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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.

Actual Delivery of Possession

Actual delivery means when a property is physically handed over to the donee. This type of delivery is possible only with tangible properties (movable as well as immovable) which are capable of being physically possessed and given.

Where the property is **movable**, it must be actually transferred and handed over to the donee.

For example, if a donor gifts a car to the donee, he must give the keys of the car and all other documents of the car to the donee so that he can use it. Mere declaring the gift on a document is not enough. The property must be handed over immediately.

Similarly, where the property is **immovable**, its actual delivery of possession is compulsory. But since it cannot be picked up and handed over, the donor may deliver such property by giving all the documents related to that property and by placing it to the donee so that he can use it as he likes.

For example, if a donor gifts the house in which he is residing, he must vacate it and ask the donee to live in it in order to make his gift valid. In case of a garden, the donor may give full dominion to the donee to use the garden in whichever way he wants including all the rights to enjoy the fruits and flowers.

Constructive Delivery of Possession

Constructive delivery of possession means a symbolic transfer of property. In this mode of delivery, the donor does some act due to which it is legally presumed that the possession has been delivered to the donee. Such type of delivery of possession takes place only when the property is of such a nature that it is not possible to deliver through actual mode. Constructive delivery of possession is sufficient to constitute a valid gift under two circumstances only:

Where the property is intangible.

Where the property is tangible but, under the situation, its actual delivery of possession is not possible.

When the constructive delivery of possession is completed?

When the possession of the movable property is delivered, the exact time of delivery of possession can be easily determined. The problem arises in the case of immovable or incorporeal properties where it is onerous to prove the exact time of the delivery of possession. However, in India, there are two judicial views regarding the exact time of the completion of delivery of possession.

Benefit Theory: Under this view, it is believed that a constructive delivery of possession is complete as soon as the donee starts getting the benefits out of the gifted property. Where even after the declaration of the gift, the donor is enjoying the benefits, the gift is not complete. But, if the donor enjoys the benefits, it is deemed that the delivery of possession has taken place.

This approach lays more emphasis on the facts of donee's benefits from the gifted property instead of the act which symbolises constructive delivery of possession.

For example, if a donor gifts a rented house to the donee, the delivery of possession is considered to take place from the date on which the donee gets the rent from the tenants.

Intention Theory: This approach supports the view that the delivery of possession is completed on the date on which the donor intent to transfer the possession to the donee. The intention of the donor can be proved on the basis of the facts and circumstances which vary from case to case. In correspondence to the intention of the donor, some potent facts must be established which exhibit that the donor has physically done everything he could in the given circumstances.

In other words, the court accepts that the delivery of possession is deemed to have taken place only when the bona fide intention of the donor to complete the gift is thoroughly established and it is not important to prove that from which date the donee reaps the benefits of the property given.

For example, if the donor and donee are living in the same house which constitutes the subject-matter of the gift, the donor's intention to transfer the possession to the donee is sufficiently proved if the donee has been authorised to manage the house.

Who may challenge the Delivery of Possession?

It is not at all necessary to prove separately in each and every case that the delivery of possession has been completed until and unless the validity of gift is challenged by the donor, the donee or any person legally authorised to claim on behalf of them.

In the case of Y. S. Chen v. Batulbai[5], a Muslim woman made a gift of a portion of her house to her daughter. The gifted portion of the house was occupied by a tenant who used to pay the rent regularly to the daughter (donee) recognising her as the landlady. After some time, the tenant refused to recognise the daughter as his landlady on the ground that the gift made in her favour was void because there was no delivery of possession. It was held by the court that –

“Any objection as to the validity of gift on the ground of absence of delivery of possession cannot be raised by the tenant who is a stranger to the transaction of a gift.”

Conditional or Contingent Hiba

The contingent or conditional gifts whose operation depends upon the occurrence of a contingency. A contingency is a possibility, a chance, an event which may or may not happen. Under Islamic law, conditional or contingent gifts are void.

For example, if a Muslim made a gift to his wife for life, and after her death to his children who are living at the time of his death, the gift is said to be contingent.

MCQ

1.
A gift for unborn person Under Muslim law is _____ :
Void Valid Voidable None of these
2.
The essential condition of a gift under Muslim Law is—
Acceptance of the gift by the donor Declaration of the gift by the donor Delivery of possession of subject matter of the gift All the above
3.
Sadqa once completed by delivery is:
Revocable Not revocable Revocable subject to condition None of these
4.
The following property may validity disposed by gift –
Impartible property Stridhana Intrest of copercenar all the above
5.
According to mitakshara gift may be –
By orally In writing Orally or in writing Depends upon parties