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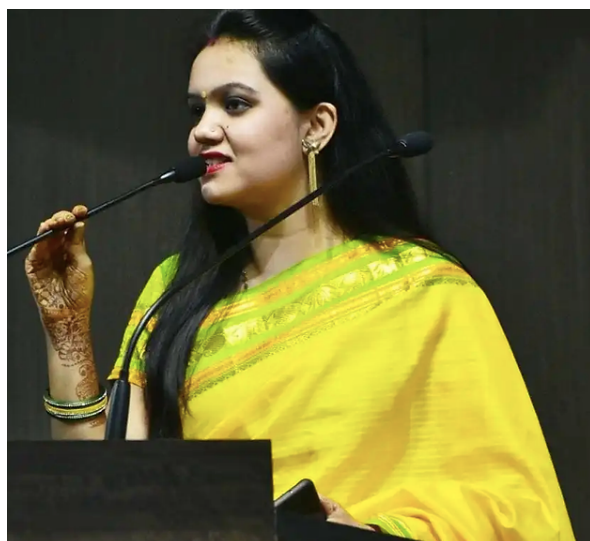


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We are here to provide you with a lucid way of learning law with the help of daily blogs pertaining to the latest/other legal issues going on in the country.

We also provide legal advice and needed legal awareness to the masses with a pioneering objective of reaching the underprivileged and serving the idea of Free Legal Aid to them. (Article 39A of the Constitution of India).

We would be appraised to welcome blogs from the readers too. Readers can submit their blogs at [contact@thelegalvidya.com](mailto:contact@thelegalvidya.com).

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**ANALYSING THE CONTOURS OF VALID GIFT: A CONSTITUTIONALITY TEST ON SECTION 129 OF TP ACT**

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**INTRODUCTION**

A ‘gift’ is typically defined as transferring ownership of the property in which the donor freely makes such a transfer without any monetary compensation or consideration. Section 122<sup>1</sup> of the Transfer of Property Act, 1882 (“the TP Act”) defines the gift and, as a result, clarifies the types of transactions that might be considered as gifts. The combined interpretation of Sections 122<sup>2</sup> and 123<sup>3</sup> of the TP Act represents the conditions of a lawful gift. However, due to Section 129<sup>4</sup> of the TP Act, the aforementioned criteria are not obligatory on the individual regulated by Mohammedan rules. Section 129 of the TP Act exempts gifts made under the Mohammedan rule from the conditions of Chapter 7 of the TP Act. The aforementioned Section appears to be problematic since it violates Article 14<sup>5</sup> of the Indian Constitution. The Courts were urged several times to examine the aforementioned Section against constitutional limitations. The High Courts (“HC”) have differing opinions on the constitutionality of Section 129 of the TP Act. Furthermore, there has been no Supreme Court judgment on the subject. In the case of *Mt. Bibi Maniran Versus Mohammad Ishaque*<sup>6</sup>, the Patna High Court was firstly called upon to decide the constitutional validity of Section 129 of the TP Act. Further, in the case of *Makku Rawther's Children: Assan Ravther v. Manahapara Charayil*<sup>7</sup>, the constitutional validity of Section 129 of the TP Act was also challenged before the Kerala High Court. Surprisingly, both the Hon’ble Courts have upheld the constitutional validity of Section 129 of the TP Act, however, their reasoning was on completely different footing. Both the judgments have laid down the different rule and created a lacuna regarding the extent and validity of Section 129 of the TP Act.

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<sup>1</sup> The Transfer of Property Act, 1882, S. 122.

<sup>2</sup> Id.

<sup>3</sup> The Transfer of Property Act, 1882, S. 123.

<sup>4</sup> The Transfer of Property Act, 1882, S. 124.

<sup>5</sup> Indian Constitution, Art. 14.

<sup>6</sup> Mt. Bibi Maniran V/s. Mohammad Ishaque, AIR 1963 Pat 229

<sup>7</sup> Makku Rawther’s Children: Assan Ravther V/s. Manahapara Charayil, AIR 1972 Ker 27

The author has bifurcated the article in following manner: (a) Contours of Valid Gift: A glance of Chapter 7 of TP Act, (b) Section 129 of TP Act and Its Conundrums, (c) Patna HC v Kerala HC: Constitutional Validity of Section 129 of TP Act. The author has supplemented the article with his original views and opinions regarding which of the aforesaid judgments has better legality and sound reasoning. Further, the author has made attempts to reflect the connection of Sustainable Development Goals<sup>8</sup>. (“SDGs”).

## **CONTOURS OF VALID GIFT: A GLANCE AT CHAPTER 7 OF TP ACT**

The gift is made a subject matter under the TP Act by virtue of Chapter 7 of the TP Act. The said Chapter contains detailed provision which defines what is gift and elaborates legal principle for its validity. Section 122 of the TP Act defines gift as a transfer of ownership of a property where the donor willingly brings into effect such transfer without any compensation or consideration in monetary value<sup>9</sup>. If the main aspects of the gift are not properly implemented, the gift may be cancelled or declared void by law. Section 122 of the TP Act in itself lays down the multiple essentials which need to be satisfied for a gift to be held valid. Following essentials of gifts can be carved out from Section 122 of the TP Act for a valid gift<sup>10</sup>:

- A. Ownership Must be transferred:** A gift is primarily defined as the transfer of ownership. In a gift, the person's whole interest in the property is given to another person<sup>11</sup>.
- B. Gift can only be made of existent property:** A legitimate gift requires that the property be present at the moment of the gift. However, the conveyance can take place in the present or in the future. Donor cannot gift the property which is yet to be acquired by him.
- C. Voluntary transfer:** the transfer of property in a transaction of gift must be voluntary.
- D. No consideration:** It is a gratuitous transfer, which indicates that no consideration is involved in transaction of gift.
- E. Acceptance is *sine qua non*:** When a donor makes a gift to a donee, the transaction is not complete until the donee accepts it. If the donee does not accept it, it is handled as if the gift did not occur<sup>12</sup>.

These requirements are gathered from the definition given under Section 122 of the TP Act. Further, there are other provisions exist under Chapter 7 of the TP Act that mention other requirements as well as deals with identified situations.

At this stage, it is important to note the existence of Section 123 of the TP Act which lays down prime

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<sup>8</sup> Uniter Nations, Department of Economic and Social Affairs Sustainable Development. N.d. THE 17 GOALS | Sustainable Development, [online] Available at: <<https://sdgs.un.org/goals>> [Accessed 10 November 2021].

<sup>9</sup> The Transfer of Property Act, 1882, S. 122.

<sup>10</sup> Id.

<sup>11</sup> udaipuria, s., 2021. *Essential Elements of a Valid Gift under Transfer of Property Act 1882 | Law column*. [online] Law column. Available at: <<https://www.lawcolumn.in/essentials-of-gift-under-transfer-of-property-act-1882/>> [Accessed 10 November 2021]

<sup>12</sup> Corner, L., 2021. *Gift - Definition, Essential Elements And Importance Of Acceptance By Donee*. [online] Law Corner. Available at: <<https://lawcorner.in/gift-definition-essential-elements-and-importance-of-acceptance-by-donee/>> [Accessed 12 November 2021].

requirement for a valid gift. Section 123 of the TP Act mention the modalities regarding transfer of a gift. It elucidates that the registration is mandatory when an immovable property is transferred as a result of gift.<sup>13</sup> The unregistered gift of immovable property won't be valid in the eyes of law. In case of *A Krishna Iyer v Lakshmi Amma*, the Court categorically held that a gift is valid and complete on registration<sup>14</sup>.

## SECTION 129 OF TP ACT AND ITS CONUNDRUMS

Section 129 of the TP Act operated as a saving provision which exempts the applicability of Chapter 7 of the TP Act in certain Situations. The said Section stipulates that provisions of gift under Chapter 7 won't affect the donations made under *mortis causa* and Muhammadan law/Muslim Law<sup>15</sup>.

The concept of *mortis causa* refers to the kind of donation or gift made on the death bed. This concept is recognised under Section 191 of the Indian Succession Act, 1925. The said Section elucidates that the person can make a gift or a donation under the apprehension of his death<sup>16</sup>. Albeit, this Section is limited to the donation of movable property and if the disposition of any immovable property is done on death bed the same won't be treated under the provision of Section 191 of the Act. Additionally, it is relevant to note that if the person has recovered from his illness and the apprehension of death in near future has ceased to exist, the gift made under the domain of *mortis causa* shall be void<sup>17</sup>.

The other exemption enumerated under Section 129 of the TP Act is with respect to donations made under Muslim Law. Muslim law recognised the donation and gift under the concept of Hiba. Hiba is a gift or donation performed by a Muslim. When a gift is made by a muslim and considered as a Hiba, such gift or donation doesn't need to satisfy the essentials given under the Chapter 7 of TP Act. The said exemption is enumerated by recognising that when the transaction is considered as a Hiba, such transaction has to satisfy the requirements given under the Muslim law to be regarded as a valid in the eyes of law. The following conditions<sup>18</sup> have to be fulfilled:

1. **Clear and Unequivocal Declaration:** It means that there should be a statement indicating the transferor's desire to make the gift (Donor) to the Donee.
2. **Acceptance:** The donee must accept the donor's gift since it represents the transferee's intention to take possession of the property and become the owner.
3. **Delivery of the possession:** To complete the transaction of gift, the donor must relinquish possession

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<sup>13</sup> The Transfer of Property Act, 1882, S. 123.

<sup>14</sup> *A Krishna Iyer V/s. Lakshmi Amma*, AIR 1950 Tr & Coch 73

<sup>15</sup> The Transfer of Property Act, 1882, S. 129.

<sup>16</sup> The Indian Succession Act, 1925, S. 191

<sup>17</sup> *Commr. Of Income Tax, Ernakulam Vs Abdul Karim*, AIR 1991 SC 1847

<sup>18</sup> Garg, A., 2020. *Hiba - gift under Muslim law - iPleaders*. [online] iPleaders. Available at: <<https://blog.ipleaders.in/hiba-gift-muslim-law/>> [Accessed 12 November 2021].



in favour of the donee.

It is evident that the essentials of gift is different than the gift made under the Muslim law i.e. Hiba. Hence, this is the prime reason that the Hiba is exempted from the operation of Chapter 7 of TP Act. Albeit, the provisions exempting only gift made under Muslim law can be held to be discriminatory on the grounds of religion and hit Article 14 of the Indian Constitution.

## **PATNA HIGH COURT V. KERALA HIGH COURT: CONSTITUTIONAL VALIDITY OF SECTION 129 OF TP ACT**

In a case titled *Mt. Bibi Maniran Versus Mohammad Ishaque*<sup>19</sup> came before the Patna HC wherein Section 129 of the TP Act was firstly argued to be violative of Constitution in the light of principle of equality<sup>20</sup> enumerated under Article 14 and Article 15 of the constitution. The original matter was of partition and an oral gift made by a deceased muslim named Ismail. The validity of oral gift was questioned as it was not registered which is a mandate under the TP Act. The appellant sought the exemption under Section 129 of the TP Act and argued that as the gift is made by a muslim and made as per the Muslim law, Section 129 of the TP Act is in operation and no requirement under Chapter 7, including the registration of gift, have to be followed. In response to this argument, the respondents challenged the constitutional validity of Section 129 of the TP Act as a particular religious practices and norms cannot be an appropriate ground for such exemption and discrimination thereof. The Patna High Court succinctly referred to test of reasonable classification under Article 14 of the Indian Constitution by referring to the case of *Moti Das v. S.P. Sahi*<sup>21</sup>. The Court initially recognised that when there is a class legislation it will be violative of Article 14, however Article 14 never prohibits the classification made on the reasonable grounds to further objective of the legislation in question. Article 14 of the Indian Constitution harmonises the equality and reasonable classification. The Court referred to the test of reasonable classification and made remarks that when any classification to be considered as a reasonable classification, there should be intelligible differentia which is parallel to the objective of the legislation under which such classification is enumerated<sup>22</sup>. The additional test is test of presumption which presumes that every enactment has its own presumed constitutionality and when a legislature put forwards any kind of classification or classes through statute it is presumed that such classification is based on rationale grounds. The person challenging the constitutional validity has to rebut the presumption which is in favour of legislature and legislation made thereof. In the given case, the respondents was not able to rebut the presumption by giving sound legal reasoning. Ergo, the Court reasoned the opinion in favour of validity of the legislation. The reasoning of the Patna High Court bench started with accepting the argument that the class legislation reflected through Section

<sup>19</sup> Mt. Bibi Maniran V/s. Mohammad Ishaque

<sup>20</sup> Indian Constitution, Art. 14

<sup>21</sup> Moti Das V/s. S.P. Sahi, AIR 1959 SC 942

<sup>22</sup> Mt. Bibi Maniran V/s. Mohammad Ishaque, AIR 1963 Pat 229

129 of the TP Act passes the test of reasonable classification. The Court pointed out the existence of difference between the custom, practices and religious norms under the Muslim law and other personal laws. The Court finally concluded that:

*“The rules of Muslim law regarding gift are based on reasonable classification and the provision of Section 129 of the Transfer of Property Act exempting Mahomedans from certain provisions of that Act is not hit by Article 14 of the Indian Constitution.”<sup>23</sup>*

Hence, in the present case the Court upheld the validity of oral gift made by a Muslim, without any registration, by virtue of Section 129 of the TP Act.

The other significant case which needs to be noted to analyse the constitutional validity, is case titled **Makku Rawther's Children: Assan Ravther v. Manahapara Charayil**<sup>24</sup>. The said case came before the Kerala High Court. The case centred around the controversies relating to validity of the gifts made after the death of Mr Rawther. The donor in the case was a Muslim and the gift was made as per the rules of Muslim laws and practices, ignoring the general rule enumerated under the TP Act. Therefore, the argument was put forth by one of the parties challenging the constitutional validity of Section 129 of the TP Act.

Justice V R Krishna Iyer authored the judgment and analysed Section 129 of the TP Act considering the principles settled under Article 14 and Article 15 of the Indian Constitution. The Hon'ble judge made very apt observation that the absolute equality is not possible in practice and thereby justified the developed test of reasonable classification. The Court analysed the problem through the constitutional prism and noted that the Transfer of Property Act came before the creation of the Constitution and the interpretation of the statute has to be done by abiding to constitutional ethos. The emphasis was made on constitutional tuning of pre-constitutional laws. The Court expressed that:

*“Whatever might have been the content of the word ‘gift’ in Section 129 when it was originally enacted, its meaning has to be gathered today in the constitutional perspective of Articles 14, 15, 25 and 44.”<sup>25</sup>*

Hon'ble justice opined that Section 129 of the TP Act comes into picture when there is a conflict between the general law and muslim law regarding gift or donation and the general law relating to gift will be applicable on the gifts made by muslim when there is an absence of muslim law on such subject matter. The Court also noted that Indian values and culture do not reflect the secular sentiments and the different application of law can

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<sup>23</sup> Id.

<sup>24</sup> Makku Rawther's Children: Assan Ravther V/s. Manahapara Charayil, AIR 1972 Ker 27.

<sup>25</sup> Id.

be done in the eyes of upholding the religious sentiments which are not secular in nature. The Court seemed in agreement with the argument of one of the counsels that the scope of Section 129 of the TP Act needs to be restricted to preserve its constitutionality. The Court opined that including all the kinds of transaction in the nature of gifts and donation cannot take the shelter under Section 129 of the TP Act. Thus, the Court limited the scope of Section 129 of the TP Act by holding that:

*“Section 129 of the Act (operates only) to that category of gifts which has a religious importance or charitable motivation.”<sup>26</sup>*

By holding the aforesaid, the court aimed at differentiating the secular gifts and non-secular gifts for the purpose of Section 129 of the TP Act. Secular gifts can be defined as transaction as a gift which has no religious significance. Whereas non-secular gifts are the kind of gifts which has religious significance.

Hence, the court concluded that Section 129 of the TP Act will only exempt Muslim gifts which are made for religious, charitable or pious purposes. Ordinary gifts made to the family members or otherwise have to follow the requirements of TP Act to be considered as valid in the eyes of law.

Had the reliance be made on the ratio of both the discussed judgment, it will be axiomatic that both the judgments have upheld the constitutional validity of Section 129 of the TP Act. Albeit, the reasoning upon which the ratios are based is on different footing. The detailed analysis of judgment given in ***Mt. Bibi Maniran Versus Mohammad Ishaque*** will denote that the judicial scrutiny of Section 129 of the TP Act was not done in sound manner. Herein, the Court only pointed out that religion can be ground for discrimination if it satisfied the reasonable classification test. Surprisingly, the Court failed to put forth the reasoning regarding how Section 129 of the TP Act satisfies such test. Hence, the judgement given in ***Mt. Bibi Maniran Versus Mohammad Ishaque*** is just a judicial decision which lacks the legal and logical reasoning. On the other end, the judgement given in ***Makku Rawther's Children: Assan Ravther v. Manahapara Charayil***, the Court not only observed the constitutional premises but made adherence to religious and pious sentiments. The Court aptly noted the pre-constitutional nature of legislation and read down the provision in such a way that it satisfy the reasonable classification test. Hence, the judgment of Kerala HC is more sound with respect to constitutional validity of Section 129 of the TP Act.

In addition to this, if we protect every Muslim gift from the operation of chapter 7 of the TP Act, it will have an adverse effect. As we saw earlier, the registration of gift of immovable property is one of the essentials of a valid gift under the TP Act. And on the other hand, Hiba/Muslim Gift does not have to register such gift under the Muslim law to be considered as valid. The importance of registration under the TP Act has time and again been pointed out by learned judiciary. In the case of ***Rosaline v The Church of South India***, while highlighting the

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<sup>26</sup> Makku Rawther's Children: Assan Ravther V/s. Manahapara Charayil, AIR 1972 Ker 27

importance of registration of a gift, the Court opined that the gift of immovable property cannot be made without the due registration and without the registration, the rightful title cannot be transferred.<sup>27</sup> The due registration also ensures that the gift has not been made by any kind of duress or without the intention and consent of donor. Ergo, if we apply the Section 129 of the TP Act on any and every kind of gift made by a Muslim then there can be instances wherein the gift was made as a result of coercion and there will no registration of gift to prove otherwise. It is also pertinent to note that the income tax laws levies tax on certain kind of gifts and without the registration there can be scenario wherein person can indulging in tax evasion while performing gift transaction. So, it is advisable to narrow down the scope of Section 129 of the TP Act by only allowing the religious, pious or charitable gift to take exemption thereof. Other kinds of gift should be subjected to general rules relating to valid gift described under the Chapter 7 of the TP Act.

### CONCLUSION

The detailed provisions given under the TP Act and judicial pronouncement have solidified the rules relating to contours of a valid gift. Albeit, controversies relating to constitutional validity of Section 129 of the TP Act has not been resolved in a true sense. It is known that there is existence of presumption in favour legislation with regards to its constitutionality. But when we analyse the conundrums of Section 129 of the TP Act, it is axiomatic that it can very well be challenged on the basis of constitutional ethos. It is indeed reflected that the both the leading judgments on constitutional validity of Section 129 of the TP Act have upheld the provision to be constitutional. However, the reasoning given in *Makku Rawther's Children: Assan Ravther v Manahapara Charayil* has made the interpretation in such a way that the said judgement in itself dictates the different law regarding the Muslim gifts. To make it more precise, if we follow the judgment of Patna HC given in *Mt. Bibi Maniran v Mohammad Ishaque*, then all the Muslim Gifts/Hiba are exempted from the Chapter 7 of the TP Act. On the other hand if we follow the judgement of Kerala HC given in *Makku Rawther's Children: Assan Ravther v Manahapara Charayil*, then only religious, pious or charitable gift made by a Muslim person are exempted from the Chapter 7 of the TP Act. Hence, it is evident that both the leading case law on Section 129 of the TP Act lay down different rules. The said conflicting views has not been resolved and there still exist lacuna with respect to the same in light of no final decision by the Apex Court of India. In the present time, both the judgments have equally important force within their own territory and ergo, there is need to relook the Section 129 of the TP Act from the constitutional ethos for its uniform application. The United Nations approved the Sustainable Development Goals (SDGs), also known as the Global Goals, in 2015 as a global call to action to eradicate poverty, safeguard the environment, and guarantee that by 2030, all people enjoy peace and prosperity.<sup>28</sup>

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<sup>27</sup> Rosaline V/s. The Church of South India, S.A.No. 158 of 2007.

<sup>28</sup> United Nations, Department of Economic and Social Affairs Sustainable Development. n.d. *THE 17 GOALS /Sustainable Development*. [online] Available at: <<https://sdgs.un.org/goals>> [Accessed 10 November 2021].

There are 17 goals which are identified under the plan of SDGs. The Goal 16 is peace, justice and strong institution<sup>29</sup>. Section 123 of the TP Act which stipulates the compulsory registration of gift furthers the Goal 16. When a particular gift is registered, the donor and donee of the gift will clearly be identified and thus, a third person cannot claim such gift. This will result in reduction of gift related disputes and thereby bring peace and justice. The Goal 10 stipulates the reduction of inequality<sup>30</sup>. The judgment of Kerala HC in case of ***Makku Rawther's Children: Assan Ravther v Manahapara Charayil***, can said to be furthering Goal 10. The Kerala HC by restricting the scope of Section 129 of the TP Act reduced the undue advantage that was given to Muslims. Hence, it can be said that such interpretation by Kerala HC furthers Goal 10 of SDGs.

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<sup>29</sup> Id.

<sup>30</sup> Id.