

Scrutiny of the consequences of handing over considered in the contract of sale

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Abstract: The singular “qabz” has multiple synonyms which is used by religious jurisconsults and jurists e.g. sometimes they use the lexicons or “tasalom” meaning delivery instead but the parallelism regarded in all labels is the mere of the bargain which are purchase money and object of sale respectively. In our country's unwritten law the delivery of object of sale and the delivery of purchased money meaning handing over and taking delivery which is considered an in force therein. The delivery of object is materialized duly by the transaction parties in any deal. In taking delivery the promptitude is not an option besides the permission of vendor but in some contracts i.e. trusts and gift inter vivos to taking the ex gratia and endowed property the authorization of grantor and donor is a prerequisite. Taking delivery is considered the origin of rules when taking place in due form of vending. The taking delivery has a ripple effect on many contracts and unilateral contracts e.g. divorce at the wife's request against compensation and etc. Its notability manifests when the verity of some contracts e.g. gift inter vivos, endowment and encumbrance is subject to taking delivery as well. The rippling effects of taking delivery are clarified i.e. if the object of sale destroys, the liability to recompense a loss would charge by the purchaser by the factor of taking delivery meaning that the liability pre and pro taking delivery is charged by vendor and purchaser respectively. In many contracts the taking delivery has no effect and its consequences are accrued by the converging will of the parties thereafter. Contract of sale is considered the axiom of contracts and the plenary of contracts for value respectively. It enjoys overriding notability in international arenas therefore. Sustained development of international trades has led the international community to the codification of integrated provisions guaranteeing the facility of international trades respectively.

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1. Introduction

The legal term “oghod” meaning objective contract is considered a loan word derived from Pandect which is equivalent to gratuitous or free agreements, the realization of which is hinged upon the offer and acceptance of mutual factors and volition or taking delivery respectively.

The conclusion of objective contracts is pending on the delivery of the issue of obligation considered in the contemporary law of treaties entitled “objective contracts” by the reputation of the aforesaid alien objective therein.

In many contracts e.g. vending and lease, the supremacy of will requires the acquisition of the influence of an agreement by mutual will without any necessity to addenda which is entitled “the principle of the consensual contract”.

As regards the taking of delivery is regarded prejudicial to the realization of certain contracts.

By seeing which way the cat jumps it is regarded that the lawgiver has necessitated the taking of delivery neither by the impotence of the will of parties, nor the mainstream of the protection of the

interests of third parties besides the taking into consideration of the consequences of the mortgage or the likelihood of the vindication of household economy (gift inter vivos) respectively.

As a result both parties will consider the proximate consequences of agreements and their properties would not forfeit by committing a mistake or a pang of short-lived one therein.

For instance in gift inter vivos contracts the personal chattels are transferred deliberately and the grantee trusts his/her proprietorship by considering the taking-over and the constructive possession of the donor respectively.

Today the aforesaid trust is initialized regarding the formation of notary public's office and the irrevocability of the registration of chattels, abide by expediency and etc.

But the preeminent role of take-over has been deteriorated e.g. in mortgages in which the underlying aim is to pursue the acquisition of debts by placing in escrow, the mortgage charge is registered in the notary public's office, leading to the

non-feasibility of disposition by the mortgage charge therein.

Lexical meaning of taking delivery

It means:

a) taking- taking by hand or palm, taking by cross arms and clenching pro taking. (Forqan chapter, verse 46). And we took it unto ourselves.

b) Picketing and not going full steam, scrimping and clenching pre obtaining. They clench their fists showing their scrimping of spending money by way of charity.

Inside the hands: immediate possession

In one's own hands: by dominance

Taking delivery of and handing over.

Qabzeh: is an infinitive meaning delivered, the metonymy of domination over objects, meaning that the whole universe has been taken by God's possession in doomsday. (Taha chapter, verse 96).

Isfahani and Fakhr Razi are quoted saying that the words "asar" and "rasoul" mean the faith of Moses and Himself respectively.

The late Sahib-Javahir says about the lexical meaning of taking delivery. (Najafi, 1412).

Taking delivery in Ibn-e-Asir standpoints means taking by the palm but the partisans of traditions daresay that it means taking by the palm respectively.

Taking delivery enjoys other meaning e.g. proof of receipt. (Dehkhoda, 1372).

Taking delivery and expansion in theosophy are considered twofold conditions forming pre-transition of the worshipper to fear and hope.

Conventional implication of taking delivery

There are various sayings about the meaning of taking delivery in which one thing is a strict purport e.g. domination over the property since from the viewpoints of Arabs the same meaning is suggested, therewith; taking delivery is not considered the truth of divine law to be adhered but due to the discrepancy of the way of materialization of the conventional meaning we conclude that taking delivery is realized by dispossession regarded in real properties i.e. premises owing to the fact that the dominance of delivered and remitted of the origin of taking delivery therein.

Taking delivery is carried out by hands considered in various properties e.g. jewels, taking bridles in animals and etc.

In the above-mentioned instances the common law deducts open and shut but there are discrepancies about its evidences since the terms of contracts are defined either by religious law or conventionally.

In any case if a term would leave undefined, thou must refer to the legislator to recognize the deducted instances respectively.

It must be considered that certain literals are religiously correct bearing peculiar purisms which are existed during pre-shaping of Islamic laws e.g. prayer, poor-rate as prescribed by Islam and pilgrimage to Mecca.

The aforesaid terms are two absolute ones depending on their materializations entitling them the religious and being lawful truths if forming pre and pro the life of Mohammad (peace be upon Him) and amongst His followers thereafter.

Yielding of the outstanding disputes with no symmetry included in the language of the lawmaker clarifies the religious and lexical purports respectively.

Despite of the fact of explicit consensus and regarding that the term "take-over" is not the religious truth, so its lexical meaning is a criterion of validity and certain scholars believe that for familiarizing with the juridical nature we should resort to the legislative authority therein.

Article 367 provides that the lawmaker has considered the conventional purport in defining the term "taking delivery", putting it as the dominance of purchasers over the object of sale and jurisconsults have deemed it as the principle of endorsement and giving effect to it respectively.

Furthermore the religious scholars loan the phrases by the common usage as a rule. (Langroudi, 1349).

They have stipulated in their works that the purport of taking delivery is the realization of its conventional and intellectual meaning which is regarded the most proper purport e.g. independence and dominance over an object without any annexation.

Purport of taking delivery considered in juridical terms

1. Jurisprudence

Scrutiny of the bibles of Twelvers jurists shows that there is divergence of views amongst them in defining the lexical meaning of taking delivery. Some believe that the word is an infinitive meaning "taghbiz" or the realization of taking delivery by dispossession which has been maintained by Sheikh Tousi, Ibn-e-Idris, Ibn-e-Zohreh, Shahidan and Sheikh Ansari in their bibles Qalaf, Saraeer, Qaniyeh and Makasib respectively. (Ansari, 1990).

It is citable that we should not rely upon a subtle deduction and the observation of Sheikh Morteza Ansari is true since he has criticized the above-cited parol which would be scrutinized later.

Some Shiite scholars say that taking delivery means transfer and delivery. Others e.g. Mirza Qomi presumes taking delivery and take-over with no

difference saying that delivery means vacating. (Ameli, 1991).

2. The late Ansari says that:

Firstly the word “qabz” is a verb meaning the purchaser and secondly if it converts to a religious term, then the edicts are the incurrance of the purchaser which is similar to the incurrance of the vendor respectively.

It is necessary to contradistinguish the act of the purchaser named taking delivery to understand the lexical purport of the word “qabz” which means the dominance over the purchaser whether regarded in real or movable properties since by referring to its lexicology purporting the taking by hands, we conclude that there is far-fetched in certain purchasing, thereafter we must realize that the word “qabz” means dominance.

Domination

There are three definitions considered for the word “estila” by referring to civil code and what has been scrutinized by lawgivers and Islamic jurists.

1. Dominance has been realized as possession which means the concrete dominance but not the feasibility of dominance.

Immediately upon the overwhelming dominance retained, the veracity of being in possession is not adequate but the dominance must retained de facto e.g. the possession of property of rights belonging to no particular person, the mere possession is not feasible and force and preponderance are not realized in dominance thereafter.

Article 146 of civil code provides that “possession” means taking or the restoration of property or presenting the possession motives respectively.

2. Dominance causing usurpation

It includes two factors e.g. restoration of property over acquisition (physical factor) and force, preponderance and violence (intellectual factor).

Article 308 provides that usurpation means the preponderance to the rights of others by force. Islamic jurists believe that the purport of the word “preponderance” is synonymous with force and mentioning to force separately is not feasible. (Langroudi, 1375).

3. Ascertained dominance of take-over which means intellectual preponderance of the purchaser over the object of sale, taking of it whenever determined, benefitting of it either physically or actual and exercising the objective right is deemed authentic. (Katouziyan, 1371).

The criterion of the realization of preponderance is the custom arbitration without any indication. (Article 367 of civil code).

Delivery of the object of sale interval

Various types of vending by the credibility of delivery date

Islamic jurists have categorized the vending by this regard. (Kerki and Qomi, 1411, 1287).

Tick sale means whole purchase money which enjoys no interval for its settlement.

Cash sale which has no maturity for the delivery of money and purchased object both the substances being fixed and total respectively.

Forward sale in which the object of sale is under obligation either being a fixed or total substances and the money must be settled as an optional contract.

Principle of the liquidation of the delivery

The vendor and the purchaser are obliged to deliver the considerations to each other in case of the absoluteness of the agreement as soon as the realization of the contract of sale. (Khansari, 1394).

In contract of sale the immediate delivery of the object is a mere recommendation and parties to sale contract have stipulated a buy-back clause which is necessitated by the agreement. (Khoee, 1412).

The aforesaid date of delivery must be well-known for the contracting parties from the evidence point of view if the delivery is considered executor, so its evidence is not sufficient in the thing itself and reality since if the definite period would be specified but the parties are ignorant of it, then the risk is irrevocable e.g. the transition of sun to the solar months Pisces or Libra is determined as the date of delivery but the yardstick of veracity is that the contracting parties will be informed of it by evidence to move down the idiotism. (Najafi, 1412).

Consequences of the postponement of delivery

The consequence of delivery in anticipation

If the delivery would be deferred, then is it possible to waive the postponement and is the other party obliged to deliver and taking over?

Islamic jurists believe that the delivery in anticipation is not voidable considered in the executor sale, although being claimed since the benefit of stipulation deteriorates. The aforesaid question is an explicit consensus. (Tabatabaee, 1420).

The stipulation of postponing considered in delivery is divided into three categories:

1) The purchaser stipulates *ratione personae* to prevent the title to claim till the specified period. If the purchaser anticipates the payment voluntarily, the vendor is obliged to undertake it since the above-said purchased money is considered his/her derelict property.

2) The vendor stipulates the postponement for the purchaser saying that he/she stipulates not to seek the purchased money during a specified interval;

therefore the vendor makes a profit only since it is irregular.

3) Both parties stipulate the anticipation of delivery; thereafter neither the purchaser nor the vendor cannot deliver the purchased money in anticipation since both parties make a profit.

Consequences of the postponing of delivery considered in quantum meruit of real dividends

There are two presumptions of fact when the object of sale is admitted as the determined one or a postponed delivery:

The first and the foremost presumption say that seller vindicates the interests of the object of sale within the allotted time and he/she is obliged to pay the quantum meruit of the dividends to the client therein.

Secondly when the seller gains no utility from the object of sale and in this case the purchaser is not entitled to the fair remuneration. (Kiani, Bita).

Consequence of dated delivery

Determination of the delivery date is considered the reciprocal options but to what extent can it be dated?

Some scholars have ratiocinated the following theorems saying that whatever has been obligated whether being deferred or not is regarded a property in which the springing use of it is feasible e.g. prompting it aside from other barter therein. But the mere bottleneck is that with the assumption of the incidence of time limit or the demise of the client, the option of postponing in excess is ipso facto avoidance since the lawgiver has relinquished the time limit by his/her demise and such an option nullifies the contract respectively. (Ansari, 1410).

Other jurisconsults say that the vending is null and void in this case thereafter. (Fakhr-Al-Mohaqeqin, 1389). Certain jurists believe that quitting the case is the means of being safe and sound.

Maturity of deferred delivery

Two assumptions are discussed in this case:

1- Demise of the vendor which says that when the delivery of object of sale is deferred, the heirloom is inherited by the heirs who are the legal proxies of the demised, being delivered to the client in allotted time since the object of sale which is the actual property is not regarded as a liability therein. (Kiani, Bita).

Article 421 of law of commercial provides that when the purchaser goes bust, his/her postponed debts become mature since it is not reasonable to split up his/her property amongst the creditors and the presumption of parity of rights necessitates that all

creditors whether dunning a maturity or postponed must be treated by equity.

2- The procedure of collation of debts of the bankrupt accelerates due to the mature debts and the title to fees of all creditors would be liquidated pro rata of the bankrupt therein. (Eskini, 1378).

The deferring of the delivery of the mature

What type of advantage is initiated to the vendor and purchaser to postpone the delivery?

Suspending of the contract of sale

The contract of sale is a contract of which its effect is dependent on a command in terms of origination and in Twelvers jurisprudence the well-known dictum is the nullity of the suspended contract but certain scholars have no consensus expressed in speech about the suspension in origination and confirm the latter. (Naeni, 1418).

Inoperativeness of the vending

Inoperativeness is considered a description of a contract being neither valid nor nugatory which is called a suspended or inoperative contract thereafter. (Yazdi, 1378).

Some religious scholars have resembled the inoperative and the void contract to a patient and the deceased respectively. (Katouzian, 1376).

If an unauthorized being immature, discerning minor and bankrupt, he/she cannot deliver the object of sale to the purchaser therein.

The duressor is not obliged to deliver the object of sale, albeit; the delivery would not be postponed in view of the contract or custom respectively.

The delivery of the object of sale by the above-said majors is destitute of legal effect and the possession of the object of sale is considered the conversion of goods since if a duressor delivers the object of sale at his discretion, the action is considered his/her full consent thereafter.

The above-mentioned instances attach either when the delivery of the object of sale is not postponed or there is a time limit for the delivery and the no longer time limit prevails pre enforcement the object of delivery respectively. (Kiani, bita).

Date of delivery on the absence of the parties in sale

It means that two parties are prepared in two localities and prompt upon buy and sell by a letter or telegraphy. (Jafari Langroudi, 1349).

The time of the sale has not been contemplated in jurisprudence of Shiites since during old times the agreements were concluded by the presence of the parties and the feasibility of the aforesaid conclusion

by correspondence has been disputed. (Katouzian, 1376).

Locality of the delivery of the object of sale

Islamic jurists have preferred the case in the topic relating to the forward sale since the determination of the locality is regarded in the topic of post delivery sale and there is divergence of views amongst the jurists about the incumbency of the locality therein. (Najafi, 1412).

Mentioning the locality of delivery is considered the necessary condition for the validity of the contract and utterly the delivery of the price of sale and the measure of propensity of the contracting parties besides their motives respectively.

Furthermore the default of the determination of localities trepans quarrels and contention. (Tousi, 1334).

Sheikh Tousi has argued about the citation with two presumptions:

The first identical one is the matter of caution and the second determines that when the locality of delivery is obvious, then the forward sale is considered authentic undoubtedly and vice versa. (Tousi, 1334).

If carrying the object of sale is costly or the locality for delivery is considered unseemly e.g. contract parties indwell a champ or other polis therein. (Helli, 1420).

The locality of delivery of the object of sale considered in our country's law

There are two articles considered in civil code which have been disputed about the locality of delivery and in the division of privities it stipulates that commitments must be lived up in a locality in which the contract has been concluded, unless the matter of convention or a recognized custom requires between the contract parties.

The same matter has been reoffended in the topic relating to the delivery of object of sale in article 375 providing that the object of sale must be delivered in a locality in which the contract sale has been concluded, unless the recognized custom of the delivery would be transacted in an alternative place therein.

Charges of the considerations' delivery

Charges related to the transfer of the object of sale to other localities except that of the locality of delivery is charged with the purchaser since it is considered a matter beyond the authority of handing over and posterior to it. The remuneration paid to the broker is charged with a person ordering him/her to brokering and if the imperator is considered contracting parties, then a half of remuneration called

upon to pay by the parties is accrued to him/her thereafter.

Some certain jurists say that the standard of proof of charges is considered the best interest and benefit which means that if a costly affair would be in the best interest of the purchaser, then the charges are entrusted to both respectively. The standard of proof which determines the aforesaid affair to one's best interest is considered the qualified person therein. (Kashef-Al-Qata, 1359).

Discussions

Taking delivery is a customary fact but not a legally one and the lawgiver has not cried out it. In many contracts the taking delivery has no impact and its consequences are accrued desirably by the mutual agreement provided by their consent e.g. sale and lease where the rule of will necessitates that the effect of contract must be lived up by mutual agreement with no extra instance to deem the requirements of the contract which is called the consensual contract therein.

Due date and the locality of taking over

The categorization of the delivery of the object of sale symbolizes the various types of sale by the validity of the due date e.g. tick, cash and forward sales. Presumption of the maturity of delivery is considered obligatory for the purchaser and client and they must deliver the considerations as soon as the contract of sale is realized unless they specify a due date respectively. Consequences of postponing which has been categorized. Considering the instances where the delivery brings about the postponement. Delivery in the absence of the contracting parties means that in case of the locality of delivery, the essence is the necessary condition for the validity of contract since the delivery considered in the price of sale influences the degree of propensity of the contracting parties and their motives respectively.

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