



**FACULTY OF JURIDICAL SCIENCES**

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## **When Delivery of Possession is not necessary**

Islamic law of gift binds great significance to delivery of possession especially in case of immovable property. The other essentials of Hiba will have no legal effect unless accompanied by delivery of possession. But there are certain exceptions to this general rule. The following are the situations under which a gift is valid without actual or constructive delivery of possession:

**Donor and donee live jointly in the gifted house:** Where the subject-matter of a gift is a house in which the donor and donee both resides together, any formal delivery of possession is not necessary to complete the gift. Since the donee is already continuing the possession of the house in some other capacity, there is no need to give the donee the same possession again in a different capacity.

But, there must be some conspicuous act or apparent activity on the part of the donor that indicates the bona fide intention of the donor to transfer the possession.

In *Humera Bibi v. Najmunnissa*[6], a Muslim lady executed a gift deed of her house in favour of her nephew who was living with her in the same house. The property was transferred in the name of the nephew but she continued to live with him as before. But after the making of the gift, the rents were collected in the name of the donee. It was held that “ *the gift was valid although there was neither any physical transfer to the donee nor any physical departure of the donor from the house.* ”

**Gift by a husband to wife or vice versa:** where a gift of immovable property is made by a husband to wife or vice versa, no transfer of possession is mandatory. The reason behind this is that a joint residence is an integral aspect of the relationship of marriage. To perform the matrimonial obligations it is necessary the husband and wife must live together.

In the case of *Fatmabibi v. Abdul Rehman*[7], the husband made an oral gift of a house to his wife. Later, the deed was also registered. The stepson, who lived with his wife in the gifted house, challenged the validity of the gift on the ground that there was no delivery of possession of the house. It was held that –

“*Oral gift in presence of two persons amounts to the declaration, mentioning the name of the wife in the registration deed amounts acceptance and mutation in the name of the wife at the instance of the wife amounts sufficient delivery of possession keeping in view the relationship between the parties.*”

In *Katheessa Ummand v. Naravanath Kumhamuand*[8], the Supreme Court held that “ *where a husband made a gift in favour of his minor wife by a registered deed and possession is handed over to the mother of minor wife, the gift was valid. Since the wife had no father and grandfather alive, nor any executor, the delivery of the gift deed to her mother instead of the minor wife herself did not invalidate the gift, as the intention was well established.*”

**Gift by Guardian to Ward:** In case a guardian makes a gifts in favour of his ward, he declares the gift as donor and accepts the gift on the part of the donee, the delivery of possession is not compulsory provided that there is a bona fide intention on the part of the guardian to divest his ownership and give it to his ward.

Gift of property already in possession of donee: The basic objective behind the concept of delivery of possession is to give the physical dominion over a property to the donee. But, anyhow if the donee already has possession of the property given by donor under a gift, mere declaration and acceptance are enough to complete the gift. No formal delivery of possession is required to complete the gift.

## **II. Gift of Mushaa – Exceptions thereof, Revocation of gifts under Shia and Sunni Law**

The word ‘Mushaa’ has an Arabic origination which literally means ‘**confusion**’. Under Islamic law, Mushaa denotes an undivided share in joint property. It is, therefore, a co-owned or joint property. If one of the several owners of such property makes a gift of his own share, there may arise confusion in regard to what part of the property is to be given to the donee. Practically, it is too difficult to deliver the possession of a joint property if a gift is made by a donor without partition of the joint property.

To circumvent such confusion, the Hanafi Jurists have developed the doctrine of Mushaa. Gift of Mushaa i.e gift of a share in the co-owned property is invalid without the partition and actual delivery of that part of the property to the donee. If the co-owned property is not capable of partition, the doctrine of Mushaa is impertinent. A Mushaa or undivided property is of two kinds: Mushaa Indivisible

It includes the property in which the partition is not possible. A gift of an undivided share (Mushaa) in a property which is incapable of being divided or where the property can be used for better advantage in an undivided condition, is valid. The doctrine of Mushaa is not applicable where the property constituting the subject-matter of the gift is indivisible. All the schools of

Islamic law accept the view that a gift of Mushaa indivisible is valid without partition and the actual delivery of possession.

**For example**, a staircase, a cinema hall, a bathing ghat etc. comprises indivisible Mushaa properties. If these kinds of properties are divided, then their original identity will be lost.

#### Mushaa Divisible

Mushaa divisible is the property which is capable of division without affecting its value or character. If the subject-matter of a Hiba is Mushaa divisible, the doctrine of Mushaa is applied and the gift is valid only if the specific share which has been gifted, is separated by the donor and is actually given to the donee. However, a gift without partition and the actual delivery of possession is merely irregular and not void ab initio.

**For example**, a co-owned piece of land or a garden or a house is a Mushaa divisible property which can be divided by a visible mark of identification without changing its original character.

**Shia law** does not recognize the principle of Mushaa. According to Shia law, a gift of a share of divisible joint property is valid even if it is made without partition.

## MCQ

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| 1. | Gift term is defined under the act –                   | In the Transfer of property Act     | In the Hindu succession Act          | In the partnership Act                               | In Indian Contract Act |
| 2. | Gift is a deposition of –                              | Movable property                    | Immovable property                   | Movable property and immovable property              | None of these          |
| 3. | Gift is a alienation of property –                     | With consideration                  | Without consideration                | With some consideration                              | None of the above      |
| 4. | Sadqa once completed by delivery is:                   | Not revocable                       | Revocable                            | Revocable subject to condition                       | None of these          |
| 5. | 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          |