
HIBA UNDER MUSLIM LAW

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ABSTRACT

A Muslim may transfer his property in various ways. One of such way is Hiba. Hiba is a transfer of property in the form of gift governed as per Muslim Law. A transfer of gift is regulated by Transfer of Property Act,1882. However, there are many limitations on this act as Muslim Law prevails over this law to maintain the religious freedom.

In this paper, efforts have been made to present all such relevant legalities in a short but comprehensive manner. The paper deals with various provisions followed by the Indian legal system over a long period of time. Also, an attempt has been made to study Muslim Law with Indian codified laws so as to best understand the actual functioning of the laws.

INTRODUCTION

A Muslim may dispose his property chiefly by two ways that is, inter-vivos transfer and testamentary disposition. This transfer can be made in the form of creation of new title (Corpus) or by creation of new interest (Usufruct). A Muslim may Hiba his entire property during his lifetime. He may dispose his entire property if he has right over the property. Testamentary disposition takes effect after his death and is then made operational by law. Any person cannot make a will under Muslim Law except that he can give maximum of 1/3rd part to any stranger.

When a Muslim transfers his property through gift, without consideration made gratuitously, the transfer is known as Hiba. The transfer of gift is governed by Transfer of Property Act, 1882. However, Chapter VII of the Transfer of Property Act, 1882 does not apply on Hiba unless to the extent to which Muslim Law permits. Chapter 2 of the Act states that ‘nothing in the second Chapter of this Act shall be deemed to affect any rule of Mohammedan Law’.

According to Hidayat, “Hiba is an unconditional transfer of an ownership in an existing property made immediately and without consideration”. Thus, the four essentials derived from this definition are-

- 1) Unconditional transfer
- 2) Ownership
- 3) Existing Property
- 4) Made immediately

Thus, if foresaid conditions are fulfilled, such gift under Mohammedan Law is known as Hiba.

One of the most eminent definitions of Hiba recognised in India is given by Mulla, “Gift is a transfer of property made immediately and without any consideration.” According to Faizi, “Hiba is an immediate and unqualified transfer without corpus, of the property without any return.”

Hon’ble High Court of Kerala speaking through Hon’ble MR. Justice P. BHAVADASAN in the case of Salekath Beevi v. Mumthas Beevi¹ stated, “Hiba is an immediate and unconditional

¹ Salekath Beevi v. Mumthas Beevi, RSA.No. 474 of 2007()

transfer of the corpus of the property without any return. Every Muslim, who has attained majority and has a sound mind can make a gift.”

SUBJECT MATTER

A Muslim may Hiba any property over which he has a title. Every form of property or right which has some legal value may be the subject-matter of a Hiba,² The property, however must be transferable as under 6 of the Transfer of Property Act, 1882. Thus, every transferable property whether tangible or intangible is a subject matter of Hiba under Muslim Law.

Precisely, three rules may be followed to categorically understand the subject matter of Hiba-

- 1) Anything over which dominion/right may be exercised; or
- 2) Anything which can be reduced to possession;
- 3) Anything which exists either in the form of specific entity or enforceable right.

Any movable or immovable property at present is a lawful subject matter of Hiba. However, gift of services is not a valis Hiba. Also, any future property is not a subject matter of Hiba. Gift of equity of redemption (not in possession of mortgagee), gift of incorporeal property, gift of actionable claims, gift of property adversely to donor, are valid subject matters of Hiba under Muslim Law.

Gift of life interest has been a controversial matter as a subject. In the case of Musamat Hazara Bai v. MD Aadani Sayed³, the Hon’ble Court did not consider gift of life interest to be a valid subject matter. However, in the case of Jamila Bibi v. Sheikh Ismail⁴, Hon’ble Court allowed gift of life interest in the form of usufruct to be a subject matter of Hiba. Later, in the case of Amjad Khan v. Ashraf Khan⁵, the Hon’ble Court allowed the gift of life interest to be treated as a valid gift under Muslim Law.

In the case of Smt. Aneesa vs Abdul Rehman Rizwi (Imam)⁶, the Hon’ble court stated, “...subject matter of the gift is also important as the subject matter of the gift must belong to

² Baillie, I, 516

³ Musamat Hazara Bai v. MD Aadani Sayed , (1977) 1 MLJ 291

⁴ Jamila Bibi v. Sheikh Ismail

⁵ Amjad Khan v. Ashraf Khan (1929) 31 BOMLR 809

⁶ Smt. Aneesa vs Abdul Rehman Rizwi (Imam) Civil Suit No.498/14

the donor and must be in existence at the time of the gift.”

CAPACITY OF DONOR AND DONEE

Donor is a person who makes the Hiba of his property. A donor or Wahib must be competent to make a gift. Any male or female with following qualification may make a Hiba-

- 1) Muslim
- 2) Sound mind
- 3) Age of majority (as under Section 3 of the Indian Majority Act, 1875)
- 4) Right to transfer the property

In the case of *Smt. Aneesa vs Abdul Rehman Rizwi (Imam)*⁷ the Hon’ble Court observed, “...the capacity of the donor that is he/she should be adult, of sound mind, capable of exercise will freely should also be considered. Similarly, capacity of donee is also relevant. It is emphatically mentioned in various books, commentaries on Muslim Law that the donee must be in existence at the time of gift.”

Any male or female Muslim is competent to gift his/her property. However, he must possess both financial and mental capacity to make a valid Hiba. Gift by a Pardanashin women is also valid. However, on any matter of dispute, burden of proof of the free consent of such Pardanashin women lays on donee⁸ as per Section 101 and Section 102 of the Indian Evidence Act, 1872. Thus, any male or female of age of majority who understands the terms of transaction and is of sound mind, with his/her own free consent transfers the property in the form of corpus or usufruct may be said to be a competent donor of a property as Hiba under Mohammedan Law. The importance of gift to be free from any compulsion has been upheld by the Hon’ble court in the case of *Pasapini v. Moula*⁹.

Donee can be any person or group/class of persons in whose favour the property is transferred in the form of Hiba. Any juristic person is also a competent donee. Every such person must be a certain person and consent of every such person is essential for Hiba to be complete. There must be a share of donee specified and certain. If the property is undividable, the property may

⁷ *Smt. Aneesa vs Abdul Rehman Rizwi (Imam)*, Civil Suit No.498/14

⁸ *Kulsumun Nissa v. Ahmadi Begum* AIR 1972 All 219; *Gajraj Pasayat v. Debraj Pasayat*, MANU/OR/0230/2018.

⁹ *Pasapini v. Moula*, (1956) 2 Cal 579

be jointly gifted. Any unborn person who is in the womb of a women, can be gifted with the property. In the case of *Tagore v Tagore*¹⁰, the Hon'ble Court recognised child in womb to be a competent donee. However, it is based on contingency, that is, birth of the child. Child in womb shall be living at the time of making of such Hiba and shall take birth within six months from the making of such Hiba. Thus, any male or female, Muslim or Non-Muslim, major or minor, sound or unsound by mind, of any status is a competent donee if he/she accepts the Hiba expressly or impliedly.

ESSENTIALS OF A HIBA

The Hon'ble court in a case observed that a gift by a Mohammedan must comply with the provisions of Mohammedan law¹¹. Under Muslim Law, following essentials must be fulfilled to make valid Hiba-

- 1) Declaration by the Donor; and
- 2) Acceptance by the Donee; and
- 3) Delivery of possession

Hon'ble High Court of Kerela in the case of *P. Kunhimma Umma v. Aaisha Umma* observed that the foresaid requirements must be completed to make Hiba complete.¹²

1. DECLARATION BY DONOR

If any person wants to gift or dispose his property to another, he must declare it. According to Muslim Law, declaration may be oral or written. If it is written, declaration is known as 'Hiba-Nama'. However, it is not necessary to get it registered. Declaration must be express and it must be unambiguous. Implied declarations are not valid. Also, there must be free consent and bona-fide intention.

Thus, for a valid declaration, following conditions must be fulfilled-

¹⁰ *Tagore v Tagore*, (1874) L.R. 1 I.A. 387

¹¹ *Kaia Chand v. Jagannath*, AIR 1928 PRIVY COUNCIL 108

¹² *P. Kunhimma Umma v. Aaisha Umma ; Mohammad Abdul Ghani and Anr. v. Fakhr Jahan Begam and Ors.*, (1922) 49 Indian Appeals 195

I) Oral/Written

The donor must declare the Hiba of a property. This declaration may be in the oral form or written.¹³

II) Express

The donor must expressly declare the transfer of the property. The transfer must be free from any ambiguousness as also held in the case of Maimuna Bibi v. Rasool Mian¹⁴.

III) Free consent

The donor must give free consent for the Hiba of a property, free from coercion, undue influence, fraud, mistake or misrepresentation.

IV) Bona-fide

The donor must have bona-fide intention to transfer any property. Any malice will make such Hiba void as also upheld in Watson & Co. v. Ramichand Dutt¹⁵.

The Andhra Pradesh has held that, "in order to establish a declaration of gift, it must be shown that the donor either in the presence of the 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 such possession as the property is capable of to the donee who accepted the gift. A declaration cannot be made unilaterally without making a public statement of the gift."¹⁶

2. ACCEPTANCE BY DONEE

Donee must clear his will of acceptance of the Hiba. Such acceptance may either express or implied¹⁷. If donee denies acceptance, Hiba will become void. Donor cannot Hiba a property with force. Any person who has capacity to hold the property, he may be donee of a gift. Age, sex or religion are no bar on acceptance of Hiba. Transfer to non-muslims is also valid. Donee must be in existence at the time of Hiba. He must exist as a living person. If a minor is gifted,

¹³ Md. Hesabuddin v. Md. Hesaruddin, AIR (1984) Pat, 203.

¹⁴ Maimuna Bibi v. Rasool Mian AIR 1991 Pat 203, 1990 (38) BLJR 1037

¹⁵ Watson & Co. v. Ramichand Dutt, 28 Cal 10

¹⁶ Ratan Lal Bora v. Mohd Nabiuddin, AIR 1984 AP 344.

¹⁷ Munni Bai v. Abdul Gani, AIR 1959 MP 226

he may be gifted but only on the consent of legal guardian. Thus, following are the essential conditions for a valid acceptance by donee-

- Capable of holding the property
- May be of any age, sex, creed or religion
- Any legal/juristic person
- May be lunatic or minor or guardian

3. DELIVERY OF POSSESSION

Hiba is not valid unless possession is complete. Hidayatullah says that Hiba is not valid unless possession is complete. Mere delivery of ownership does not make a Hiba complete, there must also be delivery of possession. However, the mode of delivery of possession depends completely upon the nature of the property made Hiba. Hon'ble court in *Maqbool Alam Khan vs Mst. Khodaija & Ors* held that writing is not necessary for a valid gift inter vivos (i.e., among living persons) among Muslims, but there must be delivery of possession according to the nature of the property given¹⁷. There must be actual or constructive delivery of possession and a donee is said to be in possession when he gets a dominion right over the property¹⁸.

Also, Hon'ble Court in a case held that in gift, delivery of possession is essential and registration does not cure defect¹⁹.

However, in cases of Hiba by father to minor or any lunatic person, husband to wife or vice-versa, where donor and donee reside in same house or have co-share in the property, cases of part delivery or incorporeal property or where the donee is already in possession, delivery of possession is not required.

METHOD OF TRANSFER

The mode of delivery of possession depends upon the nature and circumstances of the property.

Basically, there are two modes of transfer of possession:

¹⁷ *Maqbool Alam Khan vs Mst. Khodaija & Ors* AIR 1966 SUPREME COURT 1194

¹⁸ *Smt Alimon Nessa v. Sudhir Chandra Dey*, AIR 1991 Gau 13

¹⁹ AIR 1960 MYSORE 97, AIR 1971 HIMACHAL PRADESH 5

1. Actual possession

If a property can be physically possessed, or the property can be taken from one place to other (movable property), for example coins, jewellery etc., the property must be physically transferred and such delivery of property refers to the actual possession. In case of immovable property, only entry on document is not sufficient. There must be such act such as the donor departs with all goods and belongings and donee's formal entry that gives actual possession to the donee.

2. Constructive possession

Constructive possession refers to the symbolic transfer of the property. If the donor is not in actual possession of the property, he must act as such that delivery becomes valid.

In case of incorporeal property, such act must show that the property is transferred. In case of corporeal property, all the interest/right must be transferred. Donee must do an act in his power to show the transfer of the property.

WHEN DELIVERY OF POSSESSION IS COMPLETE?

In case of movable property, when the donee physically gets the property, the delivery of possession is complete. But if the property is intangible or immovable, two theories are laid down by the judicial precedents:

1. Benefit theory
2. Interest theory

Under Benefit theory, Hiba is complete when donee starts getting the gift whereas under Interest theory, it depends on the intention of the donor. The court always decides on the basis of the nature and circumstances of the case.

REVOCAION OF HIBA

Revocation of Hiba before the delivery of possession is valid and the donee can revoke the Hiba any time before the possession has been given. Once possession is given, Hiba cannot be revoked by the donee. However, there are two conditions when the Hiba can be revoked-

- By the order of the court
- By consent of donee

HIBA BIL IWAZ

Iwaz means consideration. Thus, Hiba-bil-iwaz refers to the transfer of good in exchange of some consideration. Thus, it is a transaction of exchange.

Following are the essentials of Hiba-bil-iwaz-

1. Hiba must be legal and complete.
2. Actual transfer

However, Indian law does not accept the concept of Hiba-bil-iwaz.

HIBA BA SHARTUL IWAZ

Shart means condition. Thus, donor imposes certain condition on the acceptance which IS accepted by the donee. The condition must be reasonable and both the transaction are independent. The condition is not free but compulsory. Also, the delivery of possession must be completed.

Thus following are the features of Hiba-ba-shartul-iwaz:

1. Delivery of possession is necessary.
2. Revocable until the iwaz is paid.
3. On the completion of transaction, partakes the character of sale.

SADAQAH

Sadaqah refers to the religious transfer to please the almighty God. Any Hiba having a religious motive is sadaqah. Once transferred, it becomes irrevocable. The three essential conditions of declaration, acceptance and delivery of possession must too hereby be followed. However, express acceptance is not an essential condition.

DOCTRINE OF MUSHA

The word 'Musha' is derived from the Arabic word meaning confusion. In Muslim Law, it refers to the 'saayu' meaning undivided share in the property.

Thus, Musha refers to the undivided share in the property or the co-owned property. If one of such co-owner Hiba his property, then confusion may arise as what part of property belongs to donee. Therefore. To avoid such confusion, doctrine of musha is followed.

1. MUSHA OF INDIVISIBLE PROPERTY

It includes those property in which partition is not possible. However, such Hiba seems ambiguous of the face, a gift of undivided share in a property which is incapable of being divided is valid. Hiba without possession is valid in this case.

2. MUSHA OF DIVISIBLE PROPERTY

Property which is capable of division without affecting its value, the Hiba of such property is valid only if specific share which has been gifted is separated by the donor and is actually given to donee.

Following are the exceptions of this doctrine:

- 3. Gift to co-heir (co-beneficiary)**
- 4. Gift to share in zamindari**
- 5. Gift to share in landed companies**
- 6. Gift to share in freehold property in the commercial town**