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ANALYZING THE DIFFERENCE BETWEEN A WASIYAT AND A HIBA

AUTHORED BY - PALLAVI CHIKKALA[1]

CONCEPT OF WILL/WASIYAT -

Throughout most of the world, disposal of an estate has been a matter of social custom. A will or a testament is a legal instrument by which a person (testator) expresses wishes as to how his/her property (movable or immovable) is to be distributed at death, and names one or more persons, the executor, to manage the estate until its final distribution.

A "will" according to the Section 2(h) of Indian Succession Act, 1925, "will is the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death."

Under the Muslim law, the term used is Wasiyat and it is an instrument by which a person makes an arrangement with regard to his property to take effect after his death and it is a mechanism that can be amended during his life and can be revoked. It is in a way the last desires of the person of how his property would be taken care of and distributed after his death.

In Muslim Law, According to Baillie –

"A will a conferment of rights property in a specific thing or a profit or an advantage or in gravity to take effect on the death of the testator".

According to Fatwa Alamgiri –

"Will is a legal declaration of the intention of a testator with respect to his property which desires to be carried into effect his death".

According to the law,every Muslim can make a Wasiyat if he is of the sound mind and has attained majority i.e. above the age of 18 years and in case there's a guardian taking care of him or his property then 21 years. A minor's Wasiyatbe void but it becomes valid upon him ratifying it after attaining majority. A Wasiyat made by a lunatic is void and the one made by a sane person becomes void if he becomes a lunatic subsequently.

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"A person who is committing suicide, his Wasiyat is valid under Sunni law but is invalid in case of Shias. The Shia law provides extensive powers to a person making a Wasiyat while the powers under the Sunni law are limited. Thus, the powers to make disposition of property are not unlimited."[2]

"The essentials of a Wasiyat includes for the testator to possess the full capacity to make a will, for a will to be valid and the maker to be an adult under the law and of a sound disposing mind, the property being disposed off by a Wasiyat be the property of the testator before the demise, the beneficiary to not be under any limitation that is capable of making him unable to receive under the Wasiyat, there be an express or implied acceptance of the bequeathed property by the beneficiary and the bequest made to a person who is not an heir or a Muslim is valid even with the affirmation of the heirs of the testator unless such bequest is in excess of one-third of the estate of the testator. Unless a contrary intention is expressed, a bequest made to more than one beneficiary shall be held in equal proportion by the beneficiaries. Where a bequest is made to 2 beneficiaries and 1 dies before taking the bequest the surviving beneficiary shall take the entire property. The consent of other heirs is mandatory for a bequest made to an heir to be valid even where the bequest is within one-third of the estate. Under by a release from the creditors, the bequest made by a testator who is in debt is not valid to the extent of the debt. Once the funeral cost is defrayed, a testator can validly dispose of the entirety of his estate by Wasiyat where he does not have a heir and a bequest made in favour of an unborn child that did not proceed from the womb within 6 months is void."[3]

Wills are of two kinds, oral wills, and written wills. In the case of **oral wills**, it is important that whatever may be the intention of the testator must be conveyed and proved and in case of the inability to speak the signs and gestures must be able to prove the intention. In the case of **written wills**, *Wasiyat Nama* or a written will may be written or made to be written by the testator and such a will does not require any attestation, registration, or even the signatures of the testator.

Wills under Islamic law may be oral reduced into writing what is relevant is the unequivocal intendment of the maker of the will. The courts had upheld a will which was in writing but not signed

[2]Mehak, (2020), 'Concept of Wasiyat under Muslim Law', https://lawsisto.com/legalnewsread/NTQxMA==/Concept-of-Wasiyat-Will-under-Muslim-Law
[3](2016), 'Meaning and Making of a Will/Wasiyat and its ingredients under Muslim Law', https://www.lawnn.com/meaning-and-making-of-a-will-wasiyat-and-its-ingredients-under-muslim-law/

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or attested to as validity made. In the case of RamjiLal v Ahmed[4] is instructive on the aforementioned principle guiding the formality of a will under the Islamic law. In fact, the court in extreme scenarios upheld a letter and nodding of the head as a valid bequest. In any case, where a will is not formality made, the evidential burden is wholly on the person seeking to establish the making of a will to prove that a will was made.

CONCEPT OF GIFT/HIBA –

"Gift is a voluntary transfer of personal property without consideration. A parting by owner with property without pecuniary consideration. A voluntary conveyance of land, or transfer of goods, from one person to another made gratuitously, and not upon any consideration of blood or money."[5]Gift under Transfer of Property Act deals with section 122 to section 129. "Gift" is the transfer of certain existing movable or immovable property made violently and without consideration, by one person, called Donor, to another, called the Donee and accepted by and behalf of the Donee"[6]. Chapter VII of the Transfer of Property Act, 1882 regulating the gifts does not apply to the 'Muslim Gifts' or the 'Hiba'.Every transfer of property will take effect only when it is considered by both the parties. However, gift is an exception to section 25 of Indian Contract Act, 1872. Where a contract or an agreement without consideration is void to which gift is an exception[7].

Under Muslim law, gifts are called "Hiba". The English term 'gift' is of a wider connotation and applies to all transactions where one transfer's one's property to another without any consideration. The term Hiba has a narrower meaning. It is basically transferred inter vivos i.e. between living persons.

"According to Hedaya– "Hiba is an unconditional transfer of ownership in an existing property, made immediately without any consideration."

According to Ameer Ali– "A Hiba is a voluntary gift without consideration of property by one person to another so as to constitute the donee the proprietor of the subject-matter of the gift."

[4] AIR 1952 MB 56
[5] **Black's Law Dictionary (Fourth Edition)**
[6] Transfer of property act 1882, S.122
[7] Indian contract Act 1872, S. 25

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According to Mulla– "A Hiba is a transfer of property, made immediately and without any exchange by one person to another and accepted by or on behalf of the latter."

According to Fyzee– "Hiba is the immediate and unqualified transfer of the corpus of the property without any return." "[8]

In *P.Kunheema Umma v. Aayssa Umma*[9], Kerala High Court held the requirements of immovable property under Muslim Law are-declaration by donor, acceptance by donee and delivery of possession by donor to donee.However, there is no consideration and necessity to transfer possession immediately distinguishes gift from sale.[10]

According to Ameer Ali, a hiba will be valid if the following conditions are fulfilled –

The manifestation of the wish to give on the part of the donor, acceptance of the gift, express or implied by the donee and taking of possession of the subject matter if the gift by the donee either actually or constructively.[11]

The subject matter could be both corporeal or incorporeal property. It requires the object to be in physical existence in the time of gifting. Muslim law recognizes distinction between the corpus of the property itself which is known as Ayn and the usufruct in the property known as the Manafi. Muslim law admits only ownership unlimited in duration but recognizes interests of limited duration in the use of property. All forms of property over which dominion could be exercised or anything which could be taken into possession or which could exist as a specific entity, or as an enforceable right, maybe the subject matter of a valid gift. Muslim law, in this context, makes no distinction between ancestral or self-acquired or between movable and immovable property.

[8]Anjali Dingra, (2019), 'Concept of Gift under Islamic Law', https://blog.ipleaders.in/concept-of-gift-under-islamic-law/
[9] AIR 1981 Kerala 176
[10]*Kathessa Umma v. NarayanathKunbama*, AIR 1964 SC 274
[11]Jamela vs Abdul Rahman 2001 Guj 175

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DISTICINCTION BETWEEN WASIYAT AND HIBA -

DISTINCTION IN TERMS OF	WILL /WASIYAT	GIFT/ HIBA
AS TO COMPLETION	Will is aeculted after the death of the testator.	Gift is completed during the life time of the donor.
AS TO CONDITION	Will is dependant upon a condition i.e. the death of the testator.	Gift is operated immediately.
AS TO REVOCATION	Will can be revoked at any time before the death of the testator.	Gift is usually revocable after the delivery of the possession.
AS TO LIMITATION	In a will the right of making a will is limited in two ways – in respect of the person in whose favour the bequest is made and as to the extent to which he can dispose the property.	In a gift the right of donor to gift is unrestricted.
AS TO EXISTENCE OF SUBJECT MATTER	It is not necessary that subject matter of the will must be in existence at the time of making the will.	The subject matter of gift must be in existence at the time of making the gift.
AS TO DELIVERY OF POSSESSION	Delivery of possession is not required in case of a will.	In a gift there must be delivery of the possession of the property to the donee.

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AS TO DOCTRINE OF MUSHAA	The doctrine of musha has no application in case of will.	The doctrine of musha is applicable in case of a gift.
AS TO ACCEPTANCE	In will acceptance by the legatee is not necessary.	In gift acceptance by the donee is necessary.
AS TO REGISTRATION	Registration of will is optional.	Registration of gift must be done under the Registration Act.
AS TO INSANITY	The subsequent insanity of the testator makes the will void.	Gift after the delivery of the possession is irrevocable on the ground of insanity.
AS TO CONSIDERATION	A will is always without a consideration.	In some cases, there is consideration in gift.