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SCRUTINY OF THE CONSEQUENCES OF DELIVERY AND HANDING OVER CONSIDERED IN THE CONTRACT OF SALE REGARDING THE STANDPOINTS OF IMAM KHOMEINI

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Abstract: *The word "delivery" comprises various abstractive and conventional empiricism which means domination on an object, in another words, when the common usage says that the person dominates it and the conventional domination differs from the point of view of divergence as well. The aforesaid word is the focus of many jurisprudents. The importance of the above said concept is due to the following cases:Orderliness of legal relations, pave the ways of the possibility of the contemplation of the contracting parties on the contract, their accountabilities, time of conclusion, retention of the rights of the third party and staving off the disputes and litigations.The principle considered in contracts and dealings results in, on the condition of the converging will of the parties (section 191) but it enjoys some statutory exceptions in which there is a necessity to undertake a third factor as a delivery thereupon.Many scholars i.e. Imam Khomeini, the Late Sheikh Tousi (Trecento) have mooted about the case which shows the historic notability of the matter.*

Keywords: *delivery, handing over, contract of sale, dominance, taking delivery.*

INTRODUCTION

Rules of delivery are considered of the prevalent types of deals which have been considered by humans' long time ago. Contract of sale is treated as the base of deals and the most unabridged one which encompasses various types since it is considered very substantial therein, and it is considered by scholars with widespread researches probed. The aforesaid matter is very overriding considered in the international exchanges and the ever-increasing development of international deals has lead the community of nations to formulation and implementation of integrate provisions which guarantees the facility of international relation as well.

LITERAL AND COLLOQUIAL APPLICATION OF THE WORD "TAKING DELIVERY"

It means, in Arabic concepts originations, derivatives of single trilateral infinitive of "note"and "delivery" (Tarihi, Fakhr-Al-Din, Majma-Al-Bahriyn,1408/1367),

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abstraction, tumbling and waddling. (Ibne-Manzour, Mohammad-Ibne-Mokarram1408/1988)

In Koran, as you consider, (safi pour, abdol rahim, 1356) it has been written that the word means gain ownership, taking versus expansion but in Persian language it means receipt and deed of receipt which is considered a record stating the financial collections.(Dehkhoda, ali akbar, 1372 langerodi, mohammad jafar, 1378)

COLLOQUIAL MEANING

It comprises particular significations from the point of view of jurisprudence and law which means delivery but it means freeing of possession from the object of sale and the authorization of the vendor without any impediments to facilitate the object of sale by the client. (haery shah bagh, sayyed ali, 1388).

Taking delivery means the domination of a client over the object of sale but handing over means the freeing of possession from the object of sale or by the interest of the grantee with the permission of any kinds of possession thereupon. (hoseiny ameli, mohammad javad, bi ta).

Taking delivery means the act of the grantee and the handing over is the act of the transmitter. (Ansari, morteza, 141/1990)Delivery is considered an action related to two parties but some scholars says that the delivery of grantee must be established from the alteration of possessions, (langerodi, mohammad jafar, 1368) in other words when he/she delivers the object of sale to the client and disturbs the possession, there is no delivery in fact and vice versa. (Abdeh borojerdi, mohammad, 1311)

TAKING DELIVERY FROM THE VIEW POINT OF JURISPRUDENCE

It comprises univalent and equivalent concepts in jurisprudence but it enjoys no religious fact, (bahrol olom, sayyed mohammad, 1396) therefore it means conventional domination and independence by the view points of traditions. (bojnordi, sayyed mohammad hasan, 1424). There are discrepancies amongst Shiites jurists and some of them believe that it is an infinitive meaning "note"conveyingquitting, quoted by Sheikh Tousi (Khalaaf volume), Ibn-e-Idris (Qaniyeh volume) and Shahidan (Lamee) and Sheikh Ansari (Makasib). (tosi, hasan ebn ali, 1344. Ansari, morteza, 1410/1990).

Some religious scholars believe that the word taking delivery means delivery but others i.e. Mirza Qomi say that there is no difference between "note " and "delivery " and they believe that the latter means the unconditional quitting. (Ameli, mohammad javad, 1991).

Imam Khomeini, in Tahrir-Al-Vasileh, defines the case in content:

Two aforesaid words uphold the quitting in cases in which real properties i.e. tenements and agricultural properties are considered which means no possession with exploitation by the clients therein.(mosavi Khomeini, rohollah, 1982).

He says in Al-Bei volume: the exact purport of the word is the conventional meaning but not its real and literal meaning, in other words the possession by the other parts or derivative possessions is a set-back therein. (Ansari, Morteza, 1410/ 1990).

The signification of the two words is not complementary i.e. objectivity and cause since one concept may substantiates without the other and vise versa, for example when you put something on the palm of a lying asleep, then the delivery is occurred but not the handing over. (mosavi Khomeini, rohollah, 1974).

The late Sahib Javahir believes that when Islamic laws determine that taking delivery is the necessary condition for the validity of it, thereafter, it means the transfer of conventional dominion from the maintained to the grantee both resulted pre-dominion i.e. vending, so the discrepancies arise in the case of independencies i.e. measurement, weight, figures for enumeration and etc. (mosavi Khomeini, rohollah, 1974).

Their influx is due to particular sakes but not the case before mentioned, as some scholars believe that the meaning of delivery is quitting and possession in the manner of immovable and movables thereupon. (gorji, Abolghasem, 1344).

Basis of taking delivery and handing over

Both vendors and clients, in the contract of sale, are obliged to taking delivery and handing over of the purchase money which is considered in various valuable contracts, but the question is their basis and results.

The answers are:

1. Some scholars believe that the aforesaid necessity is prompted by the contract which means that the parties are obliged to converse the considerations by the implied warranty in the sale contract which is considered as a synallagmatic contract and they pledge to transfer what has been possessed to the assignee, thereafter parties to the sale contract say that since the possessor of the inconsumable is held in trust, insomuch, he\she is obliged to deliver it to the owner. (naeeini, mohammad hosein, 1418, Emami hasa, 1364 katoziyan naser, 1376).
2. Imam Khomeini says that the incumbency of the delivery of the object of sale which originates from intellectual edicts is derived from the vending since it is authentic to say that vending means receiving and granting

> because, in other words, it is a procedure of collection to considerations, or an intention to obtain rational ownership without any delimitation or obligation considered in barter as well, unless, with a cogent reason, the vise versa is established. ((mosavi Khomeini, rohollah, 1974)

Rule of the destruction of the object of sale before delivery and its basis

Jurists, further to exemplum have imposed a rule named the destruction of the object of sale before delivery meaning that if the object of sale is exposed to involuntary damages, satisfying the vendor, ergo, it should be paid-off and there are no discrepancies amongst Shiite jurists and they have reached a consensus in the case. (Jabaei Ameli zeyne din, bi ta).

Allameh utters in Irshad that the destruction of the object of sale before delivery is coherent to the vendors' property butthe flaw of value being initiated due to any contingency and observing is coherent by the client as well. (helli, hasan ebne yosof, 410).

Section 387 of the act stipulates that if the object of sale destructs by the vendor pre-delivery, accordingly, it is rescinded and considerations must paid-off, otherwise the vendor recourses to a religious judge or his legal proxy for the delivery by considering the following qualifying conditions:

1-The object of sale is the corpus (objective) in rem in cases that the object of sale is undertaken, thereafter, the ownership is resulted for the client by delivery.

2-Destruction of the object of sale is vested before the delivery since the vendor is a joint obligor as long as he/she does not deliver the object of sale, unless considering the instance of "call option" in which the primary liability of the vendor sustains in the period of the option thereafter. There is no difference whether or not a due date has been fixed, if the due time would be in the interests of the client, the vendor or the third party respectively.

The rule of destruction is verified whether or not there is any hold-up i.e. wasting or pilferage or etc.

3-The object of sale is exposed to destruction, if there is no negligence (interference or negligence) as, there is a fire-sale, but if the third party or the vendors destruct it, according to the articles 328 &331, he/she is responsible for claims in connection with the ownership, thereinafter; he/she is obliged to pay-off the corpus of property.

4- The vendor does not call the client on; hence, the destruction of the property of the client is verified in cases he/she has not referred to a religious judge or his legal proxy due to abstention since if he/she refers, the liability is considered null and void and the vendor is treated as a trustee without negligence or interference anymore and the attainable profits are dependent to the client.

When the sale is considered on tick and the object of sale is destructed pre-delivery, henceforth, the client owns the profits of the object of sale and transacting parties are not permitted to reserve its waiving and if the aforesaid compulsory conditions reverse, the following conditions proceed:

1- Destruction is implemented by the client: if he/she does not conscious about the destruction, it is considered the actual delivery since in cases in which the objective delivery occurs; the authorization of the vendor is not qualified.

Allameh, in Irshad says that:

The destruction permitted by the client is considered the delivery and it does not treated as an incidental destruction respectively. (helli,hasan ebne yosef, 410) believes that according to the act of 389, if the destruction of the object of sale occurs by the client regarded in the two aforesaid cases, henceforth, the client has no accession and he/she is obliged to settle the consideration and when the client is hoity-toity about the destruction, thence, the vendor is responsible for the destruction.

2-Destruction is done by the vendor: the rule of the destruction of the object of sale pre-delivery is irregular and it does not include the cases of destruction and causation, so articles 328 & 331 stipulate that the responsible for claims is substitute of equal values and article 387 does not included hence.

Destruction of the object of sale pro-delivery

Pro-delivery of the object of sale by the client (in such a way that it is considered as a delivery i.e. quitting or transferring), the liability of the object of sale undertakes by the client which means that if it is destructed, hence, the client has let the chance not to work provided that the right of option is lapsed but not considering the call option i.e. option in sale of animals or put and call option between the third party and he/she respectively.

Destruction or damaging of parts of object of sale pre-delivery

Two conditions are separated in cases when parts of the object of sale are destructed by natural disasters:

1- When there is no installment in consideration of the damaged parts, therefore, the client is able to terminate the transaction, refunding the money but there are discrepancies whether or not the client is permitted to endorse the buy-back seeking compensation. Allameh believes that the compensation is verified but the author of Izah-Al-Favaeid says that the liability to recompense the loss is verified hence. (helli, mohammad ebne hasan, 1389) The author of Makasib believes that the form of the canon does not verify the compensation, (Ansari, morteza,1410/1990) but Allameh is quoted saying by the Shiite scholars, by referring to the aforesaid two

cases, believes thatthe most potent evidence is that he/she can seek compensation whenever the contract is signed. He adds that if some parts of the object of sale are destructed, for example other persons damage the object of sale, ergo, refunding is void but if there is no credit rating i.e. wristlet, the client has the option to give back the object of sale and seeking compensation as well. (According to a citation). (kiyani,Abdolah, bi ta).

Article 388 stipulates the call option but there is no verification whether or not the client is permitted to seek compensate if he/she signs the contract but the principle of non-gratuitousness is considered a stopgap solution which has been verified about the defects of object of sale, in other words, we can say that defects differ from failures since the first stands for the lack of quality but the latter stands for the quantity respectively. In view of the fact that, the exceptional ordermust be restrained up to the certainty, thence, we cannot seek compensation.(mosavi Khomeini, rohollah, 1974)

2- When a part of the consideration is conditional, according to the rule of division, it is liquidated by the portion of multiple contracts; hence, it is repudiated pro rata and verified according to the part of the consideration accordingly, (Ansari, Morteza, 1410/1990) so the option of sales unfulfilled of price is verified for the client in which he/she is permitted to discharge the object of sale, refunding all portions of the money by installment or if the client does not pay, he/she is permitted to pay the seller by the proportions determined in the contract. (mosavi Khomeini, rohollah, 1974) For example if a width of carpet or an icebox are vended, and if the icebox is wasted pre-delivery, henceforth, the sale is verified in proportion to the carpet but it is void in proportion to the icebox, so the client is empowered to choose the cancelation or refunding of whole money therefore. (kiyani, Abdolah, bi ta)

Defect of the object of sale pre-delivery

Article 425 stipulates that any defect involved in the object of sale pre and pro delivery, admitted as the ex-defect i.e. the client is permitted, according to article 422, to deliver the defected one by obtaining compensation or cancel the contract accordingly. The above-said rule is not verified like the rules of destruction and defect, owing to the defect is occurred without abusing and negligence of the landed property of the client, so the vendor has no liability but according to the rule of delivery, any defects incurred is entrusted by the vendor if defects are occurred pre-delivery thereinafter. So the above-mentioned rule says that any defect incurred pre-delivery does not mean to terminate umpteen contracts, therefore, the client can enjoy the right of compensation.

Imam Khomeini says that the client has the right of option amongst the termination of a contract, ratification of the contract or whole portion of

considerations, but there is hesitation about the merit of compensation and most potent evidence say that it is unmerited. mosavi Khomeini, rohollah, 1982)

Options you scrutinized hitherto have clarified the defects when natural disasters occurred, otherwise, the following cases are applied:

1- When the defects and incompetence testify the miscue of the client, not relating to deceit the vendor, ergo, the client is not considered rightful.

2- When defects and incompetence testify the conducts of the vendor, ergo, according to the rules of destruction and causation, the obligor is responsible for the defects.

3- If a third party induce the defects, he/she is responsible for the causation of the defects according to the rules of destruction and causation.

Due course of the rule of destruction of the object of sale pre-delivery and the comparison of it with the considerations

The form of the statute, though, stipulates that the object of sale is responsible for the destruction of the object of sale pre-delivery, clean-cut that when the considerations are destructed, no standings are incurred, but since the rubric of considerations and things given in return for considerations are authentic in the case of vending, so the purports of article 425 authenticate the state of the criterion.

Shiite jurists have reached a consensus about the consideration in kind and according to the purports of article 388, the interpretations are verified.(Emami, Hassan, 1364)

The great scholar, Bojnourdi, says in Qavaed-Al-Faqiheh:

The word "object of sale" has been used just lexically and there is a difference between "object of sale" and "considerations" but just for the sake of the state of criterion, the aforesaid rule is the basis of rational, thereinafter, either the considerations or the object of sale are not implicated pre-delivery of taking possession reciprocally, ergo, the sale is considered null respectively.(mosavi bojnordi, mirza hasan, 1393)

The object of sale would be considered as the basis of the aforesaid rule if the acts of the rule were categorized as a Tradition descended by Prophet.

Imam Khomeini says, in view of the rule that we can elaborate the time interval when the consideration of the object of sale is cash or homogeneous, as if, in the era of the living of the Prophet, legend has it that there was reciprocities calling them "considerations and reciprocals", thereafter, if the considerations are merchandises, undoubtedly, it is called "the object of sale" and it is subsumed as a tradition descended by Prophet, hence, rational courses say it indispensible, the extension of the rule, for two types of sales, besides contentions about the case respectively. (mosavi Khomeini, rohollah,1982ã)

Termination of possessory lien

The consequence of the delivery of object of sale is the termination of possessory lien i.e. the termination is notprocured merely by the delivery of the object of sale but taking delivery of the consideration, in that, is considered to result the same inference.

Definition of retaining lien

Contract of sale is based upon the barter and taking possession reciprocally,(Emami, hasan, 1364) therefore, two parties are obliged to fulfill their contractual obligations unless the prerequisite of holdup is considered. The privities of the contract for values are an authorization to refrain the delivery of the object of assumption, repeat until, the other party honor his/her commitments which is called "retaining lien".

The aforesaid privity is prompted by the synallagmatic contract in which the contracting parties have resolved i.e. parties take over to, alongside of, conversion of the other party, perform the pledge contract respectively. (katoziyan, naser, 1376)

Qualifying conditions of the application of retaining lien

There are conditions in which, with the lack of any of them, the retaining lien is considered null and void:

1- Compulsion of the vendor or both contractual parties relate to the time when both parties are authorized in an irrevocable contract i.e. not abstaining from delivery, otherwise, the abstaining party is coerced, thus, when his/her abstention is terminated, the same question is posed saying that which party is obliged to deliver.(hoseini shirazi, sayyed mohammad, bi ta)

2- When one of the contractual parties, on grounds of giving gratis, delivers his/her object of sale, the other one is compelled to repudiate the right of delivery of the other parties' property since there is no supervening cause to reserve his/her property thereinafter. (hoseini shirazi, sayyed mohammad, bi ta)

3- If one of the considerationsistreated as deferred, hence, there is no retaining lien since the party whose obligation is considered property is coerced to specific performance.(same)

4- Howsoever the non-delivery of considerations is prohibited without any grounds and since the preservation of t'others without the authorization is prohibited also, but if non-delivery is considered a real right, hence, it is not due for the abstaining party to remunerate the quantity of tenure. . (hoseini shirazi, sayyed mohammad, bi ta)

5- When the contractual parties do not enjoy his/her retaining lien, delivering the object of sale or considerations to the other party, thereupon, he/she is not permitted to recover of the property since delivery forfeits the right of retaining lien, thereinafter, if there was any impugnation for the covenantee , the underwriter is permitted to reimburse of the object since the intention to delivery is null i.e. legal casuistry, duress and etc.

6- Being responsible for claims for the considerations or substantiation of the bill of exchange by the vendor is considered as the partly taking delivered, the result of which is denouncing the retaining lien.

7- Expenditures of the possession of the object of sale during the retaining lien period are pledged by the customer since the possession of the object of sale by the vendor is regarded as the non-delivery of the considerations, henceforth, the client is called upon to pay the expenditures since the possession is procured by the leave of law and the whole expenditures are called upon by the owner of record. (kashefol ghetaT mohammad ebne hasan, 1359). The aforesaid rule is enforced in all types of contracts, otherwise the irregularities are stipulated.

8- When the examining court, by virtue of the civil code of Islamic Republic of Iran, article 277, waivers the writ at the request of the indebted, hence, the retaining lien remains in force by the indefinite period since his/her acquiescence for late payment is not considered in cases which the indefinite period is charged for the creditor respectively. (katoziyan, Naser, 1376).

Verification of the retaining lien in Shiites jurisprudence

If the vendor and the client proceed to deliver the object of sale and discharge of the considerations by their own free will, hence, there is no room for the promissory warranty but when they refrain to accomplish their duties, but the contending party shows ingratitude, in these circumstances, Shiite Jurisprudences say that the retaining party is able to refrain of what he/she possesses, if the second party scruples to deliver the object of sale, encountering hardship and distress thereupon. Shiite Jurisprudences entitle it "the retaining lien".

Author of Javahir says that the concrete proof of retaining lien considered in the incumbency of the recovery of the properties, (Najafi, mohammad hasan, 1992) non-preponderance of the vendor and the client and the requirement of the barter are considered the contentious but other scholars say that the retaining lien is an implied term in which both contractual parties are obliged to delivery in acknowledgement of the delivery to each other, the prerequisite of which is no request thereafter. (Rohani, sayyed sadegh, 1376) Imam Khomeini believes that the proof of retaining lien is the rationality of the incurred rules for sale i.e. the right in demand of the considerations and the object of sale is incurred over the exchange and the non-recovery of the considerations is morally obliged, as long

as, he/she has not delivered the object of sale, he/she cannot seek recovery therefore. (Mosavi Khomeini, Rohollah, 1974). The retaining lien is originated from reciprocal contracts. Prerogatives of both contractual parties have not been predicted in the retaining lien of the object of sale but they are qualified to sacred circumstances.

CONCLUSION

Various definitions of the word "taking delivery" indicate that the nature of the aforesaid word is quasi-abstractive in which the time, whereabouts and authenticity of the legislative authority and the common usage besides the buy-back agreements have influxes on it and the common aspects of all definitions pursue an aim of the "conventional dominance over objective one", the nature of which is related to the chose in possession therefore. The alternative influx of the delivery is the disposition of joint and several guaranteesin which one of the effects of the rule of destruction of the object of sale is considered pre-delivery. In our country, the law of treaties is categorized of the passing property contracts, but when as a rule, the object of sale is destructed during the time limit of conclusion of a contract up to delivery, rules stipulate that the destructed one must belong to clients' but if the object of sale is destructed in a disaster pre-delivery, hence, the one who sustains a loss is the vendor and he/she is obliged to reject the goods. Some jurists entitle the aforesaid term "the reciprocal liability". The overriding influx of the delivery of reciprocal liability is the transference from the vendor to the vendee since pro-delivery, the object of sale is considered irrevocable and the destruction is waivered by the vendor. Both vendors and vendees are permitted to refrain to delivery of the object of sale or considerations; hence the aforementioned authority is obtained by the solidarity between two parties, aiming at the reciprocal liability which is called "the retaining lien".

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