

## Gifts and delivery of Possession: A Study

By

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1.1. Sec 122 of the Transfer of Property Act defines a gift which has the following essential requisites:-

- i) There must be a transfer of ownership of a property;
- ii) The property should be of existing property;
- iii) The transfer should be voluntary;
- iv) It shall be without consideration;
- v) It can be of movable or immovable property;
- vi) The transfer should be accepted by the Donee from the Donor;
- vii) The acceptance of the transfer must be during the life-time of the donor and he must be still capable of giving.

In the event of the donor dying before acceptance, the gift is void.

1.2. There is no mention of delivery of possession of property in Sec 122 which defines a 'gift'. The requirement of acceptance by the donee would mean the donee agreeing or giving consent to the said gift. Conditional gifts can also be made by the donor but the condition must not be repugnant to any of the Sections

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10 to 34 of the Transfer of Property Act. Even in the definition of conditional gifts also, no mention of delivery of possession.

- 1.3. Sec 123 of the Transfer of Property Act makes a reference 'to delivery'. This section deals with the mode of transfer in the case of gifts. It provides separate provisions for the gift of immovable and movable properties.

With regard to gifts of immovable property, Sec 123 provides the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. Two essentials have been prescribed for the transfer by way of gifts namely.

- i) Must be effected by a registered instrument;
- ii) Attested by atleast two witnesses. No mention is made with regard to delivery of possession. One of the pre-requisite for registration is the transfer must be in writing and cannot be done orally. The registration must be completed in the manner prescribed by the Indian Registration Act, 1908. In other words, gifts of immovable property are compulsorily registrable and it

amounts to notice for a subsequent transfer and not for earlier transactions prior to registration.<sup>1</sup>

With regard to movable property, the gifts can be effected either by registered instrument signed as aforesaid (signed by the donor or on his behalf) or by delivery. For transfer of movable property by way of gift two modes are prescribed namely –

- i) by a registered instrument (signed by the donor or on his behalf) and attested by two witnesses; or
- ii) by delivery of possession

Even in the case of movable property, registration is made optional when delivery of possession takes place. No delivery of possession is required when it is made through a registered document. Sec 123 provides that delivery may be made in the same manner as goods sold are made i.e., which the parties agree to constitute delivery or putting the goods in possession of the buyer. As laid down by the Delhi High Court, “when it is executed by a deed, donor’s admission of execution of

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<sup>1</sup> Sahadev Vs. Shekh Papa (1905)29 Bom. P.119.

gift is enough to prove the gift; though one of the attesting witness is not called for proving it.<sup>2</sup>

1.4. It is interesting to point out that Muslim Law has laid down different rules relating to gifts. They may be stated thus:-

- i) A declaration of gift by the donor;
- ii) Acceptance of the gift by the donee
- iii) Delivery of possession, if possible

A clear reading of Muslim Law requirements makes it clear that registration is not required with regard to gifts. The position in Hindu Law is somewhat varying and deserves to be a subject of special study.

1.5. The Transfer of Property Act has not defined the term 'movable' as well as 'immovable property', but gave a non-inclusion statement to the effect that 'immovable property' does not include standing timber, growing crops or grass.<sup>3</sup> This definition is too inadequate and does not give an accurate account of what constitutes 'immovable property'. Attempts can be made to get a definition of immovable property by reference to the Indian Registration Act, 1908 as well to the General Clauses Act, 1897.

The Indian Registration Act states thus:

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<sup>2</sup> D.N.Dawar Vs. Ganga Ram Saran Dhama, AIR 1993 Del P.19.

<sup>3</sup> See Sec 3 of the Transfer of Property Act.

“Immovable property shall include land, buildings, hereditary allowances, rights-of way, lights, ferries, fisheries or any other benefits to arise out of land or things attached to the earth or permanently fastened to anything which is attached to the earth “but not standing timber, growing crop or grass”.<sup>4</sup>

The General Clauses Act, 1897 defines immovable property thus:

“Immovable property shall include land, benefit to arise out of land and things attached to earth or permanently fastened to anything attached to the earth”.<sup>5</sup>

The real test for ‘immovability’ “is whether or not the things rests by its own weight on earth and whether it can or cannot change place and be removed from one place to another place”.<sup>6</sup>

1.6. A clear reading of Sec 129 of the Transfer of Property Act makes clear that Muslim Law of gifts remains unaffected by the above provisions of the Transfer of Property Act. Muslim gifts enjoy protection from Transfer of Property Act. Even with

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<sup>4</sup> This is incorporated in the Transfer of Property Act.

<sup>5</sup> See Sec 3 (25) of the General Clauses Act, 1897.

<sup>6</sup> H.R. (1952) Hyd 495 (DB).

regard to delivery of possession it is provided, 'if it is possible'.

Hence this aspects rests on possibilities.

- 1.7. The Hindu Law of gifts considered transfer of possession as a valid requisite.<sup>7</sup> However, the requirements of registration and attestation of the gift deed have not been dispensed with.<sup>8</sup> Rules of Hindu and Buddhist laws were to remain unaffected except to the extent such rules were in conflict with Sec 123 of TP Act. However after the Amendment Act 20 of 1929, only Muslim Law received the protection and not the Hindu & Buddhist laws. Thus, the earlier protection received by Hindu and Buddhist laws of gift was removed by the Amendment Act (as protection is confined only to Muslim Law). Sec 123 of TP Act now supersedes the rules of Hindu Law, in so far as delivery of possession to the donee is concerned.<sup>9</sup> Sec 123 provides for compulsory registration and does not prescribe for delivery of possession of immovable property to the donee. For a valid gift of immovable property delivery of possession is not a pre-requisite. It must now be accepted that the provisions of Sec 123 of Transfer of Property Act makes the necessity of the

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<sup>7</sup> Bhagwan Prasad Vs. Hari Singh, AIR 1925 Nagpur 199. See also Tirath Singh Vs. Man Mohan , AIR 1981 P & H P.174.

<sup>8</sup> Tricomdas Coverji Vs. Sri Gopinath Thakur, AIR 1916 PC P.182.

<sup>9</sup> Revappa Vs. Madhava Rao, AIR 1960 Mysore P.97. See also Tirath Vs. Manohar Singh, AIR 1981 P & H P.174.

delivery of possession even it was required by strict Hindu Law, no longer applicable.

Thus, delivery of possession is not an essential requirement for gifts of immovable property except in the case of Muslim Law (if possible). This position of law is made quite clear by the decision of the Supreme Court in Renikuntla Rajamma Vs. K.Sarwanamma which is quite consistent the Statutory provision.<sup>10</sup>

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<sup>10</sup> AIR 2014 SC P.2906.