

ACCEPTANCE OF ACTUAL POSSESSION METHODS BASED ON ISLAMIC INTERVIVOS CASES IN MALAYSIA

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ABSTRACT

Hibah or Islamic inter vivos is a transfer of property ownership during the life of the donor to the donee of the property desired by the donor. Perfect ownership of the Islamic intervivos where with the donor's approval, the donee receives and manages the property. Various ways in which the community manages or make an actual possession to the property are used. However in the National Land Code 1965, which is via Form 14A, there is only one way of an actual possession given. The question arises about actual possession make by donee, which does not proceed through form 14A. Therefore, through the study of Islamic intervivos cases, the common practice of the community in Malaysia is obtained. The absence of Islamic intervivos specific law requires a review of the judge's judgment to determine the method of domination accepted actual possession practice hibah in court.

Keywords: Hibah Case, Islamic Inter Vivos, Actual Possession, Judgment.

INTRODUCTION

By using the term gifts, Hibah is an aspect under Islamic law specified in the list of states, ninth schedule, Federal Constitution. Hibah is a gift on the basis of love without expecting anything in return, the term gifts may also be associated with Hibah. The state legislature can enact the provisions contained in the list of those states on the basis of Article 74(2) of the Federal Constitution. In other words, as specified in the Administration of Islamic Law Act in the Federal Territories, the State Islamic Religious Administration Enactment, and the Sharia Court Administration Enactment, the Hibah case comes under the jurisdiction of the Sharia High Court.

There is no specific Islamic Intervivos law in Malaysia (Rashid et al., 2013; Asni & Sulong, 2016; Kamarudin et al., 2018). Therefore, based on the books of fiqh, the judge will decide the cases of hibah and refer to the previous cases.

There are four pillars of Hibah, namely the donor of Hibah, the donee of Hibah, the property given and Hibah contract, namely offer (ijab) and acceptance (qabul), based on the view of muslim scholars.

In the hibah contract, the jurists differed on the need for actual possession (qabd). There is an opinion that states that one of the contracts for the Hibah is actual possession. If a child is given the Hibah while still young, the actual possession must be performed by the custodian of the child's property (Asni & Sulong, 2016). If the actual possession is not applied, the Hibah is

deemed null and void, though there are opinions that the hibah is considered correct even though the actual possession is not implemented.

The Hanafi School and the Syafii School are among the jurists who say that actual possession is necessary in the hibah contract (Al-Zuhayli, 1989; Al-Rafi'i, 1997; Al-Khatib, 2003; Rushd, 2012). Ownership of hibah products will not be complete unless actual possession is happen. In the absence of actual possession, the donor is not bound. In other words, even after having received the approval, the donor will withdraw the grant from the donee (Rushd, 2012). It is also thought so by Al-Thawri (Rushd, 2012). As long as the property is still in his hands, the donor will use the property he wishes to gift. If the actual possession has been applied, the contract is bound and becomes a complete right to the grant donee. The donor has implicitly, no claim to the land. The hibah would therefore not be applicable only via the contract (Al-Zuhayli, 2011).

In the case of Hibah Confirmation Abdul Rahman Bin Haji Ahmad and Two Others (14700-044-0117-2010), which was heard in the Syariah High Court of the Federal Territory of Kuala Lumpur, considering the practise of actual possession in Malaysia, the claimant is a donor and has applied to the court to validate the grant he has made to his children. Moreover the donor informs the court that the grant received is voluntary and without coercion. Due to the presence of documentary evidence through the Hibah Declaration Document, the donor of the Hibah really wants to give property to his children. The donor of the hibah pronounced the gift during the ceremony, while the donee of the hibah pronounced acceptance. While the word giving and acceptance took place, according to the Syafii School, in the hibah contract it is necessary to actual possession to make the hibah contract valid (Al-Zuhayli, 2011). The hibah property that was theirs was not transferred on the basis of the testimony of the parties in this case, but the property was occupied by the donee of the hibah and all payments of utility and loss are borne by them. Therefore, according to the trial judge who heard the case, finding that the act showed as actual possession in addition to the hibah pillars, the judge determined that the hibah made was correct. Apart from that, based on the submission of the Syarie Judge in the case in the Syariah High Court of the Federal Territory of Kuala Lumpur, namely the case of Rosmah Binti Sully & Another Person v Ismail Bin Mohammad and Another JH 32 (2) is regarding the property belonging to the father to the child who was the first plaintiff, the second plaintiff and the second defendant. Their father has died and all the property belonging to the deceased has become an inheritance and should be divided according to the law of faraid. However since the property is not included in the list of property to be divided by inheritance, there is a property belonging to the deceased which is argued. According to the first defendant, who served as trustee, the Syariah Court explained to the second defendant that the property was a hibah property. Since the second defendant has not yet reached adulthood at that time, the first defendant is named as the trustee and when the second defendant has reached adulthood, the property must be handed over.

According to the court, there is a gift that the donor has said, such as this house is yours but cannot write your name on it. Although the donee does not speak the word of acceptance. The act of the donor during his lifetime and the donee went to the house and office of the first defendant to change the name is proof (qarinah) of acceptance and actual possession from the donor, according to the Judge of the Syariah High Court of the Federal Territory of Kuala Lumpur, Yang Arif Zulfikri Bin Yaso. The judge has classified, based on the facts submitted in the court, the presence of acceptance and actual possession elements based on the act. According

to the author, the decision taken in this case by the Trial Judge is right and consistent with the requirements of Islamic law.

In addition, in the Shah Alam Syariah High Court in the state of Selangor, there is a hibah case that accepted the confirmation of the hibah while the acceptance element was not proven, namely the case of Mohd Hassan Bin Ismail v Habshah Binti Alias and Eight Other Defendants (10300-044-0711-2012). Based on the submission of the Syarie Judge in this case although no statement of acceptance is clearly made by the plaintiff, but the existence of proof (qarinah) other than the word acceptance shows that actual possession has occurred as soon as the property is donated to the plaintiff. In this case, the presence of actual possession element is sufficient to approve the validation of hibah, according to Judge, even though the pillars of hibah are incomplete, i.e. approval, which is one of the elements in hibah contract (Azalan & Mohamed, 2016).

Next, the case in Pahang which is in the case of Suhaimi Bin Shaari v Mohd Sharif Bin Yahya and Three Others (06200-044-0146-2012) which was tried in the Bentong Syariah High Court, the trial judge confirmed the grant made by the adoptive father of the applicant when his life. Based on the facts of the case, the defendants in this case are the children of the deceased while the applicant is an adopted child. He donated his land to the applicant during the lifetime of the grantor. The word *ijab*, which is the offer and the word *qabul*, which is the acceptance of the hibah, was made via the Hibah Declaration Document made during his life by the hibah giver. The court claims that all the pillars and conditions of the hibah have already taken place. In addition, the court also found that there was an actual possession in this case, which is a binding requirement according to the Syafii School (Al-Zuhayli, 2011).

METODOLOGY

To indicate about acceptance of actual possession methods in Malaysia, a document analysis which is Islamic Intervivos cases were used to collect the data. To ensure the validity of the content in this study, all the documents have been recorded in Sharia High Court in Malaysia. This study also refers to Malaysian Federal Constitution, Islamic Religious Administration Enactment and Syariah Court Enactment. Besides that, this study also refer interview with judge in Syariah Court to understand actual possession in hibah contract.

DISCUSSION

The property to be donated is usually divided into two classifications, namely movable property and immovable property. Movable assets are assets that can be handed over while immovable assets are assets that cannot be handed over. Cars, furniture, pets, money and so on are examples of movable property. Houses, trees, land and so on are examples of immovable properties. According to jurists, the method of implementation of actual possession is seen through the *urf* or custom of the local community (Al-Jank, 2004).

Based on the practice in Malaysia, the method of implementation of actual possession that can be accepted in the Syariah Court for immovable property can be seen in the case of Kamsiah Binti Yusof v Latifah Binti Yusof and Three Others JH 27 (2). Based on the argument of the Trial Judge in this case, Yang Arif Tuan Mohd Nadzri Bin Haji Abdul Rahman Ibrahim:

"Actual possession can happen by emptying the property, controlling it and doing action on the property such as handing over keys and the like."

The local community's practise of managing hibah property can be seen on the basis of the claim in the case of *Nor Haily Maizura Binti Hussein v Nur Shamsul Bhariah Binti Hussein* (14700-044-0132-2011), which was tried in the Syariah High Court of Kuala Lumpur Federal Territory by paying land tax and clearing land using soil pesticides, even though there is no exchange of ownership of land (Asni & Sulong, 2016).

Similarly, in the case of *Abdul Rahman Bin Haji Ahmad and Two Others' Hibah Confirmation* (14700-044-0117-2010), this was also heard in the Syariah High Court of Kuala Lumpur Federal Territory. The Syarie judge was of the opinion that actual possession was found to have happened in this case by the way the house was occupied by the donee in addition to all utility charges and harm caused by the donee.

Based on the case in Pahang, namely in the case of *Suhaimi Bin Shaari v Mohd Sharif Bin Yahya dan Tiga Yang Lain* (06200-044-0146-2012) which was tried in the Bentong Syariah High Court, the Syarie Judge stated that actual possession occurred through the signature of the deceased in the Hibah Declaration Document which is a strong proof (*qarinah*) according to the trial judge and clearly shows that the deceased has handed over the property to his adopted child i.e. the applicant in this case as stated in the grounds of this judgment:

"Therefore if seen in this situation, all the pillars and conditions of the hibah have already taken place and applied to the incidence of actual possession, which is a binding condition according to Imam Syafii. This is because a powerful proof (qarinah) became the Hibah Declaration Document signed by the deceased and clearly indicates that the deceased had handed over the property to his adopted son, the claimant, in this case."

On the basis of the grounds of that decision, since no transfer of title has taken place, the grant made by the grantor is still deemed to be legitimate, according to the judge at trial, on the basis of the action taken by the parties concerned to sign the Grant Declaration Paper.

As for movable property, based on the judge's argument in the case of *Kamsiah Binti Yusof v Latifah Binti Yusof dan Tiga Yang Lain* JH 27(2): *"While movable property actual possession can occur by taking the property, transferring or separating the property from other properties."*

The common practise of the community can be seen in the case of *Siti Rafiah Binti Ismail v Jamaliah Binti Saod and Ten Others* (14700-044-0050-2011) in the Syariah High Court of the Federal Territory of Kuala Lumpur, the husband had hibah the claimant with the shares and had witnesses at the time of the transfer of ownership (Rashid et al., 2013). However, before the donor dies, no change of ownership takes place throughout the donor's life Dahlan and Mohamad (2017). The judge, however, found that when the donee had controlled and operated the business well, there was an actual possession by the donee.

In addition, the method of implementing actual possession for movable goods, as in the case in the Syariah High Court of the Federal Territory of Kuala Lumpur, namely the case of *Siti Nor Hayani Binti Mat Harun v Kalthum Binti Awang Long and Five Others* (14700-044-0049-2012), had donated the plaintiff a motorcycle during his lifetime. He sent the motorcycle by post during the lifetime of the donor when the plaintiff was studying at the Seberang Perai Polytechnic, Penang. The method of implementation hibah in this case when the plaintiff used

the motorcycle while he was still studying. According to the trial judge, the act of using the motorcycle showed mastery from the donee (Kamarudin et al., 2019).

CONCLUSION

The actual possession element is important to ensure that control is exercised by the grantee on the property donated as well as showing the consent given by the grantor to the acceptance. Based on the submission of the hibah case, the actual possession element is required and emphasized in the hibah contract. The judge will not authorize the Hibah contract if there is no actual possession. Furthermore, during the life of the donor, the hibah is performed, and then indirectly maintains the wellbeing of the donor with the presence of actual possession so that he is not betrayed and the property is well taken care of.

Based on the current practice by society, that is one of the methods of implementation of actual possession for movable and immovable property accepted its application in Malaysia. According to the Chief Syarie Judge of Pahang, although there is no transfer of ownership between the parties in the hibah contract does not mean that the implementation of actual possession is not donee on the property donated, in fact, the way the hibah recipient occupies the house for a long time is proof (qarinah) shows actual possession has occurred. Similarly, Shah Alam Syariah High Court Judge Tuan Mawardi Che Man's statement stated that there are no terms for actual possession (Che, 2015). The act of paying the door fee, the washing, the painting, the repair, the protection, the occupation and the keeping of the donated property therefore demonstrates that actual possession was enforced in the Hibah contract.

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