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Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

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Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and

learning.

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CONCEPT OF GIFT

AUTHORED BY - ABHIJEET CHANDRA

AMITY UNIVERSITY PATNA

INTRODUCTION

A Gift is generally regarded as a transfer of ownership of a property where the sender willingly brings into effect such transfer without any compensation or consideration in monetary value. It may be in the form of moveable or immoveable property and the parties may be two living persons or the transfer may take place only after the death of the transferor. When the transfer takes place between two living people it is called inter vivos, and when it takes place after the death of the transferor it is known as testamentary. Testamentary transfers do not fall under the scope of Section 5 of the Transfer of Property Act, and thus, only inter vivos transfers are referred to as gifts under this Act.

If the essential elements of the gift are not implemented properly it may become revoked or void by law. There are many provisions pertaining to the gifts. All such provisions, for example, types of property which may be gifted, modes of making such gift, competent transferor, suspension and revocation of gift, etc. are discussed in this article.

According to Section 122 of Transfer of Property Act, 1882 Gift is defined as the transfer of certain existing moveable and immoveable property made voluntarily and without consideration, by one person called the donor, to another, called the donee, and accepted by or on behalf of the donee. In short, a gift is a transfer of moveable or immovable property to a person without any consideration. The transfer of property act, 1882 defines 'gift' under section 122.

It is important to be noted that the gift should be accepted by the donee during the lifetime of the donor. It is because the donor should be able to transfer the gift to someone else if he desires when done does not accept the gift and if the donee dies before the acceptance the gift is said to be void. Hence, an acceptance is important from the side of the donee to make the transfer of gift complete and that should be made by donee during the lifetime of the donor.

Section 123 of the transfer of property act stipulates how the gift should be transferred. It is precisely mentioned that for gifting an immovable property, the transfer must be effected by a registered instrument which is signed by the donor and that must be attested by a minimum of two witnesses. But movable property can be gifted either by the aforesaid method or by the delivery of possession.

Definition of Gift

According to Section 122 of the Transfer of Property Act (TPA)¹, a transfer of movable or immovable property, which is already in existence, without consideration is a gift. Such a transfer should be made voluntarily by the transferor. The acceptance of the gift should be made by the person to whom the transfer is made or on behalf of him.

PARTIES TO A GIFT TRANSFER

- 1. Donor** – The person who is donating or transferring his property in return for no consideration is a donor (transferor). The donor must be a competent person, i.e., he must have the capacity as well as the right to make the gift. If the donor has the capacity to contract then he is deemed to have the capacity to make the gift. This implies that at the time of making a gift, the donor must be of the age of majority and must have a sound mind. Registered societies, firms, and institutions are referred to as juristic persons, and they are also competent to make gifts. Gift by a minor or insane person is void. Besides capacity, the donor must also have the right to make a gift. The right of the donor is determined by his ownership rights in the property at the time of the transfer because gift means the transfer of the ownership
- 2. Donee** – The person for whom a donation or gift is made is a donee. In simple words, the receiver of the gift is the donee (Transferee). Donee does not need to be competent to contract. He may be any person in existence at the date of making the gift. A gift made to an insane person, or a minor, or even to a child existing in the mother's womb is valid subject to its lawful acceptance by a competent person on his/her behalf. Juristic persons such as firms, institutions, or companies are deemed as competent donee and gift made to them is valid. However, the donee must be an ascertainable person. The gift made to the general public is void. If ascertainable, the donee may be two or more persons.

Essential elements

There are the following five essentials of a valid gift:

- 1. Transfer of ownership-** The transferor, i.e., the donor must divest himself of absolute interest in the property and vest it in the transferee, i.e., the donee. Transfer of absolute interests implies the transfer of all the rights and liabilities in respect of the property. To be able to effect such a transfer, the donor must have the right to ownership of the said property. Nothing less than ownership may be transferred by way of gift. However, like other transfers, the gift may also be made subject to certain conditions.
- 2. Existing property-**The property, which is the subject matter of the gift may be of any kind, movable, immovable, tangible, or intangible, but it must be in existence at the time of making a gift, and it must be transferable within the meaning of Section 5 of the Transfer of Property Act. Gift of any kind of future property is deemed void. And the gift of spes successionis (expectation of succession) or mere chance of inheriting property or mere right to sue, is also void.
- 3. Transfer without consideration-** A gift must be gratuitous, the ownership in the property must be transferred without any consideration. Even a negligible property or a very small sum of money given by the transferee in consideration for the transfer of a very big property would make the transaction either a sale or an exchange. Consideration, for the purpose of this section, shall have the same meaning as given in Section 2(d) of the Indian Contract Act. The consideration is pecuniary in nature, that is monetary terms. Mutual love and affection is not pecuniary consideration and thus, property transferred in consideration of love and affection is a transfer without consideration and hence a gift. A transfer of property made in consideration for the 'services' rendered by the donee is a gift. But, a property transferred in consideration of donee undertaking the liability of the donor is not gratuitous, therefore, it is not a gift because liabilities evolve pecuniary obligations.
- 4. Voluntary transfer with free consent-**The donor must make the gift voluntarily, i.e., in the exercise of his own free will and his consent as is a free consent. Free consent is when the donor has the complete freedom to make the gift without any force, fraud coercion, and undue influence. Donor's will in executing the deed of the gift must be free and independent. Voluntary act on a donor's part also means that he/she has executed the gift deed in full knowledge of the

circumstances and nature of the transaction. The burden of proving that the gift was made voluntarily with the free consent of the donor lies on the donee.

- 5. Acceptance of the gift-** The donee must accept the gift. Property cannot be given to a person, even in gift, against his/her consent. The donee may refuse the gift as in cases of non-beneficial property or onerous gift. Onerous gifts are such where the burden or liability exceeds the actual market value of the subject matter. Thus, acceptance of the gift is necessary. Such acceptance may be either express or implied. Implied acceptance may be inferred from the conduct of the donee and the surrounding circumstances. When the donee takes possession of the property or of the title deeds, there is acceptance of the gift. Where the property is on lease, acceptance may be inferred upon the acceptance of the right to collect rents. However, when the property is jointly enjoyed by the donor and donee, mere possession cannot be treated as evidence of acceptance. When the gift is not onerous, even minimal evidence is sufficient to prove that the gift has been accepted by donee. Mere silence of the donee is indicative of the acceptance provided it can be established that the donee had knowledge of the gift being made in his favour.

Acceptance when to be made

Every gift which is gifted should be accepted by the donee for the transfer to become complete and valid. According to Section 122 of the Act, the acceptance of a gift should be made while the donor is still capable of giving the gift and during the donor's lifetime. The donee should also accept the gift before he dies. If the donee dies before accepting such gift, then the gift becomes invalid (or void).

Is acceptance by donee essential for the validity of the gift?

Except in the case of Muslim law, the acceptance of a gift is essential for the validity of gift. A gift can be beneficial or a burden to a donee. Thus, a donee has to accept the gift for the gift to be valid.

The donee should accept the gift during the lifetime of the donor and while the donor is capable of giving it.

Where there are several gifts in several transactions, the donee can accept the ones with benefit

and reject the ones with a burden. However, if all the gifts are given in a single transaction, he has to accept all or reject all. In either way, the donee's acceptance is a must.

Types of property

Section 122 of the TPA defines a gift as a transfer of 'movable' or 'immovable' property. Property thus can be divided into two categories: movable and; immovable.

1. Immovable property

As the name itself suggests, immovable property is a property that cannot be moved. Things like buildings, walls, trees, land, benefits arising out of the land, and things attached to the land are immovable property. The water tank attached with the house, doors, and windows are all immovable property.

In the case of Thulasimani Ammal vs. Commissioner Of Income Tax & Anr.2 the court held that mere handing over possession or handing over documents would not constitute a valid gift. The transfer of gifts has to be registered.

2. Movable property

Anything that doesn't come under the category of 'Immovable property' is movable property. The name by itself defines the term: 'movable,' meaning that it can be moved.

Thus, anything which can be moved without damaging it is a movable property. Though the definition of movable property is not given in the TPA, section 3 of the said Act states a list of things that are movable properties. They are standing timber, growing crops or grass.

Though a tree is usually considered an immovable property, if it is grown for timber, it shall be considered a movable property as it can be cut down for other uses.

In the case of Ms. Mayawati vs. Dy Commissioner Of Income-Tax4, it was held that mere gifting of the movable property voluntarily and delivering the possession of such property to the donee is enough for the gift to be valid.

According to section 123 of the Transfer of Property Act, there are two ways to execute the transfer:

1. By registration

2. By delivery

The method of execution mainly depends upon the nature of the property. When it is a movable property, delivery of possession is sufficient but when it is an immovable property registration is compulsory irrespective of the valuation of the property.

1. Actionable claims

Actionable claims are defined under Section 3 of the Transfer of Property Act. It may be unsecured money debts or right to claim movables not in possession of the claimant. Actionable claims are beneficial interests in movable. They are thus intangible movable properties. Transfer of actionable claims comes under the purview of Section 130 of the Act. Actionable claims may be transferred as gift by an instrument in writing signed by the transferor or his duly authorised agent. Registration and delivery of possession are not necessary.

Void gifts

Following gifts are void

- A gift comprising both existing and the future property is void as to the latter.
- A gift of a thing to two or more donees, of whom one does not accept it, is void as to the interest which he would have taken had he accepted.
- A gift made for an unlawful purpose. A gift in consideration of past illicit cohabitation is immoral and invalid.
- A gift depending on a condition, the fulfilment of which is impossible or forbidden by law.
- Where the donee dies before acceptance.
- Gift by a person incompetent to contract.
- A gift which under an agreement between the parties is revocable wholly or in part at the mere will of the donor is void wholly or in part as the case may be.

A gift of future property

Gift of future property is merely a promise which is unenforceable by law. Thus, Section 124 of the Transfer of Property Act renders the gift of future property void. If a gift is made which consists of both present as well as future property, one of the properties is in existence at the time of making the gift and the other is not, the whole gift is not considered void. Only the part relating

to the future property is considered void. Gift of future income of a property before it had accrued would also be void under Section 124.

A gift made to more than one donee

Section 125 of the Act says that in case a property is gifted to more than one donee, one of whom does not accept it, the gift, to the extent of the interest which he would have taken becomes void. Such interest reverts to the transferor and does not go to the other donee.

A gift made to two donees jointly with the right of survivorship is valid, and upon the death of one, the surviving donee takes the whole.

Onerous gifts

Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

It is based on the principle that he who wants the roses must not fear the thorns (Qui senti commodum, debet et sentire onus). The rule is analogous to the doctrine of election, as the donee has to elect to accept the whole gift or not to accept anything at all.

Onerous gift to disqualified person-

The term 'Onerous' means 'burdened with an obligation.' When a donor gifts a donee with a property, this may not always benefit the donee. The said gift may also contain certain obligations, which may be a burden for a donee.

Section 127 of the TPA deals with onerous gifts. Where a donee gifts a donor with several things in a single transaction, and one of them is a burden to the donee where the rest are beneficial to

the donee, the donee can accept all (including the burdened property) or reject them all (including the property with benefits). He cannot accept the gifts with benefit and reject the ones with a burden.

In the case where a donor is gifting several things in two or more separate and individual transactions, of which one individual transaction is of burden, the donee can accept the gifts with benefits and reject the one with a burden.

Universal donee

Section 128 of TPA talks about universal donee. A universal donee is one to whom the donor's whole property is given and who consequently becomes liable for all the debts due by and liabilities of the donor at the time of the gift to the extent of the property comprised in the gift.

Revocation of gift

According to section 126 A revocation means annulment of a promise or decree. The revocation of a gift is always done before its acceptance. It can also be a condition by a donor that on the happening of some event and fulfillment of some condition, the gift will be suspended or revoked.

It can be done by three methods:

- Revocation on the grounds of undue influence, fraud etc. A gift may also be revoked in any of the cases in which if it were a contract, it might be rescinded on the grounds of undue influence, fraud, coercion etc. The onus of proving the grounds of revocation lie on the party who wants to get the gift set aside.
- Revocation by mutual agreements: when both the parties. donor and donee agree that the gift will be suspended or revoked on happening of some event, provided that, that particular event is not dependent upon the will of the donor.
- The condition for revocation is condition subsequent and it must be valid and enforceable. Any such condition which is not valid, the gift cannot be revoked.
- Revocation by the recession of contract: gift deed is always preceded by an express or implied contract. As per the Indian contract act, all the essentials of a valid contract should be fulfilled. If any essential is not fulfilled, it can be revoked.

- For example, if a gift is made out of coercion, that means the donor's consent was not there and therefore it can be revoked.

Exceptions

Section 129 of the Act provides the gifts which are treated as exceptions to the whole chapter of gifts under the Act. These are:

- **Donations mortis causa**

These are gifts made in contemplation of death.

- **Muslim-gifts (Hiba)**

These are governed by the rules of Muslim Personal Law. The only essential requirements are declaration, acceptance and delivery of possession. Registration is not necessary irrespective of the value of the gift. In case of a gift of immovable property worth more than Rupees 100, Registration under Section 17 of the Indian Registration Act is must, as it is applicable to Muslims as well. For a gift to be Hiba only the donor is required to be Muslim, the religion of the donee is irrelevant.

Case laws

Sundar Bai v. Anandi Lal,

In this case the donee was a child and in the care of the donor himself. The High Court held that in such circumstance, express acceptance could not be insisted upon.

Ponnuchami Servai v. Balasubramanian,

In this case of the father himself was the donor and executed a gift deed in favour of his minor son. The parties continued to stay together in the said property even after the gift. In these circumstances, it was held that the gift in favour of the minor would be deemed to have been accepted as the father himself was the guardian and had himself executed the gift deed.

Padma Chand vs. Laxmi Devi,

In this case, the court held that a gift is a voluntary transfer of property without any consideration

and division by the owner of the property (related to money) without any pecuniary benefit.

Vimala vs. Narayanaswamy,

In this case, the court stated that where the deed is to be taken with immediate effect, the property to be transferred during the life of the executor, it will be a gift deed, not a will.

D.N.Dawar vs. Ganga ram Saran Dhama,

In this case, the court held that in the case of a gift of an immovable property if the document is not registered then mere delivery of possession will not pass the title to the donee.

Shahdev vs. Sheikh Papa

In this case, the court held that the gifts of immovable property are compulsory registerable and it amounts to notice for a subsequent transfer and not for transaction before registration.

Conclusion

To constitute a transfer as a gift it must follow the provisions of the Transfer of Property Act. This Act extensively defines the gift itself and the circumstances of the transfer of such a gift. The gift, being a transfer of the ownership rights, must be in possession and ownership of the transferee and must be existing at the time of making the transfer. The transferor must be competent to make such transfer but the transferee may be any person. In case the transferee is incompetent to contract, the acceptance of gift must be ratified by a competent person on his/her behalf. Gift of future property is void. Partial acceptance of prosperous gifts and rejection of onerous gifts is not valid either. The acceptance of a gift entails the acceptance of the benefits as well as the liabilities coupled with such a gift. A gift may be revoked only by a mutual agreement on a condition by the donor and the donee, or by rescinding the contract pertaining to such gift. The Donations mortis causa and Hiba are the only two kinds of gifts which do not follow the provisions of the Transfer of Property Act.