

GIFTS UNDER MUSLIM LAW
AND THE REQUIREMENT OF
REGISTRATION: A STUDY IN
THE LIGHT OF SUPREME COURT'S
DECISION IN *HAFAEEZ BIBI*
AND OTHERS^{*}

By

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1. The triple requirement¹ of a valid gift under Mohammadan Law can be stated thus:-

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

2. The Supreme Court in *Mahaboob Saheb's Case*² summarized the rules of Mohammadan relating to gifts as stated by Mulla³ as follows:-

Sec 147 ... "that writing is not essential to the validity of gift either of moveable or immoveable property"

Sec 148 ... "essential to the validity of a gift that the donor should divest himself completely of all ownership and dominion over the subject-matter of gift"

Sec 149 ... The triple requirement as stated earlier⁴

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1. View of Syed Ameer Ali in his book on 'Mohammadan Law' quoted by Privy Council in Mohd. Abdul Ghani & others Vs. Fakhr Jahan Begum & others, AIR 1922 PC.P.281
2. AIR 1995 SC p.1205
3. Mulla 'Principles of Mohammadan Law, 19th Edition Para 5 (PP 696-697) Edited by Chief Justice M.Hidayatullah.
4. See Para (1) for details.

Sec150 ... For a valid gift there should be delivery of possession of the subject-matter of the gift and taking of possession of the gift by the donee either actually or constructively; and

Sec 152 ... Where the donor is in possession a gift of immoveable property of which the donor is in actual possession is not complete, unless the donor physically departs from the premises with all his good and chattels, and the donee formally enters into possession.

It is thus clear that the gift need not be in writing and consequently no registration is required.

Mulla has added to the requirement stated by Syed Ameer Ali, which requires that the donor should completely divest himself physically of the subject-matter of gift.

3. The Transfer of Property Act relating to gifts is stated in Sec 123 and Sec 129.⁵

Relevant extract Sec 123 states as follows:-

For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument, signed by or on behalf of donor and attested by two witnesses....."

Sec 129 which makes an exception to Sec 123 as follows:-

"Nothing in this chapter relates to gift of moveable property made in contemplation of death or shall be deemed to affect any rule of Mohammadan Law".

4. Sec 17(1)(a)⁶ Registration Act requires the instrument of gift of immoveable

5. See for details Sec 123 and Sec 129 of the Transfer of Property Act, 1882.

6. See for details Registration Act, 1908 Section 17 and Sec 49.

property irrespective of value shall be registered compulsorily. This can be stated thus:-

"An instrument or deed which creates, makes or completes the gift, thereby transferring the ownership of property from the executants to the person in whose favour it is executed, and in order to affect the immoveable property, the document must be a document of transfer. If it is a document of transfer, it must be registered under the Provisions of Registration Act".

5. In *Nasib Ali v. Wajid Ali*,⁷ the Calcutta High Court ruled: "...deed of gift by a Mohammadan is not a document of title but is a piece of evidence". It was considered wise and prudent to reduce the transaction to writing to preserve evidence, when all forms may not be forthcoming due to lapse of time. The Judicial Committee in *Kamarunnisa Bibi v. Hussaini Bibi*,⁸ while upholding the gift made in lieu of dower ruled: "... the requisite forms having been observed, it was not necessary to enquire whether there was any consideration for the gift or whether any dower due. In *Karam Illahi v. Sharfuddin*,⁹ it was ruled, 'if the gift was valid under Mohammadan Law, it was none the less valid' the validity of the gift will not be affected by reason of any defect in Sec 129 of TP Act or being used in evidence.

6. In *Mukku Rawather's Children Association and others v. Manahapara Charayll*,¹⁰ the opinion of Mulla was quoted with approval, which is in these terms: "...An instrument of gift is one whereby a gift is made. When in law a gift cannot be effected by a registered deed as such, it cannot be an instrument of gift. The legal position is well-settled. A Muslim gift may be valid even without a registered deed. Registration being irrelevant to its

legal force, a deed setting out Muslim gift cannot be regarded as construction of the gift and is not compulsorily registrable".

7. In *Gulam Ahmed Safi v. Mohd Sidiq Dareel and others*¹¹ it was held... "oral gift made under Muslim Law would not be affected by Sec 123 of TP Act and the gift, if it has otherwise all the attributes of a valid gift under Muslim Law, would not become invalid because there is no instrument in writing and registered".

8. The Andhra Pradesh High Court in *Uddandu Sahib's Case*¹² ruled... 'Hence, if all the formalities as prescribed by Muslim Law regarding the making of gifts are satisfied, the gift is valid notwithstanding the fact it is oral and without any instrument'. However, it was also observed that in case of contemporaneous document, it should be registered. It was also observed that the gift is antecedent and the deed is subsequent merely evidencing the past transaction, it does not require registration, as it does not by itself make or complete the gift".¹³

The Madras High Court in *Amir Khan v. Ghouse Khan*¹⁴ ruled: "Though a Muslim could create a valid gift orally, if he should reduce the same in writing, the gift is not be valid unless it is duly registered". In this context, a referenced is made to the statement of A.A.Fyzee, an authority on Muslim Law which is in these words: "It (document) may itself be the instrument of gift, such a writing in certain circumstances require registration... if there is a declaration, acceptance and delivery of possession coupled with the formal instrument of gift, it must be registered".¹⁵

11. AIR 1974 J&K P.59 (FB)

12. *Uddandu Sahib v. Masthan Bi*, AIR 1975 A.P. 271.

13. *Ibid.* 14. (1985)2 MLJ P.136

15. A.A.Fyzee, "outlines of Mohammadan Law", 5th Edition (edited and revised by Tahir Mohamood) at P.182 and quoted in *Amir Khan's case*, *Supra* at Para 27.

7. AIR 1927 Cal. P.197 8. (1880) 3 All 266.

9. (1916) 38 All 212

10. AIR 1972 Kerala P.72

Mulla's observation was also referred to, which is in these terms:- "...But it cannot be taken as a Sine Qua non in all cases that whenever there is writing about a Mohammadan gift of immovable property, there must be registration thereof. Whether the writing requires registration or not depends on the fact and circumstances of each case".¹⁶

Thus, registration is required depending on the facts and circumstances of each case, even according to Mulla.

9. The Privy Council in *Mohd. Abdul Ghani's Case*,¹⁷ gave a possible reason for the conspicuous omission of registration of Muslim gifts in these words: "when the old and authoritative texts of Mohammadan Law were promulgated, there was not in contemplation of any one, any TP Acts, Registration Acts, Revenue Courts to record transfers of possession of land and that could not have been intended to lay down for all times what should alone be the evidence that title to lands had passed".

10. The provision relating to registration is a procedural requirement which effectively protects the title of the holder of the property. It affords protection against future litigations and against fraudulent transfers. In the recent times, we come across cases of an owner transferring his landed property several times creating endless litigation for those, who are the legitimate acquires of property. The need for registration has been emphasized by the Apex Court in *T.C. Ashok Kumar's case*¹⁸ thus:-

"We may also refer to another related area, where registration should be made compulsory to reduce property

litigation.Unscrupulous property owners enter into agreements of sale and take huge earnest money deposits/ advances and sell the property to others thereby plunging the original agreement holder and subsequent purchaser into litigation... It will also assist in putting an end to the prevalent practice of entering into agreements of sale showing the real consideration and then registering the sale deed for only a part of the real consideration. If all agreements of sale are compulsorily registered, then it will go a long way to discourage generation and circulation of black money in real estate matters, as also under valuation of documents for purposes of stamp duty... It will also discourage the growth of land mafia and musclemen who dominate the real estate scene in various parts of the Country. Prevention of malaise is always better than allowing a malaise to develop and them trying to cure it".

11. There can be no better weighty reason than the reasoning of Apex Court for compulsory registration. What is said with regard to sale, apply with equal force to donations as well. The cases of a donation being made and its subsequent sale to another do occur, thereby the done and the subsequent purchaser litigating endlessly. If registration is not insisted, there are many cases of innocent parties suffering irreparably and the loss sustained is beyond any quantum of compensation. Injustice results.

12. Apart from the triple requirement of a valid Hiba, there appears to be no reason to disregard registration. It is only a procedural requirement for a valid conferment of title to holders of property. There are many benefits of registration, which authoritative texts of Muslim Law never contemplated. Muslim Law has to

16. Mulla, "Principles of Mohammadan Law" 19th Edition P.120.

17. AIR 1922 PC P.281.

18. *T.C. Ashok Kumar v. Govindammal and another* Civil Appeal No. 10325 of 2010 decided on 8.12.2010 and reported in Supreme Journal (2011) SCJ. Vol. 1 Pages 1 to 10 at Para 15.

fall in line with recent periods of development in society. Protection of innocent legitimate holders of property shall be the paramount concern of every personal law whether Hindu or Muslim. There is a need to amend Sec 129 of the Transfer of Property Act to incorporate thus:-

Proviso I to be added to Sec 129 as follows:-

"The provision of Indian Registration Act shall apply to all cases of gifts of immovable property under Mohammadan Law".

If so needed, gifts of immovable property under Muslim Law may be given either partial or total exemption from levy of stamp duty and registration fees.

In conclusion, the following suggestions are made:-

- (1) Sec 129 of the Transfer of Property Act be amended to provide for registration of gifts of immovable property under Mohammadan Law;
- (2) Such gifts as aforesaid may be given either partial or total exemption from stamp duty and registration fees; and
- (3) Oral gifts under Muslim Law can be only for moveable property and the triple requirement as laid down in *Mohd. Ghani's* case may be sufficient for a valid gift.¹⁹

DIFFERENT TYPES OF AMENDMENTS TO A COMMON WRITTEN STATEMENT

By

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"What we aspire from other's behavior in our matters, our behaviour should also be the same in the same matters of others and it is called DHARMA" by VIDHURA in MAHA BHARATHA

Filing of a Common Written Statement by several defendants itself, would suggest that they have common interest in the matter. But, filing of separate petitions by such defendants seeking different types of amendments to their common written statement would also suggest that the defendants have no such common interest and that their contentions are different. Does the law permit such different types of amendments to a common written statement is the scope of this article.

A defendant seeking for such amendment to a common written statement already filed by him along with other defendants may move the court by an Interlocutory Application under Order 6 Rule 5 or under Order 6 Rule 17 or under Order 8 Rule 9 of the Code of Civil Procedure, 1908 (for short "the Code"). But, prior to the omission, Order 6 Rule 5 of the Code reads as "A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, may in all cases be ordered, upon, such terms, as to costs and otherwise, as may be just. As well all know, Order 6 Rule 5 of the Code is no longer available to such defendants since it was omitted by the Amendment Act 1999 w.e.f. 1-7-2002.

In the case of *Future Builders Co-operative Housing Society, Secunderabad v. S. Malla Reddy and others* (2008 (2) ALT 520), the defendant

19. Supra P.281

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