

GIFTS UNDER MUSLIM LAW AND THE REQUIREMENT OF REGISTRATION:

AN ANALYSIS OF LEGAL PROVISIONS & CASE LAW

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I. INTRODUCTION

Registration of some classes of documents is compulsorily required under the various statutes like Transfer of Property Act, Contract Act etc. The (Jammu and Kashmir) Registration Act, Svt. 1970 (1922 A.D) is a specific Legislation which under section 17 enumerates the documents which have been compulsorily registered under the Act. The first class of document which is enumerated under clause (a) sub section (1) of section 17 of the Registration Act (hereinafter referred as 'the Act') is an 'instrument of gift of immovable property'. Thus as a general rule gifts relating to immovable property must be registered under the Act. The Act lays no exceptions to this rule as such; however, a repugnancy arises among the Statutes regarding the compulsory registration of the Gifts of immovable property made by a Muslim. The (Jammu and Kashmir) Transfer of Property Act, Svt. 1977(1920 A.D.) saves under section 129 any rule of Muslim Law relating to gifts thereby exempting such gifts from the requirement of registration under section 123 of the Transfer of Property Act. However, the registration Act, without any exception for Muslim gifts, mandates compulsory registration for all gifts pertaining to immovable property. Given this context the pertinent question arises-whether the Muslim gift of immovable property is compulsorily registrable under section 17 (1) (a) of the Act?

The present paper in light of various High Court judgments and the recent Supreme Court Judgment in Hafeeza Bibi's Case attempts to explore the law relating to the compulsory registration of the Muslim gifts of immovable property.

II. INSTRUMENTS OF GIFTS: DEFINITION AND THE REQUIREMENT OF REGISTRATION

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The word “gift” is not defined in the registration Act but in common parlance it is understood in much the same sense it is defined in sec.122 of The Transfer of Property Act, which reads:

“Gifts” is the transfer of certain existing moveable or immovable property made voluntarily and without consideration, by one person called donor, to another called the donee and accepted by or on behalf of the donee.

Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance the gift is void.

Sec.123 of the Transfer of property Act requires that the transfer of immovable property by way of gift must be effected by a registered instrument signed by or on behalf of the donor, and attested by atleast two witnesses. Thus, a document by which rights in immovable property are surrendered without any consideration is in effect a ‘deed of gift’ which under sec.17 (1) (a) requires registration.² Section 17(1)(a) is not attracted when the deed of gift relates to moveable property, but all instruments of gift of immovable property must be registered whatever be the value of property.³ An unregistered gift deed, therefore, cannot be used to create a title to immovable property.⁴

An instrument of gift which effect an immediate transfer of ownership falls under this clause though the instrument provides that whenever called upon by the donee, the donor would execute a registered gift deed.⁵

In Hafeeza Bibi v. Sheikh Farid (dead)⁶, R M Lodha J, observed:

the expression ‘instrument of gift of immovable property’ [means] an instrument or deed which creates or completes the gift, thereby transferring the ownership of the property from the executants to the person in whose favour it is executed. In order to affect the immovable property, the document must be a document of transfer; and if it is a

2 Hira Singh v. Punjab Singh, 1925 Lah 183; 78 IC 113.

3 Proto Kolitah v. Mottea Kolitah, 11 WR(Civil) 334; 2 BLR (App) 45.

4 See Rup Narain Panday v. Sheo Sagar Tewari, 1939 Pat 258; M.E. Tin v. Usheva Mi, 1927 Rang 335 at p.1.

5 S. Chinna Buddha Sahib v. Raja Subamma, (1954) 2 MLJ (Andh) 113.

6 Judgement delivered on May 5, 2011 by R.M. Lodha and SS Nijar JJ.

document of transfer it must be registered under the provisions of the Registration Act.

III. GIFT UNDER ISLAMIC LAW AND THE REQUIREMENT OF REGISTRATION

The essentials of a valid gift, according to Islamic law are aqid (i.e., tender and acceptance or declaration and assent) and milk (seisin)⁷. The Privy Council in the case of Mohammad Abdul Ghani and Anr. V. Fakhr Jahan Begum and Others⁸ referred to "Muhammadan law" by Syed Ameer Ali and approved the statement made therein that three conditions are necessary for a valid gift by a Muslim:

- a) Manifestation of the wish to give on the part of donor ;
- b) The acceptance of the donee, either impliedly or expressly;
- c) The taking of possession of the subject matter of the gift by the donee, either actually or constructively.

According to section 129 of the Transfer of Property Act no rule of Mohammedan law shall be affected by chapter VII of the Transfer of Property Act relating to gifts⁹. It, therefore, follows that an oral gift made by a Muslim is a valid gift and does not require registration, which otherwise is not a valid gift under section 123 of the Transfer of Property Act.¹⁰

In the context of sec.17 (1) (a) the pertinent question is about the applicability of the clause (a) to written gift executed by a Muslim in the light of section 129 of the Transfer of Property Act and the rules of Muslim law relating to gifts. The courts for a long time obscured the answer.

7 See Tara Parsana Sen v. Shandi Bibi, 1922 Cal 68.

8 1922 (49) IA 195.

9 Bishun Prasad v. Mohammad Nazir, 14 PLT 559.

10 See Mulla, Principles of Mohamedan Law, edited by M. Hidayatullah C.J., (19th ed. 1990), Butterworths India, pp. 112-121; Syed Mohd. Salim Hashmi v. Syed Abdul Fateh, AIR 1972 Pat. 279.

In *Sankesula Chinna Budde Saheb v. Raja Subbamma*¹¹, the Andhra Pradesh High Court, after noticing three essentials of gift under the Muslim law, held that if a gift was reduced to writing, it requires registration under section 17(1) (a) of the Registration Act. It went on to hold that even if by virtue of section 129 of the Transfer of Property Act, a deed of gift executed by Muslim was not required to comply with the provisions of sec.123 of the Transfer of Property Act still it had to be registered under sec.17 (1) (a) of the Registration Act when the gift related to Immoveable property.

A full bench of the Andhra Pradesh High Court in the case of *Inspector General of Registration and Stamps, Govt. of Hyderabad v. Smt. Tayyaba Begum*¹², was called upon to decide on a reference made by the Hyderabad Stamp Act whether the document under consideration therein was a gift deed or it merely evidenced a past transaction. The High Court applied the test – whether the parties regarded the instrument to be receipt; was it intended to constitute a gift or was it to serve as a record of a past event? What is the purpose which it was designed to serve?

Similarly, the Madras High Court in *Amir Khan v. Ghouse Khan*¹³ the Muslim could create a valid gift orally, if he should reduce the same in writing, the gift will not be valid unless it is duly registered.

In *Ghulam Ahmad Sofi v. Mohd. Sadiq Dareel And others*¹⁴ the question for consideration before the Jammu and Kashmir High Court was – whether in view of provisions of sections 123 and 129 of the Transfer of Property Act, the rule of gifts in Muslim law stands superseded; and whether it is necessary that there should be a registered instrument as required by sections 123 and 138¹⁵ of the Transfer of Property Act. The Full Bench held:

11 (1954)2 MLJ 113.

12 AIR 1962 AP 199; in this case it was held that a Muslim Lady executing a document on stamp paper that she had already gifted the property but “ba rafa nuks ainda” (in order to silence all doubts) regarding immovable property she executed the gift deed, would nonetheless require registration.

13 (1985) 2 MLJ 136.

14 AIR 1974 J&K 59.

15 Section 138 of the (J&K) Transfer of Property Act, read as;

138. Transfer of immovable property after due registration;

(1) No transfer of immovable property, except in a case governed by any special law to the contrary, shall be valid unless and until it is in writing, registered and the registration thereof

that an oral gift made under the Muslim law would not be affected by section 123 of Transfer of Property Act and the gift if it has otherwise all the attributes of valid gift under the Muslim law would not become invalid because there is no instrument in writing and registered. Therefore the answer to the question formulated would be in the negative i.e., that sections 123 and 129 of the Transfer of Property Act do not supersede the Muslim law on, matters relating to making of oral gifts, that it is not essential that there should be a registered instrument as required by sections 123 & 138 of the Transfer of Property Act in such cases. But if there is executed an instrument and its execution is contemporaneous with the making of the gift then in that case the instrument must be registered as provided under sec.17 of the Registration Act, If , however, the making of the gift is an antecedent act and the deed is executed afterwards as evidencing the said transaction that does not require registration as it is an instrument made after the gift is made and does not therefore, create, make or complete the gift therefore transferring the ownership of the property from the executants to the person in whose favour it is executed.

has been completed in accordance with sub-section (3) of section 61 of the Registration Act, 1977.

(2) No Court shall entertain a suit for pre-emption in respect of transfer of any such immovable property unless the transfer complies with the provision of sub-section (1).

(3) No person shall take possession of, or commence to build or build on, any land in the Province of Kashmir which has been transferred or has been contracted to be transferred to him unless and until such transfer becomes valid under the provision of sub-section (1).

(4) No person who has obtained a transfer of immoveable property referred to in sub-section (1) shall apply for and obtain from any Revenue or Settlement Officer or Court any alteration in any existing entry in any Settlement record or Paper, unless person produces before such officer or Court a duly executed registered instrument the registration whereof has been completed in the manner specified in sub-section (1).

And no such officer or Court shall alter or cause to be altered any such entry except upon the production of an instrument registered in the aforesaid manner:

Provided that nothing in this section applies to a lease of agricultural land for one year or to a lease of any other land for a period not exceeding seven years:

Provided also that nothing in sub-section (3) and (4) shall be deemed to apply to transfers by will or by any rule of intestate succession or by the operation of the law of survivorship.

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On the contrary, in *Md. Hesabuddin and Others v. Hesaruddin and Others*¹⁶, the question before the Gauhati High Court was whether a gift of immovable property written on ordinary unstamped paper is valid? The single judge of High Court held:

..... it cannot be taken as a sine qua non in all cases that wherever there is a writing about a Mohammaden gift of immovable property, there must be registration thereof. The facts and circumstances of each case have to be taken into consideration before finding whether the writing requires registration or not.

In *Nasib Ali v. Wajid Ali*¹⁷, the contention raised before the division bench of Calcutta High Court was that the deed of gift not being registered under the Registration Act, is not admissible in evidence. The Court held that a deed of gift by a Muslim is not an instrument effecting, creating or making the gift but a mere piece of evidence. The Court observed:

..... a gift even if it evidenced by writing, unless all the essential forms are observed, it is not valid according to law (Muhammaden law). That being so a deed of gift executed by a Mohammaden is not the instrument effecting, creating or making the gift but a mere piece of evidence. It may so happen after the lapse of time that the evidence of observance [of essentials of Hiba under Muhammaden law] might not be forthcoming, so it is sometimes thought prudent, to reduce the fact a gift that a gift has been made into writing. Such writing is not a document of title but is a piece of evidence.

In *Karam Ilahi v. Sharafudin*¹⁸ the Allahabad High Court held that if the gift deed was valid under the Muslim law it was nonetheless valid because there was a deed of gift which, owing to some defect, was invalid under section 123 of Transfer of Property Act.

Mulla in his *Principles of Mohammadan Law*¹⁹ states:

16 AIR 1984 Gau 41, relying upon *Jubeda Khatoon v. Moksad Ali*, Air 1973 Gau 105.

17 AIR 1927 Cal 197.

18 (1916) 38 All. 212.

19 edited by M. Hidayatullah C.J., (19th ed. 1990), Butterworths India.

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Section 129, Transfer of Property Act, excludes the rule of Mohammadan law from the purview of section 123 which mandates that the gift of immoveable property must be effected by a registered instrument as stated therein. But it cannot be taken as sine qua non in all cases that whenever there is a writing about a Mohammedan gift of immovable property there must be registration thereof. Whether the writing requires registration or not depends on the facts and circumstances of each case.²⁰

The controversy expressed in the decision of various high courts was ultimately set at rest by the Supreme Court of India in Hafeeza Bibi V. Shaikh Fareed (dead)²¹. The division bench of the court observed:

In our opinion, nearly because the gift is reduced to writing by Mohammedan instead of it having been made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by Mohammedan orally, its nature and character is not changed because of it having been made by a written document. What is important for a valid gift under Mohammedan law is that three essential requisites must be fulfilled. The form is immaterial if all the three essential requisites are satisfied constituting valid gift, the transaction of gift would not be rendered invalid because it has been written on a plain piece of paper. The distinction that if a written deed of gift recites the factum of prior gift then such deed is not required to be registered but when the writing is contemporaneous with the making of the gift, it must be registered, is inappropriate and does not seem to us to be in conformity with the rules of gifts in Mohammedan law.²²

The Apex Court further observed:

We find ourselves in express agreement with the statement of law from Mulla (see above); principle of (Mohammadan Law), page 120..... (i.e.).....it is not the requirement that in all cases where the gift made is contemporaneous to the making of the gift then such deed must be

20 Ibid p.120.

21 Judgment delivered on May 6, 2011 by R.M. Lodha and SS Nijar JJ.

22 Ibid Para 29.

registered under Section 17 of the registration Act. Each case would depend on its own facts.²³

In this case the Supreme Court approved with the views of Calcutta High Court in Nasib Ali case and the Gauhati High Court in Md. Hesabuddin case. The court further observed that the judgments delivered by Andhra Pradesh High Court, Jammu and Kashmir High Court and Madras High Court do not lay down the correct law.²⁴

IV. EXEMPTION OF MUSLIM GIFTS FROM REGISTRATION AND THE DOCTRINE OF CONSTRUCTIVE NOTICE

Registration of a document is notice of all the facts stated in that document²⁵ The purpose of the Jammu and Kashmir Registration Act, 1977, as disclosed in its provision is to provide information to people, who may deal with property as to the nature and extent of rights which person may have affecting that property. In other words it is to enable people to find out whether any particular piece of property, with which they may be concerned, has been made subject to some particular legal obligation. Further registration gives solemnity of form and legal importance to certain classes of document by direction that they shall be registered.²⁶

Another purpose is to perpetuate documents which may afterwards be of legal importance; and the general purpose is to put on record and enquire what the particulars are and in case of land what obligations exist with regard to it.²⁷ The provisions of the Registration Act are very carefully designed to prevent forgeries, procurement of conveyances or mortgages by fraud or undue influence.²⁸

In Brahma Nath v. Chandra Kali²⁹, Patna High Court observed:

23 Ibid Para 31.

24 Ibid Para 33.

25 Avtar Singh, The Transfer of Property Act, (2nd ed. 2009), Universal Law Publishing Co., p.25.

26 See Malik, The Registration Act, 1908, (2nd ed. 2011), Delhi Law House, p. 144.

27 See Sanjeeva Rao, Registration Act, (11th ed. 2005), Law Publishers (India) Pvt. Ltd., p. 113.

28 K. Roy and Bros v. Ramanthdas, AIR 1945 Cal. 37 at p.40; Baharat Indu v. Hakim Mohammad Hamid Ali Khan, AIR 1921 P.C. 93.

29 AIR 1961 Pat. 79.

The real purpose of registration is to secure that every person dealing with property, where such dealings require registration may rely with confidence upon the statements contained in the register as a full and complete account of all transactions by which his title may be affected unless indeed he was actual notice of some unregistered transaction which may be valid apart from registration.

Given this context, the relevant question is whether the exemption of Muslim Gifts operates against the spirit of the Registration Act or does it make the doctrine of constructive notice ineffective vis-à-vis Muslim gifts of immovable property? The answer of course will be in negative. Under the Muslim Law requirement of delivery of possession to complete a gift reinforces the doctrine of constructive notice. Explanation II appended to Para 8 of Section 3 of the Transfer of Property Act reads as:

Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

It follows that the actual possession operates as a constructive notice of the title. Therefore, the requirement as actual delivery of possession of the subject matter of the gift operates as constructive notice even without the registration.

V. Conclusion and Suggestion

It is clear from the above analysis that the Muslim gifts of immovable property do not require registration unless and until such gifts only evidence a transaction and do not in itself effectuate a transaction. The kind of confusion which has been created is the result of the varying requirements of registration of gifts under Registration Act and other Statutes. It is suggested that a new clause (a) should be substituted for present clause which should encompass all documents which are required to be registered under other statutes. The text under section 17 (1) (a) may after amended read as³⁰ :

Section 17 (1) the following documents shall be compulsorily registered;

- (a) instruments which under any Law require registration for giving validity to the transactions effected thereby;

³⁰ See sixth Report of Law Commission of India, 1957.

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This will ensure two things. Firstly it will bring all the statutes requiring registration in conformity with the Registration Act, Secondly exemption under other statutes for registration will be also applicable under the Registration Act, which will primarily save any rule of Muslim Law relating to gifts as provided under section 129 of Transfer of Property Act.