

## THE CONCEPT OF GIFT UNDER MUHAMMADAN LAW AND ITS REGISTRATION

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### INTRODUCTION

Recently, the Government of Maharashtra made an announcement which reiterated the position under Muhammadan law that a Muhammadan may gift immovable property without registration of such gift. The gift may be made in writing or orally. If such gift is oral, then it should satisfy the essential ingredients of Muhammadan law. In addition, stamp duty shall not be payable with respect to gift of immovable property by a Muhammadan.

It is pertinent to note that the registration of an instrument of gift of immovable property is compulsory as per the provisions of the Transfer of Property Act, 1882 ("**TP Act**") and the Registration Act, 1908 ("**Registration Act**"). However, the rule under Muhammadan law pertaining to gift is an exception to the general law.

### POSITION UNDER THE TRANSFER OF PROPERTY ACT, 1882

The general law governing gift of movable and/ or immovable property is provided in the TP Act. Section 122 of the TP Act defines 'Gift' as a transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another called donee, and accepted by or on behalf of the donee. Further, Section 123 (*Transfer how effected*) of the TP Act provides that an instrument of gift of immovable property must be registered and signed by or on behalf of the donor and attested by at least two witnesses.

However, it is interesting to note that Section 129 (*Saving of donations mortis causa and Muhammadan law*) of the TP Act specifically lays down that the provisions of Chapter VII (*Of Gifts*) of the TP Act are not applicable to gifts of movable property made in contemplation of death and that such provisions of the TP Act have no effect on any rule of Muhammadan law. Accordingly, by virtue of Section 129, Muhammadans are exempted from the provisions pertaining to gift as laid down in the TP Act.

### POSITION UNDER THE REGISTRATION ACT, 1908

Section 17(1)(a) of the Registration Act lays down that an instrument of gift of immovable property must be compulsorily registered regardless of its value. In order to effect registration, the document must be executed i.e. signed by the parties to the document.

As a general rule, both, the TP Act and the Registration Act mandate that the document/instrument pertaining to gift of immovable property must be registered. Section 49 (*Effect of non-registration of documents required to be registered*) of the Registration Act lays down the effect of non-registration of documents/instruments that are compulsorily required to be registered in accordance with Section 17(1) (*Documents of which registration is compulsory*) of the Registration Act.

Generally, an unregistered instrument of gift of immovable property does not possess any evidentiary value of such gift. However, the provisions of the Registration Act read in conjunction with the principles of Muhammadan law and Section 129 of the TP Act provide an exception to the general rule of registration.

## POSITION UNDER THE MUHAMMADAN LAW

The term 'Hiba'<sup>1</sup> means gift under Muhammadan law. It is a transfer of property made forthwith, and not for consideration, by one person to another and accepted by or on behalf of that other person.

The gift of immovable or movable property need not be in writing under Muhammadan law. A Muhammadan of sound mind and not being a minor is at liberty to make an oral gift in respect of immovable or movable property in favour of a donee, provided such oral gift is made in the presence of witnesses or by a public declaration so that it is indisputable that the donor has indeed gifted the property to the donee and has put such donee in possession of that property.

The Privy Council in ***Mohammad Abdul Ghani and Anr. v. Fakhr Jahan Begam and Ors.***<sup>2</sup>, applied the following requirements for a valid hiba or gift as laid down under Muhammadan law –

- (i) manifestation of the wish to give on the part of the donor;
- (ii) the acceptance of the donee, either implied or expressly; and
- (iii) the taking of the possession of the subject matter of the gift by the donee, either actually or constructively.

Hence, a gift is complete, valid and irrevocable upon compliance with all the aforesaid conditions.

If either of the abovementioned conditions remains unfulfilled then such gift is incomplete and hence not valid. For instance, an instrument of gift of immovable property may be registered in accordance with the applicable law although the possession is not received by the donee, then, in such case, that gift is void as per Muhammadan law. Actual or constructive delivery of possession is essential to make the gift valid.

Registration is not a pre-requisite for validity of gift under the Muhammadan law.

## SUPREME COURT OF INDIA ON REGISTRATION OF GIFTS UNDER MUHAMMADAN LAW

In the matter of ***Hafeeza Bibi and Ors. v. Farid (Dead) by L.Rs. and Ors.***<sup>3</sup>, the judgement and order dated 13<sup>th</sup> September 2004 passed by the High Court of Andhra Pradesh holding an unregistered gift deed to be invalid, was challenged. The main issue before the apex court was whether the hiba (gift deed) dated 5th February 1968 was true, valid and binding. In the present case, one Shaikh Dawood, the donor had executed the said gift deed in favour of his son Mohammed Yakub, the donee. The donee had given his acceptance to the gift and the donor handed over the properties mentioned in the gift deed to the donee. The trial court held the said gift deed to be valid and binding since all the three requisites of a valid gift as provided under the Muhammadan law had been fulfilled. However, in appeal, the Andhra Pradesh High Court set aside the judgment of the trial court and held that the gift was not valid due to lack of registration.

The apex court referred to the relevant provisions of law as well as to the judgments of various High Courts holding differing views on the issue of registration of a document/ instrument of gift when such gift is made by a Muhammadan.

The apex court while recognising and restating the three essentials of a gift under Muhammadan Law i.e. (i) declaration of the gift by the donor; (2) acceptance of the gift by the donee and (3) delivery of possession stated that the rules of Muhammadan Law do not make writing essential to the validity of a gift. An oral gift fulfilling all the three essentials makes the gift complete and irrevocable.

<sup>1</sup> For the sake of clarity, it is essential to distinguish between hiba and hib-bil-iwaz. The latter is a gift in return for consideration akin to sale and the value of the immovable property is above Rs 100/- then in such case the transfer must

be effected by a registered instrument of gift of immovable property.

<sup>2</sup> (1922) 49 I.A. 195

<sup>3</sup> AIR 2011 SC 1695

The apex court observed: *"In our opinion, merely because the gift is reduced to writing by a Mohammadan instead of it having been made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by Mohammadan orally, its nature and character is not changed because of it having been made by a written document. What is important for a valid gift under Mohammadan Law is that three essential requisites must be fulfilled. The form is immaterial. If all the three essential requisites are satisfied constituting valid gift, the transaction of gift would not be rendered invalid because it has been written on a plain piece of paper. The distinction that if a written deed of gift recites the factum of prior gift then such deed is not required to be registered but when the writing is contemporaneous with the making of the gift, it must be registered, is inappropriate and does not seem to us to be in conformity with the rule of gifts in Mohammadan Law."*

It has been settled that if all the three essentials constituting a valid gift under Muhammadan Law are satisfied, the transaction of gift would not be rendered invalid merely because it is in writing but the same is not registered. Section 129 of the TP Act preserves the rule of Muhammadan law and excludes the applicability of Section 123 of the TP Act to a gift of an immovable property by a Muhammadan. The court further stated: *"29. ... In other words, it is not the requirement that in all cases where the gift deed is contemporaneous to the making of the gift then such deed must be registered under Section 17 of the Registration Act. Each case would depend on its own facts."*

## **BOMBAY HIGH COURT (NAGPUR BENCH) ON LEVY OF STAMP DUTY AND REGISTRATION OF GIFTS UNDER MUHAMMADAN LAW**

In the matter of ***Mohammed Yusuf s/o Mohammed Ibrahim v. State of Maharashtra and Ors.***<sup>4</sup>, the stamp duty demand notice of Respondent No. 3 i.e., Sub-Registrar and Stamp Collector, C/o Collectorate, Bhandara was challenged. The Bombay High Court held that stamp duty demand as raised by the impugned stamp duty notice was unrecoverable since the stamp duty on oral gift made by a Muhammadan of sound mind in favour of the donee cannot be levied. Whilst reiterating the three requisites of a valid oral gift as per Muhammadan law which make the gift complete and irrevocable, the High Court stated that the gift or instrument of gift does not require registration in each case. It was further stated that Sections 122 to 129 of TP Act are not applicable to a gift by a Muhammadan and there is no provision for levying stamp duty on an oral gift made by any Muhammadan of sound mind, in favour of the donee.

## **CONCLUSION**

Upon an analysis of the various judgments of the Indian courts, the statutes and the relevant principles of Muhammadan law, it can be concluded that a Muhammadan is permitted to make a written or oral gift in accordance with the rule of Muhammadan law pertaining to gifts. An oral gift may be accompanied by a document recording such transaction. In addition, the document or instrument making the gift is not required to be registered however this would depend on the facts and circumstances of each case.

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*The content of this article is intended to provide a general guide to the subject matter and should not be construed as legal advice.*

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<sup>4</sup> 2015 (1) BomCR 740