

TRANSFER OF TITLE/ OWNERSHIP OF GOODS IN CONTRACT OF SALE UNDER ISLAMIC LAW

Ilyasu Ibrahim (Esq) and Zainab Umar Dange (Esq)

College of General Studies

Umaru Ali Shinkafi Polytechnic Sokoto

ilyasuibrahim192@gmail.com, dangenab@gmail.com

ABSTRACT

The central focus of this paper is the discussion on the transfer of title/ ownership of goods in the contract of sale under Islamic Law. The main intention of parties in the contract of sale is the movement of goods from the seller to the Buyer. Islamic Law defines a contract of sale as the delivery of a definite object which possesses legal value in exchange for something equivalent in value (called the price). When parties make a contract, they should know when a contract is made because it helps determine the passing of ownership of goods. Some conditions and rules govern the passing of ownership in the contract sale contract: the type of goods in the contract determines the Buyer's ownership. The form of the contract also plays a role in passing ownership in the contract and the parties' intention therein. It is immaterial whether the time of payment, the delivery of the goods, or both, is postponed; it will not affect the property's passing when the contract is made. The paper uses a doctrinal research methodology to examine the transfer of ownership/ title of goods in the contract of sale under Islamic Law; it concludes that knowledge of the moment at which a contract is made between the parties to the contract of sale is essential in determining the transfer of ownership/ title from the seller to the Buyer. Therefore, the paper is limited to discussing transfer ownership/ title of goods in the contract of sale under Islamic Law.

Keywords: Passing, Ownership, Goods, Ba'iu, Mushtari, Mumayyiz and Al-bai'u.

INTRODUCTION

The central focus of this paper is the discussion on the passing/transfer of title/ ownership of goods in the contract of sale from the seller to the Buyer under Islamic Law perspective. Many writers did not bother to explain the point at which the ownership of goods involved in a contract of sale is said to transfer from the seller to the Buyer; for this, people do face problems on who owns goods while something happens to the goods while they are making the contract because they do not know at what point in a contract of sale the ownership transfers from the seller to the Buyer, the main aim of parties to contract of sale is the movement of ownership of goods from the seller to the Buyer, a contract of sale comes into being after series of bargaining during which no contract is made. Therefore, ownership of goods passes to the seller when a contract is made between the parties. The importance of knowing when a contract is made between the parties to the contract cannot be overemphasized because it is at that point ownership of goods is said to

transfer from the seller to the Buyer. Almighty Allah says in His Holy Book: "O you who believe eat not each other's property by the wrong means, but let there be amongst you trade and business through mutual goodwill"¹ Quran chapter 4:29

LITERATURE REVIEW

(Abdurrahman D.) 2010, in his book Shariah the Islamic Law defines the transfer of ownership of goods in the contract of sale as the "delivery of definite object which poses legal value in exchange for something equivalent in value (called the price)."² The concept of sale under Islamic Law also includes barter (exchange of one thing for the other of equivalent value). (Abul-kasim Muhammad bn Ahmad bn Jazzzi) 2008, in his book Alkawaninul-fiqhiyyah, defines the transfer of ownership in the contract of sale as "the movement of valuable property from one party to another for exchange of price or other goods equivalent in value with the property" (Okay M. C) 2009, in his book, Nigerian Commercial Law, defines the transfer of ownership of goods in the contract of sale as "the movement of ownership of goods from the seller to the buyer when the is made between the parties."

The definition given to the concept of transfer of ownership of goods in the contract of sale differs from the definitions given to the concept by the writers mentioned above, as the paper views the concept as the main aim of the parties in a contract of sale, which in most times the parties do not know at what point in the process of making the contract that aim is reached.

LEGALITY OF CONTRACT OF SALE

There are several verses of the Holy Quran and number Ahadith of the Prophet (S.A.W) that encourage people to engage in the contract of sale, some of which are as follows:

"Some people will travel in seeking the bounties of Allah (through trade), and some will travel to fight a war of defense (jihad) in the path of Allah³. Quran Chapter 73:20".

"And when the prayer is finished, then may you disperse through the land, and seek the Bounty of Allah (through trade, business and undertaking lawful professions) and celebrate the praises of Allah so that you may prosper⁴." Quran Chapter 62: 10.

The Messenger of Allah had himself engaged in trade on behalf of Lady Khadijah (Sayyidah) and has encouraged business through his practice.

He was reported to have said:

"A trustworthy and an honest and truthful businessman will rise with martyrs on the Day of Resurrection." In yet another Hadith, he has said:

"A truthful and trustworthy trader will rise with Prophets, the righteous and the martyrs."⁵

¹ Quran Chapter 4:29

²² Shariah the Islamic by Abdurrahman Doi page 358

³ Quran Chapter 73:20

⁴ Quran Chapter 62:10

⁵ Thirmizi

WHO SHOULD TRADE BE CARRIED OUT UNDER ISLAMIC LAW

The following verse provides a code of conduct for traders under Islamic Law in carrying out their businesses:

"O you who believe eat not each other's property by the wrong means, but let there be amongst you trade and business through mutual goodwill." Quran Chapter 4:29.

The above verse has set down an important principle concerning trade for every trader. Therefore traders are always expected to be guided by the provisions of Shariah in their trading and business activities.

PARTIES TO THE CONTRACT OF SALE

The parties to the contract of sale under Islamic Law are:

The seller (Al- ba' i) and the Buyer (Mushtari)

QUALITIES OF SELLER (AL BA'I)⁶

He must be a mumiyyiz, i.e., he must understand the implication of the contract of sale.

He must be capable of disposing of the property.

He must be free to use his discretion (Muktar), i.e., he must not sell his property under coercion, undue influence, misrepresentation, fraud or mistake.

QUALITIES OF BUYER (MUSHTARI)⁷

He must be a mumayyiz, i.e., he must understand the implication of the contract of sale.

He must be free to use his discretion (Muktar), i.e., he must not enter into a contract to buy the property under coercion, undue influence, misrepresentation, fraud or mistake.

CAPACITY TO ENTER INTO CONTRACT OF SALE UNDER ISLAMIC LAW⁸

The parties who want to enter into a contract of sale must be legally competent to do so; the following classes of persons cannot enter into a contract of sale according to the provisions of the Islamic Law:

A minor

A person of unsound mind

An intoxicated person

A person suffering from a deadly illness (marad al- maut)

An insolvent person

An enslaved person

Generally, a minor cannot enter into a contract of sale. Still, if the minor is mumiyyiz, i.e., he understands the implication of making a contract of sale, his contract is valid. We engage in most

⁶ Shariah The Islamic Law by Abdurrahman Doi page 358

⁷ Shariah The Islamic Law by Abdurrahman Doi page 358

⁸ Shariah The Islamic Law by Abdurrahman Doi page 357



of our small contracts; in our areas, we do them with minors who are mumayyizun (who understand the implication of making a contract of sale); therefore, the contracts are valid.

SUBJECT MATTER OF CONTRACT OF SALE⁹

Under the Islamic Law of contract, anything that qualifies to be called (Mal) property capable of being owned and delivered to the Buyer can be subject to a contract of sale.

QUALITIES OF SUBJECT MATTER OF CONTRACT OF SALE

The seller must own it.

It must be in a position to be delivered.

It must be lawful.

It must be wholesome (Dahir)

MAKING OF CONTRACT OF SALE¹⁰

A contract of sale is made under the Islamic Law of the contract whenever there is an indication of consent to make the contract between the parties (Seller and Buyer). A contract of sale can be made in any of the following ways:

i. Verbally (Bilkalam).

ii. In writing (Bilkitab).

iii. Through a message sent with some person (Rasul)

iv. By way of signs and gestures, particularly in cases where the person offering is deaf or dumb or when the recipient does not understand the language of the offering.

PASSING (TRANSFER) OF OWNERSHIP OF PROPERTY¹¹

The general rule under Islamic Law of contract, mainly according to the Maliki School of thought, is that whenever it is shown that a contract of sale is made between the Buyer and the seller, the ownership of the property has transferred from the seller to the Buyer even if the seller is still in possession of the property and whether the payment or delivery or both are made at the point of making the contract or postponed that is immaterial because it will not affect the passing of the ownership of the property to the Buyer.

DIFFERENCE BETWEEN OWNERSHIP AND POSSESSION

Ownership indicates a relationship of control over property between a person to exclude any other person. And possession, on the other hand, indicates a relationship of control over a property that exists between a person and the property but not to the exclusion of other persons. This difference between the possession and the ownership gave birth to different forms of ownership, as we will see below:

⁹ Shariah The Islamic Law by Abdurrahman Doi page 356

¹⁰ Ashalul madariki v. 2. Page 220

¹¹ Al qawanin Alfqhiyyah page 192



- i. Physical possession (Milk al- yad)
- ii. Right of disposal of the property (Milk attasarrufat)
- iii. Proprietary right (Milk arraqabah)

THE IMPORTANCE OF DETERMINING THE EXACT MOMENT AS TO WHEN THE OWNERSHIP PASSES FROM THE SELLER TO THE BUYER¹²

- i. If the goods are lost or damaged, who will bear the loss shall depend on whether the ownership is with the seller or the Buyer. The general rule is risk follows ownership.
- ii. In the case of damage to the goods by third parties, the owner can take action.
- iii. In the event of insolvency (Taflis) of either seller or Buyer, whether the Official Assignee or receiver can claim the goods shall depend upon whether the property has passed to the Buyer or not.

EXCEPTION TO THE GENERAL RULE OF PASSING OF OWNERSHIP WHEN THE CONTRACT IS MADE¹³

The general rule as mentioned above is that the moment a contract of sale is made, the owner has moved from the seller to the Buyer, but there are exceptions to the rule depending on the type of contract and the nature of the property involved. According to the Maliki School of thought, there are five (5) exceptions to the general rule. Namely;

1. "SALE ON APPROVAL" OR "SALE OR RETURN BASIS" (BAI AL KHIYAR)

Where property is delivered to the Buyer on approval or sale or return or similar terms, the property will not pass to the Buyer unless any of the following takes place:

- i. The Buyer signifies his approval or acceptance to the seller.
- ii. The Buyer does any act adopting the transaction, e. g he sells the property to a third party.
- iii. Retains the property without giving notice of rejection beyond the fixed time for the return of the goods, or if no time is fixed, holds the property beyond a reasonable time.

2. A SALE WHICH IS VOID ABINITIO (A.L.- BAI AL- FASID).

In any contract of sale that is initially void according to Islamic Law, the goods in that contract will not pass to the Buyer even if the said Buyer delivers the property. And whatever happens to the property is the seller to bear it.

¹² Business Law including Company Law by S.S Gulshan and G.K Kapoor page 186_187

¹³ Alqawanin Alfiqhiyyah page 192



3. IN A CONTRACT OF SALE WHERE SALLER IS BOUND TO DO SOMETHING TO THE GOODS

In a contract of sale under which the seller is bound to do something to the property to put it in a deliverable state, e. g to measure, to test, to count or to weigh, the goods will not pass to the Buyer until that thing is done and the Buyer has noticed. So, for example, in a situation where you give a rice seller money to measure ten (10) measures for you, the ownership of the rice will not pass to you until the rice is measured. Likewise, you have noticed that it has been measured, or where you paid for a television set on the condition that the seller should test the television; the ownership of the television will not pass to you until the testing is done and you are given notice.

4. IN A CONTRACT OF SALE WHERE THE PROPERTY ARE SOLD TO THE BUYER BASED ON DESCRIPTION

In a contract of sale where the property is not identified or agreed upon and do not have the seller at the time of making the contract but to be acquired by the seller, later on, are sold to the Buyer on description, the ownership of the property does not pass to the Buyer.

5. IN A CONTRACT OF SALE WHERE PROPERTY SOLD ARE NOT IN A DELIVERABLE STATE

In a contract of sale where the property to be sold is not in a deliverable state, the ownership of the property will not pass to the Buyer; the property is said to be in a deliverable state, where the Buyer is bound to take delivery if he so wishes, an example of a property which is not in a deliverable state are fruits which are not ripe.

CONCLUSION

The importance of this topic, "**transfer of ownership of goods in the contract of sale under Islamic Law,**" is very significant and cannot be over-emphasized because of its role in making the contract of sale. The result of this research is to show the moment at which a contract is made, and as such, ownership transfers to the Buyer; this paper discusses the transfer of title/ ownership of goods in the contract of sale under Islamic Law. The paper suggests that people should be educated on the point at which a contract is made whenever they sell goods. While entering into a contract of sale, people should be careful because it is only in a few transactions ownership does not transfer to the Buyer immediately after the contract is made.

Being contract of sale involves peoples' property (Al-mal). Islamic Law sets a code of conduct on how people should carry out their trades and businesses in line with the provisions of Shariah. That is why there are several verses of the Holy Quran and the Sayings of the Prophet (S.A.W) concerning the contract of sale.

Because of the critical position Shariah places on the contract of sale, not every person is allowed to conduct or carry out business activities; for an individual to be allowed to engage in a contract of sale, he must meet certain conditions as stipulated by Shariah. Likewise, every object

intended to be used as the subject matter of the contract of sale under Islamic Law must satisfy some conditions laid down by Shariah. Islamic Law places much concern on the issue of buying and selling because it is one of the necessities of life.

From the preceding discussion on the transfer of title in the contract of sale, it became apparent that the movement of ownership of goods from the seller to the Buyer in the contract of sale relies solely on forms of the contract, types of goods involved in the contract and the intention of the parties therein. It is also shown that where a contract is made, the property in goods passes to the Buyer regarding whether the payment or delivery is delayed or both are postponed that will not affect the passing of the property to the Buyer.

REFERENCES

- Abdurrahman, D. (2010), Shariah the Islamic, Malthouse Law Books Publisher
- Abul-Kasim Muhammad bn Ahmad bn Jazzzi, (2008), Alqawanin-alfiqhiyyah, Darul-kutub Egypt Publisher
- Gulshan S. S., Kapoor G. K. (2000), Business law including company law, Book Club Associates London Publisher
- Okay M. C. (2009), Nigerian Commercial Law, Africana First Publisher Plc Publisher
- Pritchard J. (1986), The Penguin Guide To The Law, Book Club Associates London Publisher
- Qura'an (2018), Islamic Organisation Publisher
- Sahiul Muslim Hadith (2015), Vol, 9. Darul Hadith Beirut, Publisher

