gift will be valid, if the pardanasheen lady had the advantage of independent advice, and the contents of the deed were fully explained to and understood by her.[8]

B. Capacity for a Donee (Mahub-lahu)

A donee, who has the following qualifications, has capacity to take a Hiba :

i. Mohammedan : A donee may be a Mohammedan or non-Mohammedan.[9]After the completion of the gift, to a non-Mohammedan, the property will be subject to the personal law of the donee.[10]

ii. Sex : A donee may be a male or female.

iii. Status : A donee may be married or unmarried.

iv. Age of Majority : A donee may be a major or minor.

v. Soundness or unsoundness of mind : A donee may be an insane. But when a gift is made to a minor or a person of unsound mind, the gift will be complete by the

[5] Baillie, I, 516
[6] Ibid
[7] Pasapini v. Moula, (1956) 2 Cal 579
[8] Kairum v. Mariman, AIR 1960 Mad 447
[9] Baillie, II, 224
[10] Ajagar v. Chadalavada, AIR 1927 Mad 574

delivery of possession to the guardian of the minor or of the person of the unsound mind.[11]

vi. Existence of a donee or Child in Womb : A Hiba cannot be lawfully made in favour of an unborn person. Such a Hiba to unborn person is invalid,[12]with one exception. For example, if the donor makes a gift of some property to a donee and after his death to donee's son who is not in existence, such gift will be void. But a gift to an unborn donee, who is in womb and is born within 6 months of making of the gift, is valid. Therefore, the child in its mother's womb is a competent donee. Although the child in mother's womb has no worldly existence yet, in the eyes of law it is regarded as a living person. Under the Muslim law, a gift in favour of a child in the womb is valid provided such child is born alive within six month from the date on which the gift was made.

vii. A Hiba cannot be made in favour of a dead person. When a widow makes a Hiba of her Mehr to her deceased husband, though such a transaction if called Hiba-a-Mehr. It is in fact a unilateral foregoing of the right to Mehr by the widow to which the principle of 'Hiba' do not apply.

viii. And a gift of future usufruct to unborn person is valid provided the donee is in being at the time when interest opens out of heirs.[13]

ix. Joint donees : A Hiba jointly in favour of two or more persons is not *ipso facto* invalid. In other words, a gift may be made jointly to two or more persons but the shares of each should be clearly specified. For example, if a gift of a property capable of being divided is made to two or more person without specifying their shares or without dividing them, then the gift is not valid but if such donees themselves make any mutual arrangement and take possession of their individual shares, then the gift is valid.

2. Subject-matter of a Hiba (Mouhub) :

A Muslim can make a Hiba of the whole of his/her property. Every form of property or right which has some legal value may be the subject-matter of a Hiba.[14]However, the property must be transferable under Section 6 of the Transfer of Property Act, 1882. As a matter of fact, any property (mal) over which ownership may be exercised, may be transferred through a gift. Tangible as well as intangible property may be the subject matter of a gift. Whatever is mal according to Muslim jurisprudence can be lawfully subjects of gifts at Muslim law.

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[11] Baillie, I, 538; The Hedaya, 484
[12] Imam v. Ameer, AIR 1955 Mad 621
[13] Baillie, II, 214
[14] Baillie, I, 516

3. Formalities of a Hiba

Under the Muslim law, for the validity of a gift, the following formalities must be complied with :

i. Clear and unequivocal declaration by the donor
ii. Acceptance by the donee
iii. Delivery of possession.

i. Clear and unequivocal declaration by the donor :

The first condition required for the validity of a gift is the declaration of intention. Such declaration may be made orally or in writing. A clear and unequivocal declaration of intention of making a gift by the donor or his agent the first is essential element of the validity of a gift. The form of declaration is not immaterial. Such declaration of intention must be bona fide.[15] Such declaration may be made orally or by writing a deed. A gift made with the intention of defrauding creditors, of the donor, will be invalid because there is no bona fide intention with the property and continues in possession.

Such declaration may be made by the donor himself or his agent.

ii. Acceptance by the donee : The second condition necessary for the validity of a gift is acceptance by the donee or his agent. Such acceptance may be made expressly or impliedly.[16] Acceptance is not required in the following cases :

a. Where the gift is made by the guardian to his ward : A gift may be made by a guardian to his ward, and in such cases, acceptance of the wards is not necessary.[17] But if a gift is made to minors other than the guardians, then acceptance of the minor is required.
b. Where the gift of a debt is made to the debtor : A gift of a debt may be made to a debtor. In such a case the acceptance of the debtor is not required but a debtor may refuse to accept the gift of the debt.[18] But a surety is not released from the debt unless the debtor accepts.

iii. Delivery of Possession :

c. A gift is complete only after the delivery of the possession. So the third and most essential condition required for the validity of a gift is delivery of possession of the property whether movable or immovable of gift.[19] A gift not accompanied by

[15] Baillie, I, 515
[16] Munni Bai v. Abdul Gani, AIR 1959 MP 226
[17] Ebrahim v. Bai Asi, AIR 1934 Bom 21
[18] Baillie, I, 531
[19] The Hedaya 482

possession is void *ab initio*. Under the Muslim law, a gift is complete only after the delivery of the possession.

Exception to actual delivery of Possession : In every case of property, whether movable or immovable, actual or physical delivery of possession must be made except in few cases. In such cases symbolic or constructive delivery of possession is sufficient. The exception are :

a. Joint residence of the donor and the donee : When the donor and the donee are both residing in the house, which is subject-matter of gift, the actual or physical delivery of possession is not necessary, in such a case the gift will be completed by some overact by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the property.[20]
b. Property in possession of other persons : The property of gift may not be in the possession of the donor himself but in the possession of some other person like as a mortgagee, tenant or licensee. This property of the gift may be held adversely by other persons or under attachment of arrears of revenue. A valid gift may be made of the possession of a mortgagee, even if the donor makes a constructive delivery of possession. Such a possession may be made by the donor by handing over the gift-deed and divesting himself of his title, right and interest in the property. When the property is in the occupation of tenants, a valid gift may be made without giving physical delivery of possession but by delivering title-deeds or by mutation in the revenue records.[21]
c. Gift between spouses : When a husband or a wife makes gifts to each other of some property in their joint possession, then the physical delivery of possession is not required. Where the donor handed over the keys of the house to his wife, the subject-matter of the gift, the gift would be valid even though the husband continued to live in that house.[22]
d. Gift by a guardian to his ward : In the case of a gift made by a guardian to his ward, actual delivery of possession is not necessary, only an indication of a bona fide intention to stand in *loco parentis* to the donee or is in lawful custody of donee.[23]

REVOCATION OF GIFT

Under Islamic law all voluntary transactions are revocable, therefore this revocability should also be attributed to Gift.[24]Gift is a voluntary and gratuitous transfer of property. The donor makes a gift of the properties of his own free will and the transfer

[20] Mohd. Ibrahim Khan v. LRs. Of Azad Rasul & others, AIR 2008 (NOC) 187 (Raj); Mst. Husaina Bai v. Mst. Zohara Bai, AIR 1960 MP 63; Mohd. Saleem v. Abdul, AIR 1972 Pat 279
[21] M.M.Quasim v. Manoharlal Sharma, AIR 1981 SC 113; Gaui v. Wajid, AIR 1935 Cal 393, Ibrahim v. Noor Ahmed, AIR 1984 Guj 126
[22] Maniram v. Ishaque, AIR 1963 Pat 229
[23] Mohd. Sadiq v. Fakhr Jahan, AIR 1932 PC 13
[24] Tayabji, 437

without any consideration or exchange. In the transfer of property by way of gift, there are three stages : Declaration, Acceptance and the delivery of possession. As we have discussed earlier that without the delivery of possession there is no gift at all.

Revocation before delivery of possession : Delivery of possession makes a gift complete, so before the delivery of possession all gifts are revocable. A gift may be revoked by the donor at any time before the delivery of possession. A mere declaration by the donor that he has revoked the gift is sufficient.

Revocation after delivery of possession : When delivery of possession is made by the donor, the gift becomes complete. After the delivery of possession, the gift cannot be revoked by donor through mere declaration. For the revocation of such a gift, there are two ways :

Exception or Irrevocable Gift : There are certain exceptions, when even after the delivery of possession, a gift cannot be revoked. Such exception are according to the Hanafi law, exceptions are as follows :

i. Gift between the spouses: A gift between the spouses is irrevocable, if made only during the subsistence of their marriage, even though the marriage is irregular and is dissolved afterwards.[25]

ii. Relationship by prohibited degrees : When the donor and the donee are related within prohibited degrees, by consanguinity, the gifts are irrevocable. Gift in favour of persons other than related by blood, is not irrevocable. For example, a gift in favour of a brother[26] is irrevocable and in favour of a son-in-law is revocable because son-in-law[27] is not a blood relation.

Shia Law : Under the Shia law, a gift to a relation whether within the prohibited degrees or not, is not revocable, but irrevocable.[28]

iii. Death of either party : The right of gift is personal right and so if either the donor or the donee dies, the gift is irrevocable, their heirs have no right of revocation.[29]

iv. Where the donee has transferred the property to another person : After completion of the gift the donee becomes an absolute owner of the gifted property. As such, the donee may transfer that property to another person. In such cases, interest of that third person would be affected and he would be put to loss without any fault of his own.

v. Where the property is lost or has been destroyed : After revocation of a gift, the property should revert back to the donor but if it is lost or destroyed there would remain nothing to be given back to the donor.

HIBA-BIL-IWAZ

Hiba-bil-Iwaz is a peculiar concept of the Muslim personal law. Hiba means gift and Iwaz means consideration or return. Hiba-bil-iwaz, is, therefore, a gift with an exchange or a gift

[25] Sadiq Ali v. Amiran, AIR 1927 Oudh 439
[26] Tajjoo Khan v. Mazhar Khan, AIR 1952 All 614
[27] Imdad Ali v. Ahmed Ali, AIR 1925 Oudh 519
[28] Baillie, II, 205
[29] Mohboob v. Abdul, AIR 1964 Raj 250

for consideration. Under all the systems of law there cannot be any consideration or exchange in the transaction of gift. But Muslim law recognises a gift with an exchange as a kind of Hiba.

If a gift has duly been made and completed, but subsequently the donee also gives something to the donor in lieu of this gift, then the gift is called Hiba-bil-Iwaz.

Hiba means gift and Iwaz means consideration. Hiba Bil Iwaz means gift for consideration already received. It is thus a transaction made up of two mutual or reciprocal gifts between two persons. One gift from donor to donee and one from donee to donor. The gift and return gift are independent transactions which together make up Hiba bil Iwaz.

Essentials of Hiba-bil-iwaz :

The following two conditions are necessary to render a transfer as Hiba-bil-Iwaz :

I. A valid and complete gift by the donor to donee. It means the three essentials condition for a valid Hiba is essentials namely, the declaration, acceptance and delivery of possession. Every Hiba-bil-Iwaz is pure gift in its inception. But as soon as the donee also makes a gift in return of the original gift, the original gift becomes Hiba-bil-Iwaz.
II. The donee must may something to the donor after the completion of the gift. If donee pays the consideration, the gift is Hiba-bil-Iwaz. It the donee does not pay, the gift continues to be pure Hiba. Actual payment of consideration on the part of the donee is necessary. In Khajoorunissa vs Raushan Begam[30] held that adequacy of the consideration is not the question. As long is the consideration is bona fide, it is valid no matter even if it is insufficient.
III. It is important here that donee must mention it clearly that he is transferring the property to doner in return of a gift made to him.

The consideration (iwaz) paid by the donee to the donor, need not be equal to the value of the property gifted. It may be a nominal consideration or less in value as compared to the subject matter of the gift. In this regards, the Privy Council observed :

> Undoubtedly, the adequacy of the consideration is not the question. A consideration may be perfectly valid which is wholly inadequate in amount when compared with the thing given. Some of the cases have gone so far as to say that even a gift of a ring may be sufficient consideration.[31]

Difference between Hiba and Hiba-bil-Iwaz

[30] AIR 1939 Lah 292
[31] Ranee Khujooroonnissa v. Mst. Roushan Jehan, (1876) 3 IA 291

1. A Hiba is a transfer of some property or right by one person called donor to another called donee, without any consideration. But a Hiba-bil-Iwaz is a Hiba for consideration or in return or Iwaz of something.
2. In Hiba-bil-Iwaz , there are two transactions, one is for a Hiba and the second is for the return or iwaz but in Hiba there is only one transaction. Both these transactions together are known as a Hiba-bil-Iwaz.
3. Indian Hiba-bil-Iwaz is in reality a sale and has all the incidents of a sale.

HIBA-BA-SHART-UL-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 presumption (Shufa). As in sale, either party can return the subject of the sale in case of a defect. It has the following requisites –

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

Difference between Hiba-bil-iwaz and Hiba-ba-shartul-iwaz :

i. In Hiba-bil-Iwaz the consideration is paid by donee voluntarily whereas in Hiba-ba-Shart-ul-Iwaz its payment is a condition precedent.

ii. In Hiba-bil-Iwaz the consideration is at the will of the donee but in a Hiba-ba-Shart-ul-Iwaz the value and kind of consideration is at the direction of the donor.

iii. Hiba-bil-iwaz is not Hiba, it is either sale or exchange whereas Hiba-ba-Shart-ul-Iwaz is treated as Hiba.

iv. Doctrine of Musha is not applicable to Hiba-bil-Iwaz whereas this doctrine is applicable to Hiba-ba-Shart-ul-Iwaz.

v. Since Hiba-bil-Iwaz is not a gift, it is sale or exchange, therefore, it must be in writing and registered. On the other hand, writing and registration is neither necessary nor sufficient for Hiba-ba-Shart-ul-Iwaz.

Differences between Hiba, Hiba bil Iwaz, and Hiba ba Shart ul Iwaz

Hiba	Hiba-bil-Iwaz	Hiba-ba-Shart-ul-Iwaz
Ownership in property is transferred without consideration.	Ownership in property is transferred for consideration called Iwaz. But there is no express agreement for a return. Iwaz is voluntary.	Ownership in property is transferred for consideration called Iwaz, with an express agreement for a return.
Delivery of possession is essential.	Delivery of possession is NOT essential.	Delivery of possession is essential.
Gift of Musha where a property is divisible is invalid.	Gift of Musha even where a property is divisible is valid.	Gift of Musha where a property is divisible is invalid.
Barring a few exceptions it is revocable.	It is irrevocable.	It is revocable until the Iwaz is paid. Irrevocable after that.
It is a pure gift.	It is like a contract of sale.	In its inception it is a gift but becomes a sale after the Iwaz is paid.

Gift of Musha or Gift of undivided share :
The word Musha means an undivided share or part in a property. Such property may be movable or immovable. Under Muslim law, Musha signifies an undivided share in a joint property. Musha is therefore, a co-owned or joint property. If one of the several owners of this property makes a gift of his own share, there may be confusion as to which portion or part of the property is to be given to the donee.

Under the Hanafi doctrine of Musha, gift of a share in the co-owned property is invalid (irregular) without partition and actual delivery of that part of the property to the donee. However, if the co-owned property is not capable of partition or division, the doctrine of Musha is inapplicable.

A. Musha Indivisible : Gift of Musha indivisible is valid. There are certain properties which are by nature indivisible. The physical partition or division of such properties is not practical. For example, bathing ghat, a stair case or a cinema house etc., are indivisible Musha properties. Where a stair case is co-owned by, say two persons, then each being the owner of half of the stain-case, is entitled to make a Hiba of his share. But, if the stair-case is divided into two parts, it would either be too narrow to be used or it would become useless.

The doctrine of Musha is not applicable where the subject matter of gift is indivisible. According to all the schools of Muslims law, a gift of Musha indivisible is valid without any partition and actual delivery of possession.

B. Musha Divisible :

Where the subject-matter of a Hiba is Musha-divisible, the Hanafi doctrine of Musha is applicable and the gift is not valid unless the specific share, which has been gifted, is separated by the donor and is actually given to donee. However, under the Hanafi doctrine of Musha, the gift without partition and actual delivery of possession is not void *ab initio*, it is merely irregular (fasid). The result is that where such a gift has been made, it may be regularised by a subsequent partition and by giving to the donee the actual possession of the specified share of the property. It is evident, therefore, that the doctrine of Musha is limited, both in its application as well as in its effects.

Illustration

(a) A, B, and C are the co-owners of a house. Since a house cannot be divided, A can give his undivided share of the house to D in gift.

(b) A, B, and C are the co-owners of 3 Tons of Wheat, under Shafai and Ithna Ahsharia law, A can give his undivided share of the wheat to D if he withdraws control over it but under Hanafi law, A cannot do so unless the wheat is divided and the A delivers the possession of 1 ton of wheat to D.