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Concept of Gift under Islamic Law:

This article is written by Neha Gururani, a student of Guru Gobind Singh Indraprastha University, New Delhi. In this article, she has discussed the concept of gift under Islamic law, the various formalities of a gift and the .differences between the laws relating to gift and will under Islamic law

Introduction

A Muslim can devolve his property in various ways. Muslim law permits the transfer of property inter vivos (gift) or through testamentary dispositions (will). A disposition inter vivos is unrestricted as to quantum and a Muslim is allowed to give away his entire property during his lifetime by gift, but only one-third of the total property can be bequeathed by will. Conventionally, a gift, being a transfer of property is governed by the Transfer of Property Act, 1882.

But Chapter VII of the Transfer of Property Act, 1882 regulating the gifts does not apply to the 'Muslim Gifts' or the 'Hiba'. Although there is no such difference between a gift made by a non-muslim or a Muslim yet, the formalities of Hiba are different from that of a gift made by a non-muslim. Therefore, Hiba is governed by the Muslim Personal Law.

Meaning and Definition of Gift

A gift is generally a transfer of ownership of a property by a living person to another living person without any consideration. In Islamic law, gifts are known as 'Hiba'. To be very precise, gift implies to an extensive overtone and appertain to all kind of transfers of ownership not involving any consideration. On the other hand, the term 'Hiba' includes a narrow connotation. It is basically transferred inter vivos i.e. between living person.

Acceptance of gift by the Donee

For the validity of a gift, it must be accepted by the donee. Acceptance manifests the intention of the donee to take the property and become its new owner. Without acceptance, the gift is considered to be incomplete. Since under Islamic law, Hiba is treated as a bilateral transaction, therefore, it is important that the proposal made by the donor to transfer the ownership of the property must be accepted by the donee.

Minor: In case the donee is minor, the acceptance on behalf of a minor can be given by the guardian of the property of the minor.

Juristic person: If a gift is made in favour of any institution or any other juristic person, the acceptance of the gift is made by either manager or any other competent authority.

Two or more Donees: Gift made in favour of two or more donees must be accepted by each and every person separately. If the share of each person is explicitly specified by the donor then, they will get the separate possession in the same way as declared by the donor. But if the share under a gift is not specified and no separate possession is given by the donor, then also the gift is valid and the donees will take the property as tenants-in-common.

Delivery of Possession

The formalities laid down for gifts under Section 123, Transfer of Property Act, 1882, are not applicable to Muslim gifts. Under Islamic law, a gift is complete only after the delivery of possession by the donor and taking of possession by the donee. Thus, it is obligatory that the declaration and acceptance must be accompanied by the delivery of possession of the property.

The gift takes effect from the date when the possession of the property is delivered to the donee and not from the date when the declaration was made by the donor. Delivery of possession is an overriding facet in Islamic law. The importance is to such an extent that without the delivery of possession to the donee, the gift is void even if it has been made through a registered deed.

The donor must divest himself of not only the ownership but also the possession in favour of the donee in order to make a gift complete. Muslim law does not presume transfer of ownership rights from donor to a donee without the explicit delivery of possession of the property.

In Noorjahan v. Muftakhar[4], a donor made a gift of certain property to the donee, but the donor continued to manage the properties and takes the profit himself. Till the death of the donor, no mutation was made in the name of the donee. It was held by the court that since no delivery of possession was made, the gift was incomplete and ineffective in nature.

Mode of Delivery of Possession

The mode of delivery of possession totally depends upon the nature of the property gifted. Legally, the donor is required to do something by which the donee gets the physical control over the property in order to constitute the delivery of possession.

A donee is said to be in possession of a property when he is so placed that he can exercise exclusive dominion over it and gain the benefits out of it as is usually derived from it. Therefore, the delivery of possession can be either actual or constructive i.e. symbolic.

Concept of will under Muslim Law

A Will or Testament or Wasiyat has been defined as â€œan instrument by which a person makes disposition of his property to take effect after his death.â€□

Tyabji defines Will as â€œconferment of right of property in a specific thing or in a profit or advantage or in a gratuity to take effect on the death of the testator.â€□

The distinguishing feature of a Will is that it becomes effective after the death of the testator and it is revocable.

Unlike any other disposition (e.g. sale or gift), the testator exercises full control over the property bequeathed till he is alive: the legatee or beneficiary under the Will cannot interfere in any manner whatsoever in the legator's power of enjoyment of the property including its disposal or transfer (in that case the Will becomes revoked).

Object and Significance of Wills

The object of Wills according to the tradition of the Prophet is to provide for the maintenance of members of family and other relatives where they cannot be properly provided for by the law of inheritance.

At the same time the prophet has declared that the power should not be exercised to the injury of the lawful heirs.

A bequest in favour of an heir would be an injury to the other heirs as it would reduce their shares and would consequently induce a breach of the ties of kindred.

Thus the policy of the Muslim law is to permit a man to give away the whole of his property by gift inter vivos, but to prevent him, except for one third of his estate, from interfering by Will with the course of the devolution of property according to the laws of inheritance.

A Will offers to the testator the means of correcting to a certain extent the law of succession, and enabling some of those relatives who are excluded from inheritance to obtain a share in his property, and recognizing the services rendered to him by a stranger.

Formality of a Will

As a general rule, no formality is required for making a Will (Abdul Manan Khan v Mirtuza Khan).

No writing is necessary to make a Will valid, and no particular form, even verbal declaration is necessary so long as the intention of the testator is sufficiently ascertained.

Where the Will is reduced to writing it is called a â€˜Wasiyatnama.â€™ If it is in writing it need not be signed. It does not require attestation and if it is attested there is no need to get it registered.

Instructions of the testator written on a plain paper, or in the form of a letter, that in clear cut terms provide for distribution of his property after his death would constitute a valid Will (Abdul Hameed V.Mahomed Yoonus).

In case, a Will is oral, the intention of the testator should be sufficiently ascertained. In comparison to a Will in writing which is easier to prove, the burden to prove an oral Will is heavy.

Testator and his Competence (Who can make Will?)

Every major Muslim (above 18 years) of sound mind can make a Will.

The age of majority is governed by the Indian Majority Act, 1875, under which, a person attains majority on completion of 18 years (or on completion of 21 years, if he is under supervision of Courts of Wards).

Thus, the testator must be of 18 or 21 years, as the case may he, at the time of execution of the Will.

At the time of execution of a Will (i.e. when it is being made), the testator must be of sound mind.

Under Muslim law, the legator must have a perfectly â€˜disposing mindâ€™ i.e. the legator must be capable of knowing fully the legal consequences of his activities not only for a brief period when the declaration was made, but much after that.

A Will that is executed in apprehension of death is valid, but under the Shia law, if a person executes any Will after attempting to commit suicide, the Will is void.

A minor is incompetent to make a Will (such a Will is void) but a Will made by minor may subsequently be validated by his ratification on attaining majority.

A Will procured by undue influence, coercion or fraud is not valid, and the court takes great care in admitting the Will of a pardanashin lady. Thus, a Will must be executed by a legator with his free consent.

The legator must be a Muslim â€œat the time of making or execution of the Will.â€☐ A Will operates only after the death of the legator; before his death, it is simply a mere declaration on the basis of which the legatee may get the property in future.

If a Will has been executed by a Muslim who ceases to be a Muslim at the time of his death, the Will is valid under Muslim law.

Also, the Will is governed by the rules of that school of Muslim law to which the legator belonged at the time of execution of the Will. For example, if the legator was a Shia Muslim at the time when he wrote the Will, only Shia law of Will is made applicable.

Legatee and his Competence (To whom Will can be made?)

Any person capable of holding property (Muslim, non-Muslim, insane, minor, a child in its mother's womb, etc.) may be the legatee under a Will. Thus, sex, age, creed or religion is no bar to the taking of a bequest.

Legatee (including a child in its mother's womb) must be in existence at the time of making of the Will. Thus, a bequest to a person unborn person is void.

A bequest may be validly made for the benefit of â€˜juristic personâ€™ or an institution (but it should not be an institution that promotes a religion other than the Muslim religion viz. Hindu temple, Christian church etc.).

A bequest for the benefit of a religious or charitable object is valid. It is unlawful to make a bequest to benefit an object opposed to Islam e.g. to an idol in Hindu temple, because idol worship is opposed to Islam.

No one can be made the beneficial owner of shares against his will. Therefore, the title to the subject of bequest can only be completed with the express or implied consent of the legatee after the death of the testator. The legatee has the right to disclaim.

A person who has caused the death of the legator cannot be a competent legatee. A Will operates only after the death of a legator, therefore, a greedy and impatient legatee may cause the legator's death to get properties immediately. However, it is also immaterial whether the legatee knew about him being a beneficiary under the Will or not.

Joint Legatees

A bequest may be made to two or more legatees jointly, and when no specific share of any of them has been mentioned, the property is divided equally amongst all the legatees. But, where the legator himself has specified

the respective shares of the legatee then, each legatee would get the shares allotted to him.

Subject Matter of Will (Bequeathable Property) and its Validity

The testator must be the owner of the property to be disposed by will; the property must be capable of being transferred; and, the property must he in existence at the time of testator's death, it is not necessary that it should be in existence at the time of making of Will.

Any kind of property, movable or immovable, corporeal or incorporeal, may be the subject-matter of a Will.

In order to be a valid bequest the grant in the bequeathed property must be complete or absolute. A bequest has to be unconditional. If any condition is attached, say the legatee shall not alienate the subject of legacy, the condition is void and the bequest is effective without condition.

Likewise, a bequest in futuro is void, and so does a contingent bequest.