

# Provisions of gift under Islamic Personal Laws and the Transfer of Property Act, 1882 - A Comparative Study

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## ABSTRACT:

In a legal sense, the term gift refers to a certain and voluntary transfer of property from one person to another. Under Islamic Laws, a gift or *hiba* is “transfer of property, made immediately, and without any exchange, by one person to another, and accepted by or on behalf of the latter. It is, the transfer of movable or immovable property with immediate effect and without consideration by one person called donor, to another person called donee. Hindu law defines gift as “the creation of another person’s proprietary right after the extinction of one’s own proprietary right in the subject matter of the gift. Gift has been defined in The Transfer of Property Act, 1882 under section 122 as, “ the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee.

In this paper, the author has made an attempt to draw a comparative study between the provisions of gift under Islamic Personal laws and the Transfer of Property Act, 1882 – the legal statute that deals with gifts amongst Hindus.

## I. INTRODUCTION

A gift is a thing given willingly to someone without payment.<sup>1</sup> It is a present. A gift is a thing that one gives to somebody, especially on a special occasion or to express gratitude.

Under Islamic Laws, a gift or *hiba* is “transfer of property, made immediately, and without any exchange, by one person to another, and accepted by or on behalf of the latter. It is, the transfer of movable or immovable property with immediate effect and without consideration by one person called *donor*, to another person called *donee*.<sup>2</sup> Mohammedan law draws no distinction between real and personal property.

Hindu law defines gift as “the creation of another person’s proprietary right after the extinction of one’s own proprietary right in the subject matter of the gift. Gift has been defined in The Transfer of Property Act, 1882 under section 122 as, “ the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the *donor*, to another, called the *donee*. According to the *Mitakshara*, “A gift consists in the relinquishment without consideration of one’s own right of property, and the creation of the right of another. The creation of another man’s right is completed or that other’s acceptance of the gift, but not otherwise.

<sup>1</sup> oxforddictionaries.com/definition/gift

<sup>2</sup> Dr. Tanzil-ur-Rahman, A Code of Muslim Personal Law, Vol. II, p. 1.

## II. PART II: GIFTS AS UNDER ISLAMIC LAWS

In Islamic laws, a person is allowed to lawfully make a gift of his property to another during his lifetime or he may transfer it by way of will which will take effect after his death. The former one is called a *disposition inter vivos* and the latter one is known as a testamentary disposition. The Islamic law permits a man to give away the whole of his property during the lifetime, whereas only 1/3<sup>rd</sup> of it can be bequeathed by will.

A gift *inter vivos* or *hibal* literally translates into the donation of a thing from which the donee may derive benefit.

**Baillie** is of the opinion that gift means conferring of a right of something specific without an exchange.<sup>3</sup>

According to **Fyzee**,<sup>4</sup> *hiba* is an immediate and unqualified transfer of the corpus of the property without any return.

According to **Mulla**, “Gift is a transfer of property, made immediately, and without any exchange, by one person to the other and accepted by or on behalf of the latter.”<sup>5</sup>

Sunni law says that gift or *hiba* is an act of bounty by which a right of property is conferred in something specific without exchange. Shia law is of the opinion that gift is an obligation by which property in specific object is transferred immediately and unconditionally without exchange.

The property in question can be movable or immovable and it is necessary that the transfer has to be without any condition. It must be clean and pure in every sense. The subject matter of the gift must be certain existing movable or immovable property. The general principle is that the subject of a gift can be anything over which dominion or right of property might be exercised, it can be anything which may be reduced to possession and also anything which exists either as a specific entity or as an enforceable right but gift of anything that is to be made in future is void, that means that the donor must possess the gift.

## III. ESSENTIAL ELEMENTS OF A GIFT

For a gift under Islamic laws to be valid, the given requisites are essential:

- **Parties (Donor and Donee)** – There must be a person who is willing and has pure intentions of gifting a property to somebody and there must be a person who accepts the gift given by the former person. Here, the former is known as the donor and the latter is called, the donee.
- **Capacity of Parties** – The donor can be any person who is a Muslim and is of sound mind and is also major according to the Indian Majority Act, 1875. The validity of a gift by a *Pardanashin* Woman was

<sup>3</sup>Baillie, Neil B. E. (Neil Benjamin Edmonstone), *A Digest Of Moohummudan Law On The Subjects To Which It Is Usually Applied By British Courts Of Justice In India*.

<sup>4</sup>Fyzee, *Outlines of Muhammadan Law*, p. 218.

<sup>5</sup>Mulla, *op. Cit* 134.

questioned and it was held that the donee must establish that the donor understood the full implications and consequences of the act and the nature of her act.<sup>6</sup> The donor must have absolute ownership and possession of the property that is in question.

The donee can be of any religion, i.e., it is not necessary that he/she has to be a Muslim to be able to accept the gift. Even the soundness of the donee's mind is not a criteria for the concerned person to receive the gift. Also, the donee need not be a major. Though it is necessary that the donee must be a legal juristic person who is capable of holding property and is, by any means, not held unfit by law.

- **The Subject Matter – The Property-** The property in question can be movable or immovable, there are no guidelines for it. The property must be owned absolutely by the donor and he/she must have the property a self-acquires or ancestral or a separate property. The property can be corporeal or incorporeal too, i.e., it may or may not be tangible. After all this, there is one restriction that the property in question cannot be a future gift. It means that the property in question has to be in possession of the donor at the time of making of the gift. There exists in Islamic Law, the rule of Immediate Transfer and that is why future gifts are not considered here. To exemplify my point, let us consider a person 'A' who, in the month of April 2018 says that all the eggs that his hen might lay in October 2018, he would gift it to his friend 'S'. Hence, it would not be a valid gift under Islamic laws as the donor does not have possession of the gift at the time of making the gift. In *Rahim Bux v. Mohd. Hasen*,<sup>7</sup> it was held that gift of services is not valid because it does not exist at the time of making the gift. Gift of an indivisible property can be made to more than one persons.
- **Delivery of Possession** – Here in Islamic Laws, there has to be immediate transfer of possession of the property in question. The proper transfer is completed or deemed to be completed only when the delivery is done.

Muslim law views the law of gift as a part of law of contract without consideration, so there must be the following formalities.

There must exist an offer (*ijab*), an acceptance (*qubul*), and transfer (*qabza*).

In the landmark case of *Smt. Hussenabiv. Husensab Hasan*,<sup>8</sup> a grandfather made an offertooft gift to his grandchildren. He also accepted the offer on behalf of minor grandchildren. However, there was no expressed or implied acceptance 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.

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<sup>6</sup>*Imam Sahib v. Ameer Sahib* AIR 1955 Mad 621.

<sup>7</sup>*Rahim Bux v. Mohd. Hasen* 1883.

<sup>8</sup> AIR 1989 Kant 218.

The *ijab* or offer must be done by the donor and it must be a clear declaration of the intention of the donor. It should be a voluntary declaration without any condition or ambiguity and must also be done in a bona fide intention. The presence of a witness is mandatory.

The *qubulor* acceptance must be done by the donee. In case the donee is a minor or is unsound, the acceptance should be made by the guardian. The natural guardian in such cases is the father of the donee. Though there might be some unforeseen circumstances, hence the Court decided that under some circumstances, people who are not guardian of the donee can accept the gift on behalf of the latter. In the case of *Ibrahim Bibi v. Pakir Mohidin*,<sup>9</sup> a minor girl was given a gift during her marriage. The husband (provided he is an adult), can accept the gift on behalf of his wife.

#### IV. GIFTS AS UNDER THE TRANSFER OF PROPERTY ACT, 1882

The sections 122 – 129 deal with the provisions of gift in the The Transfer of Property Act, 1882.

**Gift** is defined under section 122 of The Transfer of Property Act, 1882. It states that:

*“Gift is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.”*

It is required to be a voluntary transfer of property to another made gratuitously and without consideration. This section applies to those gifts that are gifts inter vivos or an absolute gift. Property under the above section can be both movable and immovable but however have to be tangible in nature. In order to constitute a valid „gift“, there must be an existing property.

These provisions do not regulated the Muslim individuals as they are regulated by there personal law under the concept of *hiba*. In *Babu Lal v. Ghansham Das*,<sup>10</sup> the Court held that the incidents of a gift between two Muslim people are governed by the Mohammadan Law, and not by the TP Act. Also, section 129 of The Transfer of Property Act, 1882 states that:

*“nothing in this chapter relates to gifts of movable property made in contemplation of death, or shall be deemed to affect any rule of Mohammadan Law.”*

The Acceptance of these gifts must be made during the lifetime of the donor and while he is still capable of giving. These provisions also state that if the donee dies before the acceptance of the gift, the gift stands void.

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<sup>9</sup>AIR 1970 Mad 17.

<sup>10</sup> (1992) ILR 44 All 633.

## V. PART V: ESSENTIAL ELEMENTS OF GIFT

Section 122 of the Act defines gift and also states the essential elements of gift. They are:

- **Voluntary and without consideration** – A gift is nothing but a transfer, a gratuitous transfer. The usage of the term *voluntarily* denotes the exercise of the will of the donor. In the case of *Shiv Kishanv. Hari Narain*,<sup>11</sup> it was held that for proving that the deed was executed with free and voluntary consent of the donor, it must be proved that the physical act of signing the deed coincided with the mental act, i.e., an intention to execute the gift. The principles of *free consent* laid down in the Indian Contract Act, 1872 would be used to determine the consent.
- Also, the word *consideration* is used in the same sense as it is used in the Indian Contract Act, 1872. A gift in consideration of a donee taking liability of the donor is not gratuitous and thus, it is not a gift.<sup>12</sup> In a case where the intention of the donee is proved that he wanted to get the land of the donor for monetary consideration which he had spent over his maintenance, ceases to be a gift.<sup>13</sup>
- **Parties (Donor and Donee)** – The person giving the gift is the *donor*. Any *sui juris* person can make a gift if his property. As it was held in the famous case of *Mohribiv.Dharmodas Ghosh*,<sup>14</sup> a minor is incompetent to contract, under section 7 of The Transfer of Property Act, 1882, he is incompetent to transfer and a gift made by a minor therefore, would be void. Also, it is upon the donor to prove that he was minor at the time of making the gift.
- The person accepting the gift is the *donee*. A gift can be accepted by or on behalf of a person who is not competent to contract. This means that a minor can be a donee – this was held in the very famous case of property, *K Balakrishnan v.Kamalam*.<sup>15</sup> The words ‘accepted by or on behalf of the donee’ reflects that the donee may be a person unable to express acceptance. This might happen when a gift is made to a child in his mother’s womb. The gift could be accepted on his behalf.
- **Subject Matter (Property)** – The subject matter, i.e., the gift must be certain, movable or immovable property it may be land or goods or actionable claims but in no way, just like Muslim law, it can never be a future property as mentioned under section 124 of this very Act. It states that a gift comprising both existing

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<sup>11</sup>AIR 1998 Raj 185.

<sup>12</sup>*Kulasekara Perumal v. Pathakutty* AIR 1961 Mad 405.

<sup>13</sup>*Pawan Kumar v. Tilak Raj* AIR 2011 (NOC) 98 (HP).

<sup>14</sup> 1903 ILR 30 Cal 539.

<sup>15</sup> AIR 2004 SC 1257.

and future property is void as to the latter. In the case of *AmtulNissarv. Mir Nuruddin*,<sup>16</sup> it was held that a gift of future revenue of a village is invalid. There must be an existing property.

- **Transfer** – The provisions relating to the transfer of gifts under The Transfer of Property Act, 1882 have been dealt under section 123. It says that for the transfer of immovable property, the transfer must be effected by a registered instrument signed by a or on behalf of the donor, and attested by at least two witnesses. In case of a movable property, the transfer must be effected either by a registered instrument signed by or on behalf of the donor or by delivery of possession.
- **Acceptance** – In order to constitute a valid gift, the primary requirement is that acceptance. The acceptance must be completed by the donee during the lifetime of the donor. No particular mode of acceptance is specified in law and hence it varies according to the time and circumstances.

## VI. PART VI: ANALYSIS AND COMPARISON

Drawing a comparison between both the heads is not so difficult. There are not so many differences though I will further mention the differences. The conception of the term "gift" as used in the Transfer of Property Act is somewhat different from the use in Mohammedan law. The comparison stands as mentioned below:

1. As defined by Mulla, "Gift is a transfer of property, made immediately, and without any exchange, by one person to the other and accepted by or on behalf of the latter."<sup>17</sup> Various other jurists, Islamic jurists in particular, have stressed upon the fact that *hiba* is an immediate and unqualified transfer of the corpus of the property without any return. On the other hand, in The Transfer of Property Act, 1882, it is specifically defined under section 122. Here, there is no kind of a difference between the concept of gift as both need a person to give a gift, a person to accept the gift.
2. The person giving the gift, i.e., the *donor*, in the case of Islamic law, has to be a person following the tenants of Islamic law who is of sound mind and fulfils the conditions of being a major vis-à-vis the provisions laid down in The Indian Majority Act, 1875. Also, the donor must have possession of the gift. The conditions are not much different in The Transfer of Property Act. Under the Act, there must be a person who is willing to give a gift. The donor must be of sound mind and any minor doing the transaction will be void.

The *donee*, i.e., the person accepting the gift, in case of Islamic laws can be a Muslim or even a non-Muslim. The donee must a legal juristic person though he/she need not be a major and also, the concerned person

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<sup>16</sup> (1898) ILR 22 Bom 489.

<sup>17</sup> *Supra* 5.

does not need to be a sound person either. Similar provisions are laid down in the Transfer of Property Act where a minor can be a donee but the gift would be accepted by someone on the minor's behalf.

3. In both these spheres, the conditions for the subject matter, i.e., *property* is the same. The property can be corporeal or incorporeal, movable or immovable ( though there are different provisions relating to transfer of movable and immovable property under section 123 of The Transfer of Property Act). The property must be in absolute possession of the donor. This thing has been made very clear in both the spheres. Another point where conditions are same is the incidence of future property. Both Islamic laws and The Transfer of Property Act have laid down that there is nothing related to future property. It simply does not exist. Under Islamic laws, in the case of *Rahim Bux*<sup>18</sup> and other cases, the Court held that future property does not exist. In the Property Act, *AmtulNissar*<sup>19</sup> case is an example of the Court saying that future property is void.

4. So far as declaration is concerned, it must be shown that the donor either in the "presence of witnesses or otherwise made a public statement that he gifted the property in favour of the donee and that he divested himself of the ownership of the property by delivering possession to the donee. A Muslim can make oral gift of his immovable property subject to these conditions. Delivery of possession being essential to the validity of a gift, it follows that if there is no delivery of possession, there is no valid gift. Under the Muslim law, a valid gift can be affected by delivery of possession, and if there is delivery of possession, the mere fact that there is also an unregistered deed of gift does not make the gift invalid. The transfer of property Act deals only with gifts of tangible property; and so a release of a security without consideration does not fall under this section; because, though the release of the security may be said to be a gift, still the gift is not one of tangible property.

5. When it comes to revocation under Islamic laws, A Muslim can revoke a gift even after delivery of possession except in the following cases: When the gift is made by a husband to his wife or by a wife to her husband ; when the donee is related to the donor within the prohibited degrees; when the gift is Sadaka (i.e. made to a charity or for any religious purpose); when the donee is dead; when the thing given has passed out of the donee's possession by sale, gift or otherwise; or the thing given is lost or destroyed; when the thing given has increased in value, whatever be the cause of the increase; and when the donor has received something in exchange for the gift. In Shia law, a gift can be revoked by mere declaration while in Sunni law, it can be revoked only by the intervention of the court of law or by the consent of the donee.

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<sup>18</sup>*Supra* 7.

<sup>19</sup>*Supra* 16.

Under The Transfer of Property Act, section 126 provides that under the following conditions a gift may be revoked: That the donor and donee must have agreed that the gift shall be suspended or revoked on the happening of a specified event; such event must be one which does not depend upon the donor's will; the donor and donee must have agreed to the condition at the time of accepting the gift; and the condition should not be illegal, or immoral and should not be repugnant to the estate created under the gift.

## VII. CONCLUSION

The research project compares Hiba under Islamic law and The Transfer of Property Act, 1882 of India and concludes that the provisions of *gifts* as under Islamic law is more futuristic and easily applicable have less procedural requirements. While The Transfer of property Act, 1882 requires lot of procedures and possess difficulties in providing gifts.

Different aspects related to gift in The Transfer of Property Act, 1882 and its distinction with the Muslim law and its implications has been the talking point of this report. In considering the law of gift's, it is to be remembered that the English word gift is really broad and must not be confused with the technical term of Islamic law, *hiba*. The concept of *hiba* and the term gift as used in the transfer of property act, are different. *hiba* under Muslim law is very easy to take into effect while gift under The Transfer of Property Law, 1882 in India is a long procedural matter.