sanctioned but also it is an act of devotion or **Ibadat.** Islam has prescribed specific laws on maintenance based on the **Quran** and the **Sunnah.** On the basis of **Shariyah** or substantive law, competent Civil courts used to pass decree for providing maintenance in the absence of statutory laws.

According to Islamic law, it is incumbent upon a husband to provide maintenance to his wife, upon a son to his parents, upon a father to his minor children and sometimes to near relations. As pointed out above, in Bangladesh we have three statutes which, amongst other subjects, deal specifically with maintenance. The Code of Criminal Procedure, 1898 (Section 488) deals with the maintenance of wife and children, the Muslim Family Laws Ordinance, 1961 and the Family Courts Ordinance, 1985 deal with maintenance of wife only. There is no statute to deal with the provision of maintenance of parents or near relations. In the absence of such statute to protect the right of parents; innumerable Muslim parents are leading inhuman life due to the fact that their sons are not providing adequate maintenance to the parents. Government of Bangladesh may legislate Act like the Family Courts Ordinance, 1985 to safequard the rights of the poor Muslim parents.

It is the moral duty of a man to provide maintenance to the old parents and poor relatives. But moral duty is not enforceable unless it is clothed by the law to make it a legal duty. Existing **Sharia** law has asked the wealthy sons, though not in strong terms, to provide maintenance to their old and poor parents. But nothing has been said about the violation of this instruction. In absence of this, people may find plea not to abide by instruction. It is submitted that the lacuna left by the old traditional law can be filled up by providing appropriate provisions in the statues.

Chapter Twelve
Gifts *(HIBA)*
Section- 1

1. Significance of gift

A Muslim may validly transfer his property either in whole or part to another person by way of gift. Generally, a gift may be made intervivos, i.e. from one living person to another living person without any restriction. According to the provision of Islam, a Muslim can make gift of his entire property during his lifetime.[1] The motive of gift is either to manifest affection towards an individual donee or to win the affection of the donee.[2]

Ranee khajooroon Nissa v. *Mst Roushan Jehan* case states the purpose and significance of gift as follows: "The policy of the Mohammedan laws appears to prevent a testator interfering by will with the course of devolution of property according to law among his heirs, although he may give a specified portion as much as a third to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons, provided he complies with cartain forms.[3]

The intention of the donor must be honest and not merely to achieve any ulterior object. A gift will be invalid if it is made to disinherit some of the heirs. But all the cases of disinheritance of some of heirs are not invalid.[4] A gift is invalid only where the disinheritance is the object but not merely the result of the gift.[5] Islam encourages the making of mutual gift with the intention of transferring wealth from one person to another leading to cordiality and affection. Besides, making of the gift closes the relationship between the donor and the donee. Here lies the importance and significance of the gift. The Prophet Hazrat Muhammad (peace be on him) encourages the making of the gift.

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1 Asaf A.A. Fyzee, Outling of Muhammadan Law, P. 217.
2 R.K. Wilson, Ango-Muhammadan Law, P. 323.
3 (1876) 3 1A 291 at 307 (P.C)
4 PLD 1955 Lah. 181.
5 PLD 1950 Pesh. 45.

Traditionists discussed the rules, importantance and mode of transaction relating to gift in separate book entitled *kitabul hiba.*

2. Definition of *Hiba* or gift.

The term '*hiba*' or gift has been defined differently by different jurists. Asaf Fyzee defines it, "*Hiba* is the immediate and unqualified transfer of the corpus of the property without any return."[6] Ameer Ali cites from *Durrul Mukhtar*, "A *hiba* is defined as the transfer of the right of property in the substance by one person to another without consideration (*iwaz*). Thus a *hiba* is a voluntary gift without consideration of property or the substance of a thing by one person to another so as to constitute the donee, the propictor of the subject-matter of the gift." D.F. Mulla defines it, " Gift 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."[7] According to *Hedaya*, "Gift (*hiba*) in its literal sense signifies the donation of a thing from which the donee may derive a benefit; in the language of the law, it means a transfer of property made immediately, and without any exchange.[8]

"Gift is thus the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another person called the donee, and accepted by or on behalf of the donee.[9] Such acceptance must be made during the lifetime of the donor and when he is still capable of doing so. The gift will be invalid in case of death of the donee before acceptance. *Hiba* must be made unconditionally and it shall be free from any pious or religious purpose on the part of he donor.[10]

3. Essential conditions of a valid gift:

It is essential that three conditions must be satisfied for the validity of a gift. These are-

(i) A declaration by the donor with the intention to transfer in present to the donee the subject matter of the gift.

[6] Asaf A.A. Fyzee, Outlines of Muhammadan Law, P. 217.
[7] D.F. Mulla, Principles of Mahomedan Law, P. 112 (1993).
[8] Hedaya, Tr. Hamilton, P. 482.
[9] Section 122, T.PAct 1882 (Act No. IV of 1882)
[10] Neil Baillie, A Digest of Muhammadan Law, P. 203.

There shall be *bonafide* intention of the donor to make a gift. Thus a man might allow his property to be recorder and possessed by his sons without any intention that they should be owners, as for instance, when he wishes to baffle his creditors. A gift made with intent to defraud the creditors of the donor is voidable at the option of creditors. Such an intention, however, can not be inferred from the mere fact that the donor owned some debts at the time of the gift.[11]

(ii) Acceptance of the gift expressed or implied by or on behalf of the donee.

The donee must accept the gift for its validity, may be expressly or impliedly. The acceptance of the gift must be by a person competent to accept. A gift made in favour of a minor, if accepted by another minor on behalf of the minor, is not valid, because a minor is not competent to accept the gift. So a gift made in favour of a minor is to be accepted by a person who is free from legal bar. Thus when a father makes a gift in favour of his minor son, the minor becomes proprietor of the same, though it was not formally handed over to the child, because the possession of the father is tantamount to the possession of the infant by virtue of the gift.[12] If the donee is competent to take possession, he is entitled to do so, but if it is a minor or insane (*Majnun*) , then the *wali* or guardians is entiled to take possession.

(iii) Delivery of possession of the subject of gift by the donor to the donee -

The donor should make delivery of the thing gifted to the donee when he makes a declaration. Such delivery of possession may be actual or constructive. In case of more than one donee, possession by any one co-sharer is presumed to be in the name and on behalf of other co-sharers. Registration of a deed of a gift without delivery of possession is not enough. Thus where Abdullah, for example, executes a deed of gift of his house in favour of Bayazid and the deed is not registered but no delivery of possession takes place, the gift is invalid.[13] But delivery of possession is not necessary in the following cases:[14]

(a) Where the donor and the donee reside in the same house;

[11] D. F. Mulla, P. 112.
[12] Syed Ameer Ali, Muhammedan Law, Vol. I, P. 127 (Reprint 1985).
[13] Asaf A.A. Fyzee, Outlines of Muhammadan Law, P. 231.
[14] Asaf A.A. Fyzee, Outlines of Muhammadan Law, PP. 232-237.

(b) Where the gift is from the husband to the wife or vice versa;

(c) Where the father or the mother makes a gift to a child;

(d) Where a guardian makes a gift to the ward;

(e) Where the subject of the gift is in the possession of the donee at the time of the making of the gift under the following situations:-

(a) Residence in the same house

If the donor and the donee reside in the same house, donor can complete the gift without physical transfer of possession. A Muslim lady, who had brought up her nephew as her son, executed a deed of gift in favour of the nephew of a house in which they were residing at the time of the gift. The lady never departed from the said house physically, nor was the house formally handed over to the donee, but the property was transferred and the rents were recovered in his name. It was held that the gift was valid, although there was no physical delivery of possession.[15]

But mere living together does not always mean that delivery of possession is not necessary. A Muslim lady, as for instance, executed a deed of gift of her house in favour of her nephew and in that house both of them resided. In the deed there was mention of delivery of possession to the nephew. The deed also was not delivered to the nephew and the lady continued to pay municipal tax. In these circumstances, it was held that the gift was invalid.[16]

(b) Husband to wife

Where a married couple live in a house belonging to the husband, the husband may make a valid gift of the house to the wife, without physical delivery of possession. The same rule is applicable in the case of a wife making a gift to the husband. In a deed the husband made a gift of his immovable property to his wife and got the mutation done. But still he continued to live in that house and also continued to receive the rents. It was held that as the donor and the donee were husband and wife and so the husband continued to live with his wife, donee, in that house which was gifted. It was deemed that the husband would collect the rents on behalf of his wife. It was held that the gift was valid.[17]

[15] Ibrahim Bivi V. K.M.M Pakkier Mohi deen, AIR (1970) Mad. 17.
[16] Qamar-ud-Din V. Mst Hassan Jan (1934) 16 Lah. 629.
[17] Amina Bibi V. Khatija Bibi (1886) 1Bom. H.C.R 157.

(c) Gift to a minor by father or other guardian –

Transfer of possession is not necessary where a father or mother makes a gift of immovable property to their minor child. The reason is that the possession of the father is tantamount to the possession of the minor by virtue of the gift. Similarly, where a gift is made to a minor by a person other than the father, the gift is rendered complete by the seisin of the father of the minor. The reason in favour of this principle is that it would be absurd that the owner of the property (parent) hands over possession to himself as guardian of the child. This delivery of possession by a father to his minor amounts to delivery by right hand to left hand.

(d) Gift to donee in possession

Where the subject of the gift is in possession of the donee at the time of the making of the gift, the gift will be completed on declaration and acceptance without formal delivery of possession. Thus a gift of property in the possession of a bailee, lessee or mortgagee is completed without formal transfer of possession.[18]

4. Qualifications of donor

Every Muslim donor must possess the following qualifications:-

(a) He must be major;

(b) He must be a man of sound mind or sane and

(c) He must be an owner of the thing given at the time when the gift is made.

Explanation

A minor cannot make a valid gift, because minority stands on the way of making gift. A donor must have to attain majority. A lunatic also cannot make a valid gift because of his insanity. A donor should also hold the title of the thing to be gifted.

A woman is free to make a valid gift of her property, but if she is a *pardanoshin* lady, she is presumed to be weak and ignorant and likely to be imposed upon by undue influence, unless the contrary is shown. If the donor has been suffering from death illness or *Marz-ul Maut*, such a gift is neither exactly a gift, nor exactly a will, but a mixture of both. A

[18] Hedaya, P. 484.

gift made during *Marz-ul Maut* cannot take effect beyond one third estate of the donor, after paying funeral expenses and debts, if any, unless the heirs have their consent, after the death of the donor. Again, a gift (will) to heirs will be effective with the consent of other heirs, after the death of the donor. An insolvent may make gift with *bonafide* intention, but a gift to defraud the creditors is voidable at their option .The donor, therefore, must have sanity, majority, ownership, free mind or free from undue influence.

5. Qualifications of a donee

(a) Gift in favour of legal Person

According to Islamic law, a donee must possess some qualifications. In the absence of those qualifications, it shall be deemed that the donee lacks legal capacity and as such this gift will become invalid. Gift, therefore, must be made in favour of the following persons:

(i) Donee must be in existence:-

(a) A gift can be made in favour of any person natural or juristic who is in existence and is capable of holding or owning property. Gift to a lunatic or minor is valid provided the possession of the gifted immovable property is transferred to their legal guardians.

(b) Gift in favour of an unborn person:-

An unborn person means a person not in existence and so is incapable to hold or own any property. A Gift made in favour of an unborn person is invalid.

(c)Gift in favour of a child in the womb-

A gift to an unborn child may be made provided the child is born within six months from the date of the gift. The argument is that this is the shortest period of gestation. But if a child is born after six months from the date of gift, it is invalid as there is possibility that it was conceived after the gift was made.

(ii) Gift in favour of juristic person:-

Gift made in favour of a juristic person like mosque is valid, because a mosque is recognized as a juristic person.

(iii) Gift to a non- Muslim :-

A Gift made to a non-Muslim is valid. Once the donee (non-Muslim) accepts the gift, the property becomes the subject to his personal law.

(iv) Identity of the donee :-

It is necessary for the validity of the gift that the donee is to be identified, otherwise, it shall be invalid.

6. Subject of gift

A thing cannot be a subject of gift without its existence at the time when the gift is made. A donor, for example, makes a gift the fruits of his mango garden that may be produced this year. This gift is invalid since the mangoes were not in existence at the time of making the gift. Under Islamic law, anything over which dominion or the right of property may be exercised or anything which exists either as a specific entity or an enforceable right, or anything in fact, which comes within the meaning of the word *mal* (property) may form the subject of gift.[19] A thing cannot be treated as subject of gift which lacks in value because of its absence of meeting the necessity of life.

7. Future gift

A gift is invalid which takes effect at any future date. Hence if the operation of a gift is postpond to some future date, the transaction is invalid. The reason is this that the subject of gift is not delivered immediately. Hafiz, for example, says to Mofiz, " This garden is yours from tomorrow as a gift" This gift is invalid.

8. Contingent gift

A gift is void if it depends on the happening of a contingency. A gift, therefore, must not be dependant on anything contingent or on the happening of a particular event. The word contingent implies that no present interest exists and that whether such right or interest will ever exist depends upon a future uncertain event. Thus a gift, for example, made on the condition that it would be effective if 'K' is married, would be void.

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[19] Abid Hussain V. Manno Bibi, AIR (1927) Oudh. 261.

9. Gift of usufruct of property

A gift of usufruct for life with the condition that after the death of the donee the property would revert to the donor or to his heir or legal representative is valid.[20] The creation of life interest is like a lease to certain property which subsists for the lifetime of the lessee. According to Hanafi law, a gift of a property to a person for his lifetime is nothing but a gift and a condition and this is a valid gift. In this case the donee can enjoy the property absolutely during his lifetime.

10. Gift during Marz-ul-Maut (death illness)

Marz-ul Maut is an illness which, if induces in the person suffering from it, creates a sense of imminence of death and ultimately proves to the immediate cause of his death . In determining whether the gift of a person suffering from an illness be treated as *Marz-ul Maut* the court considers – (a) Whether the donor suffering from a disease at the time of making gift, that was the cause of his death, (b) whether the nature of the disease is such that it induces in him the belief that it would cause his death, (c) whether the illness is such that it incapacitates him from the pursuit of his ordinary avocations, (d) whether the illness continued for a long time so as to remove or lessen the apprehension of immediate fatality. The court, therefore, considers whether the gift in question was made under the pressure of sense of the imminence of death or not.[21]

The determination of the validity of the gift during *Marz-ul Maut* depends on the circumstances which exist at the time of making he gift. Subsequent failure to die cannot validate an invalid transaction. The doctrine thus would apply where a person was suffering from strong tuberculosis and he was under apprehension of death when the gift was made, but he was shot dead by some persons or died of an accident a short time after the gift. It is not *Marz-ul Maut* when a man suffers old age debility and as a result he dies. If a man makes a gift when he is dangerously ill, but recovers afterwards, the gift is valid. If he dies of the disease and the heirs refuse their assent to the gift it is valid only to the extent of one-third of his property, when delivery of possession

[20] PLD 1963 Pesh. 199; PLD 1956 Dhaka 143.
[21] PLD 1964 S.C., 146; 16 DLR S.C, 310; PLD 1967 Lah 613.

takes place, but before delivery of possession, the property falls into his inheritance.[22]

11. *Musha* or undivided property.

'*Musha*' means an undivided part or share, a common building or land. This property may be movable or immovable. The undivided share maybe of- (i) a property which cannot be divided without destroying its utility like horse, bath, tree etc. or of (2) a property which can be divided without loosing its utility like land, house etc.

Now we shall discuss when *Musha* is valid and when not.

(i) Gift of *Musha* where property is Indivisible-

A valid gift may be made of a *Musha* or an undivided property which is not capable of partition. A gift of divided share in a small house or a small bath would be valid. The gift of P's undivided share in the stair-case, though it is a gift of *Musha*, is valid, because a stair-case is not capable of division. Similarly, a gift of an undivided share of the banks of a tank is valid if the banks are regarded as indivisible.[23]

(ii) Gift of *Musha* where property is divisible -

A gift of an undivided share in property which is capable of division is irregular (*fasid*) but not void (*batil*). As the gift is irregular and not void, it may be perfected and rendered valid by subsequent partition and delivery to the donee of the share given to him. The gift, therefore, of an undivided share of property which is capable of division cannot be hit by the principle of *Musha* if the said share can be separated subsequently at the instance of the donee.[24] A gift being indivisble, possession of any part of the property would make the gift operative .The gift is validated, if possession is taken by the donee. For instance, 'A' makes a gift of her undivided share in certain lands to 'B'. The share is not divided off at the time of gift, but subsequently separated and possession there of is

[22] PLD 1964 SC. 143; 16 DLR S.C. 330.
[23] Ala Baksa V. Mahabat Ali, AIR (1935) Cal.739.
[24] PLD 1963 BJI; AIR 1960 Pat. 297.

delivered to 'B' The gift, though initially irregular, is validated by subsequent delivery of possession.[25]

The rule regarding *Musha* is not only confined within the strictest limits, but is cut down by some exceptions which are as follows:[26]

(a) Where the gift is made by one co-heir to another-

A Muslim female dies leaving a mother, a son and a daughter as her only heirs. The mother may make a valid gift of undivided share in the inheritance to the son or to the daughter or jointly to the son and daughter. The gift thus was held valid.[27]

(b) Gift to co-sharers in undivided land-

The gift of a share in undivided land or *Zamindari*, by one co-sharer to another person, is valid, even if the share is not divided off and delivered to the donee. Thus if 'A' and 'B' are co-sharers in a *Zamindari* each having a well defined share in the rent of undivided land, and 'A' makes a gift of his share to 'B' there being no regular partition of the *Zamindari*, the gift is valid.

(c) Gift to two or more persons.-

A gift of property capable of division to two donees without dividing it is valid where the two joint donees have agreed among themselves either on the division of the property or on enjoying it jointly[28] or if there is a subsequent arrangements between the donees with regard to the possession of the property gifted.

(d) Gift of *Musha* in big commercial towns

The gift of a share in a large commercial town is valid from the moment of the gift even if the share be not divided off and delivered to

[25] Muhammad Mentaz V. Zubaida Jan (1889) 11 All. 460, 16 1.A.205; Mofezzuddin Talukdar V. Abed Ali Sheik (1935) 62 Cal. L.J. 424.
[26] Asaf A.A. Fyzee, Outlines of Muhammadan Law, P.241.
[27] AIR 1960 Mad. 447.
[28] PLD 1960 Dacca 489; AIR 1960 Mad, 447 (D.B).

the donee.[29] A house in Rajshahi, Chittagong or Khulna, for example, is covered by this exceptions, because those towns are big commercial towns.

(e) Gift of shares in a land company

Where the gift is of shares in a land company, the principle of *Musha* does not apply.

(f) Periodical payment in the nature of life grants.

Where property is transferred absolutely to certain donees, and it is stipulated that they shall make certain periodical payments out of the recurring income of the property, such payments do not attract the law of *Musha*.[30]

12. Revocation of gift

Although the revocation of a gift is abominable not only from moral point of view but also from the view of *hadith*, but still revocation is valid under certain circumstances. According to Islamic law, all voluntary transactions including *hiba* or gift are revocable. As regards gift, there is difference in the case of before and after delivery of possession of the subject of gift. A gift may be revoked by the donor at any time before delivery of possession. The argument has been shown that a gift is not legally a gift before delivery of possession and therefore the rules of gift are not applicable. But when a gift is made and the subject matter of the gift is duly transferred to the possession of the donee, it cannot be revoked without the (a) intervention of the court of law or (b) without the consent of the donee. Only a declaration by the donor is not enough for revocation of gift. The donor, and not his heirs, can revoke a gift after the death of the donor. An illustration is given in favour of it.

'A' makes a gift of his house to 'B' and 'B' accepts the gift; but before the delivery of possession 'A' changes his mind; This is the case of an incomplete gift; and if no further steps are taken by 'A' in pursuance of his original intention, the gift does not take effect. It is not a

[29] PLD 1957 Kar. 884; PLD 1952 Lah, 545.
[30] Asaf A.A. Fyzee, Outlines of Muhammadan Law, P. 243; Mohideen V. Madras State (1957) Mad. 893, 901.

revocation as it was not materialized. The question of revocation arises only after a complete gift and not in case of an incomplete gift.[31]

The following gifts cannot be revoked even with the consent of the donee or by the intervention of the court:

(i) Gift by husband to wife and vice versa

A gift made by the husband and accepted by the wife either before or after the solemnization of the marriage is not revocable, even it is not revocable after the dissolution of the marriage.[32]

(ii) When the donor or donee dies;

(iii) When the thing given is destroyed or lost;

(iv) When the donor and the donee are related to one another within the prohibited degrees ;

(v) When the thing given has been transferred by the donee by gift, sale or otherwise;

(vi) When the donor has received any return or consideration (*iwaz*) for gift from the donee or third person;

(vii) When the thing given increased in value, whatever the cause of such increase;

(viii) When the subject of gift is so changed that it cannot be identified, when the wheat, for example, is converted into flour by grinding.

(ix) When the motive of the gift is religious or spiritual, for, in this case the gift amounts to *sadaqa*;

(x) A gift made in favour of a poor man who has taken possession of the subject of gift is not revocable.

13. *Hibabil – iwaz* (Gift for exchange)

Hibabil iwaz, different from a *hiba* or simple gift, is a gift for a consideration or exchange. *Iwaz* means exchange or consideration. When the donor makes a gift and the donee declares his intention that he makes a reciprocal gift to thedonor in exchange of the gift he has received. This

[31] Fyzee, P. 265.
[32] Syed Ameer Ali,Muhammedan Law , Voll. I, P. 152 (Reprint 1985).

reciprocal gift is called *iwaz* or return. Thus, according to Islamic law, it is a transaction made up of two separate acts of donation. So it is a mutual or reciprocal gifts between two persons, each, of whom is alternately the donor of one gift and the donee of the other.[33]

Both the gifts are simple gifts but once the second gift, as an *iwaz* of the first, has been accepted by the donor of the first, both the gifts cannot be revoked. An illustration is cited for proper clarification. 'K' makes a gift to 'M' a necklace. 'M' then makes a gift to 'K' a ring of gold and states that this gift(Ring) is a return for the first gift (necklace) and 'K' accepts it. Here ring is the return or '*iwaz*' for the primary gift (necklace). The whole process is called *hiba bil iwaz*.

14. *Hiba-bil- Shartil Iwaz*

Hiba-bil-Shartil Iwaz is a gift made on condition of return or *iwaz* or exchange. 'A', for example, makes a gift of his house to 'B' on condition that 'B' would give his car to 'A'. Delivery of possession of *iwaz* is necessary in order to make the gift perfect. Both donor and donee may revoke it before delivery of possession takes place.

15.Distinctions between *Hiba-bil iwaz* and *Hiba-bil shartil iwaz*

The distictions between the two are as follows :-

(i) In the case of *hiba-bil-iwaz*, the idea of *iwaz* or return originate afterwards; but in *hiba-bil shartil iwaz*, the two go (gift and return) hand in hand.

(ii) The return is completed by both parties in the *hiba-bil- iwaz*.

(iii) In the case of *hiba*bil *iwaz*, the donee intends to make primary of his own accord and offers it to the primary donor.

But in the case of *hiba-bil Shartil iwaz*, there is a contract between the donor and the donee for a return before making gift, After the gift and the return have been completed by delivery of possession, neither of them can be revoked.

Strictly speaking, both the two forms of gift are outside the simple gift and they differ from the simple gift fundamentally.

[33] PLD 1964 Dhaka. 451; 15 DLR Dhaka, 671.