

THE GIFT OF USUFRUCT IN FAVOUR OF WIFE

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Abstract

The gift of property to wife, especially to an issueless, for her life time, has been a common practice amongst the Muslims of the subcontinent. The case laws show that there have been differences between heirs of husband and wife over ownership of the so gifted property, after her death. What is the true position in the issue under Islamic law, and what is legal position in the light of case laws in Pakistan? Can a gift be construed in some situations as gift in lieu of debt? What if a husband disposes of his property, or its usufruct, through will in favour of his wife? This work tries to answer these questions.

Introduction

The Islamic Law divides a property into Corpus and Usufruct¹⁹⁶ thereof. Both the Corpus and usufruct, separately and combined, can be transferred by its owner to another person. Islamic Law recognizes transfer for no consideration under *Hiba* and *Ariyath*, both fall under the English law term “Gift”.

Al-Umra is kind of *Hiba* in which “gift of usufruct” is made for life time of the donee. Whether corpus of the so gifted property will be inherited by heirs of the donee, or it shall revert to the one who made the gift, or his heirs, in case he is not alive? The Islamic jurists are divided into two groups in responding to the question. The first group hold that in such case the even the

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¹⁹⁶The right of enjoying the fruits of property of another person e.g. the wife of a deceased person living in an estate house until her death. <https://legal-dictionary.thefreedictionary.com/usufruct> last accessed 10.03.2017

corpus will be considered as gifted, and thus the donee's heir will inherit the property, along with all rights in it. The second group holds that the property shall revert to the donor.

The Pakistani courts have decided that condition is void and effective, when a corpus is gifted, with the condition that at the death of donee the property shall revert to the donor. However, when only the usufruct is gifted, with the said condition, then the property will go back to its original owner or his heirs, the condition being valid.

Division of property into corpus and usufruct under Islamic law

Islamic law divides property into Corpus and usufruct. The division has many legal consequences. The concept of *MilkiyaThama* (where an owner of a property enjoys all the three basic rights¹⁹⁷ of a property), and *MilkiyaNaqisa* (where a person enjoy some of those rights) is based on the division between Corpus and usufruct. Where an owner enjoys all rights (i.e. the basic three one) property; he is said to be having *MilkiyaThama* (full ownership). On the contrary if right to possess and right to usufruct are vested into two different persons, then each is said to be having *MilkiyaNaqisa* (lesser ownership) of the property.

The same difference is manifested from the terms of *Albai'* (which covers sale and exchange transaction of English Law) and *Ijara* (lease). Under Islamic law the first term is applied where all the three rights (in other words *MilkiyaThama*) are transferred from one person to another through sale or exchange transaction. But the term *Ijara* is applied where only Usufruct of a property is transferred for a specific time for some consideration.

A gift is generally considered as “transfer of property or benefits thereof to another person for no consideration”.¹⁹⁸ It is defined, under Sec. 122 of the Transfer of Property Act, 1882, ‘as the transfer of certain existing moveable or immoveable property made voluntarily and

¹⁹⁷ These rights are right to possession, right to use, and right to dispose of.

¹⁹⁸ Syed Ameer Ali, Mahommedean Law, vol. 1, (Lahore: Law Publishing Company),34

without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee'.¹⁹⁹

Essential elements of Gift

There are three essential elements of a Gift. These elements have been recognized by all Muslim jurists.

1. "A declaration by the donor. There must be a clear and unambiguous intention of the donor to make a gift.
2. Acceptance by the donee. A gift is void if the donee has not given his acceptance. Legal guardian may accept on behalf of a minor.
3. Delivery of possession by the donor and taking of the possession by the donee. A guardian may keep possession of the Gift property on behalf of a minor donee."²⁰⁰

Types of *Hiba* (Gift)

Under Islamic law there are three types of *Hiba*.

Hiba, as absolute *Hiba*, is transfer of property from its owner to another for no consideration. It resembles the "Gift" of English law. The Second type is *Hiba-bil-Iwaz*, which is a gift for some consideration, which the purposes of Islamic law, it attracts all characteristics and laws of the *Al-baai'* (sale). The third type is *Hiba-bi-Sharth-i-Iwaz*, in which a gift is made for some consideration receivable at some subsequent time. It is also treated as sale.²⁰¹

The English law term "Gift" covers two different conception of the Islamic Law, one is *Hiba* and the other is *Ariyath*. The *Hiba* means the transfer of *Tamlík al ain* (transfer of the corpus along with usufruct) or *MilkiyaThama*, is an immediate and unconditional transfer of the

¹⁹⁹ Available online at: <https://www.lawkam.org/property/gift-transfer-property-act-1882/6619/> last accessed 25.08.2017

²⁰⁰ Available at: <https://www.lawctopus.com/academike/concept-of-gift-under-muslim-law/> last accessed 25.08.2017

²⁰¹ Ibid

ownership of some property or of some right, without any consideration. *Ariyath*(commudatum) is known as *Tamlík al manafe* or the grant of some limited interest in respect of the use or “usufruct” of some property or right.²⁰² In this kind of Gift only usufruct is transferred for a specific period; and the ownership of corpus remains with the donor.

Our focus in this study is on *Ariyath* made in favor of wife. The judiciary in Pakistan has followed the *Hanafi* school of thought in number of cases; which are given in the following discussion.

The *Bidayath-ul-Mujtahid* says:

Hiba is of two kinds. First is the thing gifted along with the ownership, second is thing gifted to take benefit without giving ownership. The later has been further subdivided, gift given for a specific time known as *Ariyath*, and gift given for lifetime and returned after his death, known as *Al-Umree*.²⁰³

Types of *Hiba* in respect of transfer of property for ever and for some given time

When all those rights which are enjoyed by the owner of a property are transferred to another without any consideration it’s called *Hiba* or absolute gift. When usufruct of a property is transferred, it is called *Ariyath*.

There is no concept of reversion of the property in the case of absolute gift. The *Ariyath* contains an implied condition, that is to say, that after enjoying the specified benefit out of the property, the donee has to give back the property to its original owner. For example, when a person “A” lends his car to another person “B,” to travel from Peshawar to Islamabad, and then

²⁰² Rad-ul-Mukhtar, in book of *Ariyath* has described it in the following words. تملك المنافع مجاناً.

²⁰³ Available online at

http://library.islamweb.net/newlibrary/display_book.php?bk_no=97&ID=424&idfrom=677&idto=680&bookid=97&startno=2 (26 .08.2017)

back from Islamabad to Peshawar. The arrangement is called *Ariayth* under Islamic law. “B” has to return the car to “A” after his journey is once over.

The issue arises when a person gifts usufruct of his property to another for the life time of the donee. This arrangement is known as “*Al-Umra*”. Whether the property should now revert to the donor as per condition of the gift or not? Under the general principle it should revert, But the there have been *Ahadith* which discourage “life Grant”, and consequently which lay down that “the property should vest in the donee and his heirs, and should not be reverted”. At the same time other reports (*Ahadith*) which lead us to a contrary result that the so gifted property would revert. This position is supported by the general principle of Islamic law that ‘the *Muslims go by their stipulations.*²⁰⁴

When an *Ariyath* is made for life time of the donee, it is called *Alumragift*. In *Ariyath* the gift property is to be returned to the donor as per condition of the gift transaction; but when *Ariyathis* made for life time of the donee, then the legal consequences change. The traditions of the Holy Prophet show two different approaches in matter of *Al-Umra* gift.

1. *Jabir b. 'Abdullah* (Allah be pleased with them) reported Allah's Messenger (May peace be upon him) as saying: “Whoever a person is gifted a life grant, then it is for him (belongs to him and to his posterity, for it belongs to him who has been given it). It would not return to him who gave it for he conferred it as a gift (it becomes the property of the donee and as such) rules of inheritance will apply to it.”²⁰⁵
2. *Jaber b. 'Abdullah* (may Allah be pleased with them) reported Allah's Messenger (may peace be upon him) as saying: “He who conferred a life grant upon a person, it becomes his possession and that of his successors, for he surrendered his right in that

²⁰⁴ المسلمون عند شروطهم

²⁰⁵ *Sahih Muslim, Chapter 3 AL-'UMRA (LIFE GRANT), Book 12, hadith Number 3972, Translation*
http://www.iium.edu.my/deed/hadith/muslim/012_smt.html (11.04.2014 2053PST)

- by his declaration. (This property) now belongs to one to whom this lifelong grant has been made, and to his successors. *Yahya* narrated in the beginning of his narration: Whatever man is given a life grant, it belongs to him and his posterity.”²⁰⁶
3. *Jabir b. 'Abdullah al-Ansari* (Allah be pleased with him) said: Allah's Messenger (May peace be upon him) said: Whoever a person conferred *Umra* (life grant) upon a person and he says: “I confer upon you this and upon your descendants and anyone who survives you, and that becomes his possession and that of his posterity. It would become (a permanent possession) of those who were conferred upon this gift, and it would not return to its owner (donor), for he gave that as a gift in which accrued the right of inheritance.”²⁰⁷
 4. “*Jabir (b. 'Abdullah)* (Allah be pleased with him) reported Allah's Messenger (may peace be upon him) as saying: Life grant is for one upon whom it is bestowed.”²⁰⁸
 5. “*Jabir* (Allah be pleased with him) reported that a woman gave her garden as a life grant to her son. He died and later on she also died and left a son behind and brothers also, The sons of the woman making life grant said (to those who had been conferred upon this *'Umra*): This garden has returned to us. The sons of the one who had been given life grant said: This belonged to our father, during his lifetime and in case of his death. They took their dispute to *Tariq*, the freed slave of *'Uthman*. He called *Jabir* and he gave testimony of Allah's Messenger (May peace be upon him) having said: Life grant belongs to one who is conferred upon this (privilege). *Tariq* gave this decision and then wrote to *Abd al-Malik* and informed him, *Jabir* bearing witness to it. *Abd al-Malik* said: *Jabir* has told the truth. Then *Tariq* gave a decree and, as a

²⁰⁶ Ibid, *Hadith* number 3973.

²⁰⁷ Ibid, *Hadith* No. 3974

²⁰⁸ Ibid, *Hadith* No. 3977

result thereof, it is to this day that the garden belongs to descendants of one who was conferred upon the life grant.”²⁰⁹

In these *Ahadith* it is clear that a “life grant” or gift for life time is an exception to the concept of *Ariyath*. The *Ariyath* will be converted to the gift of *Hiba*, if it is made for the life time of the donee. In other words the gift of usufruct is valid when it’s made for a period other than life time only. A gift of usufruct (*Tamleekmanafi*) for life time of the donee will be considered as the gift of property along with all the essential rights or gift with transfer of full ownership (*tamleeka’in*).

However, there are *Ahadith* that guide us to another and a different view has been narrated, which shows that if an *Umra* gift is made with condition that the property should revert to me (the donor) at the death of the donee; then it would revert to him or his legal heirs upon the stipulated incident.

1. *Jabir* (Allah be pleased with him) said: “The *Umra* for which Allah's Messenger (may peace be upon him) gave sanction that a person may say: This (property) is for you and for your descendants. And when he said: That is for you as long as you live, and then it will return to its owner (after the death of the donee). *Ma'mar* said: *Zuhri* used to give religious verdict according to this.”²¹⁰
2. *Malik* narrated to me from *Nafith* that *Abdullah ibn Umar* inherited the house of *Hafsabint Umar*. He said, “*Hafs* gave lodging to the daughter of *Zayd ibn al-Khattab* for as long as she lived. When the daughter of *Zayd* died, *Abdullah ibn Umar* took possession of the dwelling and considered that it was his.”²¹¹

²⁰⁹ Ibid, *Hadith* No. 3982.

²¹⁰ Ibid, *Hadith* No.3975

²¹¹ Translation of *Malik's Muwatta* Book 36, Number 36.37.45: http://www.muwatta.com/ebooks/english/al-muwatta_english.pdf (15.08.2017 2176PST)

The View of *Fiqhi* Schools on *Al-Umra* Gift

In the following lines views of the Sunni school on the issue are given.

Under the *Hanafi* Law, when it is clear that the intention is to make to “A” a gift of the corpus of a thing, and it is conditioned that he should take a limited interest in it or take it only for his life, the condition would be void, and the gift would take effect absolutely.²¹²

Neil B E Baillie puts it as under:

The word gift is veiled under an illusion, but is known to signify the gift. For example; ‘thy garment is this piece of cloth’ or ‘I have invested thee with this mansion for my age’, which would be a gift. ‘This mansion is to thee umree’ (for thy age-umr), or ‘hyatee’ (for thy life life-hyat), and when thou are dead it reverts to me,’ in which case the gift is lawful, and the condition void.²¹³

In *Albadi’ as Sani’* it appears

When the condition of gift is made subject to life, it is forbidden. When it is given, it becomes his or her property, and after his death, legacy transfers to the heirs”. On other hand, when a gift is made in such words which shows that only “usufruct” of the property is gifted; the transaction becomes ‘*Ariyath*’, even if it’s named mistakenly as ‘*Hiba*’. The *Hanafi* view is that in such a case, the condition is valid. The donee will be entitled to benefits out of the property till his death, and at his the property shall revert to the donor, or donor’s heir. The very statement of *Albadi’ as Sani’* is followed by the following paragraph. Which provides that when at the time of making the gift only usufruct is transferred; the condition of reversion will be valid.²¹⁴

²¹² Syed Ameer Ali, *Mahommedean Law*, p.134

²¹³ *Neil B E Baillie, Digest Of Moohummadan (Law, Lahore, Premier Book House), 2nd ed., p.517*

²¹⁴ Alkasani, *Al-Badai’ As-Sanai’*, (Beriut, Darulkutub al-Ilmiya) 2003, 2nd ed., vol.8, pp.88-89. (ater making a comparison with original source the text was copied from

http://library.islamweb.net/newlibrary/display_book.php?idfrom=2880&idto=2900&bk_no=12&ID=664
11.08.2017)

The donee will be entitled to benefits out of the property till his death, and at this the property shall revert to the donor, or donor's heir *Imam Abu Hanifa*, and *Imam Muhammad* have opined this, while *Imam Abu Yusuf* was of the view that even here the condition will be void, and no reversion would take place."²¹⁵.

The construction of the words of the donor, play an important role in determining that whether he meant *Hiba* or *Ariyath*. For example: "This house is for you" is a complete *Hiba*, provided other condition is fulfilled. 'the conveyance is for you' or 'benefits of this house is for you' results in *Ariyath*. And apparently a similar statement again makes it a '*Hiba*', 'this house is for you to live in' has been construed as '*Hiba*', holding 'to live in' as an advice after transferring the property.

Maliki view on the Subject

The *Muwata* of *Malik* the following *Hadith* have been narrated.

*Malik narrated to me from Nafi that Abdullah ibn Umar inherited the house of Hafsabint Umar. He said, "Hafsa gave lodging to the daughter of Zaydibn al-Khattab for as long as she lived. When the daughter of Zayd died, Abdullah ibn Umar took possession of the dwelling and considered that it was his."*²¹⁶

Al-Mudawanath-ul-Kubra describes the view of *Maliki* school on the matter as that when a person makes a life grant of his house to another, with condition that it should revert to me on your (donee) death. The same should revert to the donor or his legal heirs on the death of the donee.

²¹⁵ Ibid,

²¹⁶ Translation of *Malik's Muwatta* Book 36, Number 36.37.45: http://www.muwatta.com/ebooks/english/al-muwatta_english.pdf(accessed 13.08.2017)

When Imam Malik was asked about aboutumree gift? He said, “When a person gifts somebody till his death, the property will return to the owner, as it is a valid principle of Islamic law, to meet the condition.”²¹⁷

Even if the donor stipulates that it should return to me on the death of the last male child of the heirs of the donee, it should be returned to the legal heirs of the donor (how low so ever) accordingly.

Shafi’ view on the matter

The *Shafi’* view in Al-Umm is as under.²¹⁸

When Imam Shafi was asked about *Umree* gift, he said, “The gift is for the donee and would not be returned. Imam Ghazali has described the *Shafi’* view on the life grant in the following way.”²¹⁹ (Translated from Arabic):

And whereas the life grant is concerned, there are three possible situations.

The *first (situation)* is that a person says: I have gifted you this house for your life time. And when you die, it is for your heirs. This (transaction) is valid, because he has intended thereby making of a gift, though he made his statement a bit lengthy.

The *second (situation)* is that when the donor says it is for you during your life time. And (he) does not mention what to be done with the property after the donee’s death. Then there are two opinions. The former is that such transaction is invalid. The recent is that it is valid, and the property will be owned by the donee.

²¹⁷ https://library.islamweb.net/hadith/display_hbook.php?indexstartno=0&hflag=1&pid=9097&bk_no=20&startno=0 (١٨,٠٨٢٠٧)

²¹⁸ Arabic text copied from https://library.islamweb.net/hadith/display_hbook.php?hflag=1&bk_no=47&pid=14681 (19.05.2014)

²¹⁹ Imam Ghazali, *Alwaseet fi Almadhab*, Darusalam, 1997, vol. 4, p .266

The *third situation* is that when the donor says (to the donee) “when you die, the property shall revert to me”. Here are two opinions. One is that such transfer is invalid. The other is that the transfer is valid, and the condition (of reversion) is invalid.

Hanbali view on the subject

There are two opinions in the *Hanbali Fiqh*. The preferred is that when a life grant is made with condition that the gifted property shall come back to the donor at the death of the donee, the transfer would take place absolutely, and condition will be null.²²⁰

Judicial Decision on Gift of Usufruct (*Al-Umra* Gift)

The Pakistani courts have differentiated between gift of corpus and gift of usufruct. According to the decision if a Gift of Corpus is made, then any condition attach to it, which is derogatory to the transfer of corpus, would be invalid. On other hand if it is manifested that the gift was intended to be only of usufruct, then the condition of reversion of the property would be valid. Though, this position does not seem to be in accordance with the *Hanfi* School of view, as the *Hanfi* view is that when a gift is made for life time, then the gift should be completed, and the condition derogatory will be void, and there is no such differentiation between the corpus and usufruct, when it comes to a gift for life time (*Al-Umra*).

The courts have also show tendency to declare any gift made in lieu of dower of wife as *Hiba-bil-iwaz*; which for the legal purposes is a *Al-baia*’ (sale transaction), rather than a mere gift. In such cases the gifted property has been held to be given to wife for her dower.

In the following lines some important Pakistani cases are reproduced.

²²⁰*Ibn-i-Qudamath, Al-Mughni, Dar AlmKuthub, (Riyadh: 1997),285-286, vol. 8,*

Sardar Nisar Ali Khan vs K.B. Sardar Mohammad Ali Khan²²¹

A Shia Muslim made gift in favor of his nephew 'A' for life time. At the death the property was to be transferred to another nephew 'B', and after 'B', the property shall go to another nephew of the testator 'C', provided that if 'C' be alive at B's death. 'C' had power to nominate his successor. 'C' died prior to 'B', so 'B' considered himself to be having power to nominate his successor. He nominated *Nawazish Ali khan*, son of 'C' (appellant) to succeed after his death.

The appointment was challenged by *Ali Raza Khan* who was a grandson of the testator. The question before the Privy Council was that whether 'B' had power to nominate his successor. The Privy Council held that when a usufruct is gifted, the corpus will be reverted at the end to the testator's heirs. The property was legally held by 'A' and 'B', but 'B' had no power to nominate another successor. The property was held to be reverted to the heirs of the testator.

The Privy Council arrived to another conclusion as well. It held that should 'C' be alive after 'B', and should he have enjoyed the property, he would have no power to nominate his successor. This conclusion may be differed, however.

Mst. Khan Bibi v. Safia Begum²²²

Abdurahim, a Sunni Muslim, died, leaving his widow, mother and two sisters. One of the sisters brought a suit for her share in the deceased property, which was consisting of two houses. There was no dispute over one house; however the widow contended that one out of the two houses was given to her by the deceased during his life time. She produced a document and a number of witnesses in favor of her claim. Accordingly the trial judge accepted widow's ownership of one house as gifted to her by the deceased.

²²¹ Available online at: <http://www.legalcrystal.com/946222> (last accessed 10.08.2017)

²²² PLD 1969 Lahore 338

The gift deed recited as under:

“The possession of the donee on the house in question will be up to her life time, and so long as she lives the donor will not alienate the house or dispossess her. Similarly the wife will have no right to mortgage, alienate or gift the property to anyone”

At the end of the document it's mentioned.

“After the death of the wife, the whole house will revert to the donor or his heirs in its entirety.”

The question before the High Court was whether the “life grant” in favor of wife was a gift of usufruct till the death of the donee (the widow), was gift that would end with her death, and the property would revert to the donor, or that the gift was Umra gift, whereby the widow is now full owner of the house, the condition attached thereto being void.

The counsel of the sisters argued that the widow has only right of usufruct till her death, and this right does not prevent the house to be distributed amongst the heirs as per their shares.

The counsel for the widow contended that the gift was *Al-Umra* gift. Therefore the widow is now full owner of the house. In support of its view the counsel produced the text from *Hidaya*(Hamlton), *Digest of Muhammeden Law* (BE Bailie), *Sahih Muslim* and other books. These arguments were based on the above mentioned *Ahadith*, and *HanafiFiqh*.

The counsel for contesting respondent produced case law on the issue. In *Mst. Hameeda v Mst. Budlun*(17 Suth. W R 525) the Privy Council had observed:

“The Privy Council reversed so much of the decisions of High Courts as ruled that effect of the arrangement between the plaintiff and her son, by which the son relinquished his share in his late father's property, was not that the mother took an absolute interest in the property in satisfaction of her claim of unpaid dower, but she should have only a life-interest, the son retaining the legal reversion in himself.”

Another case which was presented, and on which the High Court placed reliance in its decision was *NagoorAmmal v. M.K.M. Meeran* (AIR 1954 Mad.770). In the case the Gift-Deed of a Sunni-Muslim in favor of his second wife was considered. It was held therein that there was no absolute gift of the corpus, but it created only a life-interest in favor of the wife.

The Court held:

“The consensus of opinion of different authors of *Muhammadan* Law supports the proposition that where corpus of the property is transferred for life time and the condition are attached thereto, the gift is valid, but the condition is void. However where the contention of the maker of the gift is to transfer the usufruct of the property, then in that case a limited interest is created for a particular time and, therefore, condition can be attached to it such as the reversion of the property to the donor after the expiry of the limited period.”

The learned Court further held that the corpus of the said house was retained by the deceased, and the widow enjoys only life-interest. It has also declared that the transaction was indeed *Ariyath* and not the *Hiba*.

It appears that the court has placed much reliance on the court decisions; which itself have misunderstood the Islamic law on the issue. The Court has not given any satisfactory answer that why it has ignored the *Ahadith* and *Fiqhi* text produced by the widow’s counsel.

Farid v. Mst. Noor BiBi²²³

Though the case has not directly discussed the concept of *al-Umra* gift, but it is ratio is that when a gift is completed once, it cannot be revoked later on. It has also declared that use of phrase ‘till life or till second nikh’, when such phrase is used in a gift deed made in favor of wife, will be of no use, once the gift is completed.

²²³ PLD 1970 Lahore 502

The facts of the case are as that the plaintiff gifted a land to his wife at the time of marriage. The gift deed contained the above mentioned phrase. The marriage ended soon with divorce. The husband filed a suit to get the gift deed, and mutation there upon, cancelled. His contention was that the gift was made only to provide maintenance to her, and as long as, after divorce, he is no longer responsible for maintenance, therefore his property should be returned to him. The respondent raised the plea that the gift was completed in all respects, and therefore, is irrevocable.

The court has arrived at two important conclusions. The first is that whenever such phrase is used in favor of wife, it signifies “the life-interest in the corpus”. The other is that the condition of “for life or till her marriage” was void.

The Court held:

From the above, it is apparent that normally whenever a widow takes an estate under the technical condition) she takes a life-estate in the property, and not mere right to maintenance out of the usufruct of the property.

The decision continues:

In the light of the above discussion, the use of the words ‘till life or till second nikha^l by the Revenue Authorities, of course, on the statement of the appellant, means nothing else than a life estate in the property, i.e. in the corpus of the property for maintenance. Therefore, agreeing with the learned courts below, I hold that the corpus of the land in dispute was gifted away by the appellant to the respondent. I further hold, relying on the ruling in the case of Mst. Khan BiBi, that the gift of the land is that of corpus of the land and that the condition attached to it, as to it be only for life of the donee or till her marriage, is void; and the gift would continue to operate without the said condition. The

result of the above finding is that the gift of the land in dispute in favor of the respondent is complete in every respect and the condition being void, it is absolute.

Murid Hussain v. Mst. Bakhsh Ilahi²²⁴

. Where the husband transferred to his wife “income of a land for maintenance till her life time”, The court decided that such arrangement was Ariyath. She had a right to receive usufruct of the property and no more and it could continue only till the life time of the wife. She had no right to alienate the property. As the wife has since died, the property in suit would revert to the heirs of the husband, whoever they are, at the time the husband died.

Abdul Hameed v. Muhammad Mohiyuddin Siddique Raja²²⁵

It is very important case on the issue of *Al-Umra* gift. The court has examined the relevant *Ahadith* and the *Hanafiqh* text thoroughly. It has also examined the *Mst. Khan Bibi v. Safia Begum* and *Farid V. Mst. Noor BiBi* cases.

The question before the Court was whether a gift by a person to his issueless wife for life could be construed that it was a gift of immovable property, the condition of usufruct being void?

The appellant contended that the donor statement contained that the land was given to the wife for maintenance during her life only, and this shows intention of the donor that he had gifted usufruct of the land, and not the land itself. Further, that the donor used the word, given for life, i.e. till she lives. According to the appellant these words are not used by a donor whose intention is to gift corpus of the property. The counsel of appellant relied on the case of *Mst. Khan BiBi*, and stated that the principles of Muslim Law on the question of *Hiba* and *Ariaythare* fully stated in this judgment.

The appellant counsel presented the following *Hadith*.

²²⁴ PLD 1975 Lahore 1484

²²⁵ PLD 1997 SC 730

Narrated *Jabir (R.A.):Allah's Messenger (S.A.W.)* said, "what is given in life-tenancy belongs to the the one to whom it is given".

Muslim has: "Keep your properties for yourselves and do not squander them, for if any one gives a life tenancy it goes to the one to whom it is given both during his life and after his death, and to his descendants."

A version has: "The life-tenancy which *Allah's Messenger (S.A.W.)* allowed was only that in which one says, 'it is for you and your descendants', when he says, 'it is yours as long as you live, it returns to its owner.'"

The learned counsel for the respondent on other hand argued that the instant case is a case of transfer of corpus of property, and the words for life or till second nikh'are to be treated according to the well-established principles of *Shariah* to be ineffective and void. The Gift should be allowed, as it was *Al-Umra* gift, and the condition should be ignored.

The court has examined the Islamic Law on the issue in detail; especially the relevant Ahadith in *Nayl-ul-Awtar*, and the text from *Al-Hidaya*, and *FatawaAlamgiri*. The court, then, held:

[A] gift of property for life made by a person to any person, who may be his issueless wife, where intention is to transfer and convey corpus of the property is to be construed as an outright and absolute gift of property and any condition attached derogatory to the transfer of corpus in that case would be void. In other words any derogatory condition sought to be attached on the "Umra" gift will be void and shall not be recognized.

The court decided the case in favor of wife, and declared her owner of the disputed property. The court also declared the condition of 'for life or till second nikh'as ineffective. Similarly, in *Mst.*

*SamiaNaz v. Sheikh PervaizAfzal*²²⁶ a gift deed was considered, and the Supreme Court upheld the High Court construction of the deed as gift of usufruct, and not the gift of the corpus.

Kazim v. Muhammad Iqbal²²⁷

In this case the court has construed a gift in lieu of dower as *Hiba-bil-Iwaz*, whereby the donee gets exclusive rights in the gifted property. Held that where deed of gift by husband in favor of wife, was by necessary intendment, a dower deed, such wife becomes full owner of the property, and her title thereto could not be questioned. Any condition laid down in the deed the donee would enjoy usufruct only would be void and of no effect.

Kaneez BiBi v. Sher Muhammad²²⁸

The case has elaborated three different rules regarding gift. The first is about transfer of possession; which an essential element of the gift. The court held that where a gift is made by husband to wife living in the same house, then there is no strict need of proof of transfer of possession. The same is applicable to a gift made by father to his child, while living in the same house.

The Second principle is about revocation, or otherwise, of the gift. The question was whether after making the gift, any subsequent action of the donor in respect of the gifted property signifies revocation of the gift? The Court held that when the donor and the donee are of close relation, and the mutation has been once proved, then, such action would be considered as to be having done on behalf of the donee, and not in his own capacity as owner.

The Third principle is related to the *Hiba-bil-Iwaz*, where a gift was made by Father-in-Law to his Daughter-in-Law in lieu of marriage, and the deed contained that “she will be entitled to the

²²⁶ 2002 SCMR 164

²²⁷ PLD 1987 Pesh. 152

²²⁸ PLD 1991 SC 466

outcome of the property”. The court held that the gift was not only of usufruct, but of the corpus as well.

Analysis of the Case Law and *Hanafi* View

The case law shows that the courts have accepted the view of Imam Abu Hanifa and Imam Muhammad. The view of Imam Malik also coincides with them.

When the corpus is gifted, then any derogatory condition attached to the gift, will be void. Such conditions include terms like ‘the donee shall own it for his/her life time’, ‘gifted for life time’ or ‘the property to be revert after donee’s death’.

When the gift is only of the usufruct, all such condition will be effective, and the reversion will take place.

However, the courts should try to focus construction of instruments according to the principles and requirements of the local languages, rather than mechanically applying the examples quoted in the Fiqh books, for *equity looks to the substance rather than the form*.²²⁹

Will in Favor of Widow

Through “Will” or “*Wasiyath*”, a person can transfer his property to another, at his (donor) death, without receiving any consideration. Under Islamic law, the up to maximum one-third of the total property can be transferred to a non-heir. A will in favor of a legal heir is invalid and ineffective. It can be allowed only with the consent of all other legal heirs.

In *Farida Khatoon v. Dr. Masood Ahmad Butt*²³⁰, the Supreme Court examined the situation of a will made in favor of wife. The court held that such will was not sustainable, as the shares of the heirs under Shariah cannot be deferred.

²²⁹ العبرة في العقود للمقاصد والمعاني لا للألفاظ والمباني

²³⁰ 2009 SCMR 464

The facts of the case are that the deceased left behind a widow and a brother as heirs. The deceased had issued two instruments. The first was a gift deed, through which he transferred half of his property to his wife during his life time. The second instrument was named as *WasiyathNama*, through which he transferred usufruct of the remaining property to the wife.

At death of the donor, his widow took possession of the remaining property, whereas his brother asked for his share in the remaining property. The trial court found that she is entitled to one-fourth of the usufruct, and the three-fourth would be held by the deceased's brother. The Lahore High Court reversed judgment of the trial court of three-fourth in favor of the appellant.

The Supreme Court considered the question, that either a share in inheritance under Islamic Law be deferred through a Will of usufruct. The Court held that the said will was not sustainable in the eye of law, as the right to inheritance cannot be deferred or suspended by custom or usage.

The decision of the court is though not detailed, and it does not give reasons that how or why such will was not sustainable. However, it is very clear that in this case the will was made in favor of a legal heir, which is not allowed under Islamic Law.

Conclusions

The Islamic law divides property into Corpus and Usufruct thereof. Both can be alienated through Gift, i.e. *Hiba* and *Ariyath*. In *Hiba* transaction one transfers full ownership of a property to another, inclusive both of Corpus and usufruct, along with power to alienate the gifted property. In case of *Ariyath*, only usufruct is transferred.

When a gift is made for the life time of the donee, then the reports from the Holy Prophet (S.A.W.) has two different views. Some of the *Ahadith* show that in such case the property would not revert to the donor, and other reports show that it would be reverted. Accordingly the *Fiqhi*

views have also showed both tendencies. *Imam Abu Hanifa, Imam Muhammad* and *Imam Malik* have opined in support of reversion; while other jurists have viewed that the condition of reversion will be void.

The Courts in Pakistan, have adopted the view of *Imam Abu Hanifa, Imam Muhammad*, on *Al-Umra* gift or gift that makes 'life grant'.

The courts have declared a gift made in lieu of dower as "*Hiba-bil-Iwaz*", and that when a gift is made by husband to wife; there will be no need to prove strictly transfers of possession, provided they live together. The court has denied sustaining a will made in favor of wife.
