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A STUDY OF LEGAL NATURE OF PRELIMINARY AGREEMENTS AND ITS NECESSITY FUNDAMENTALS

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ABSTRACT

The lack of explicit rules about preliminary agreements in Iran's law especially at a time in which there is an urgent need for the existence of various contracts for increasing economical trades causes academia and authorities responsible for civil lawsuits to be confused about reliability and unreliability and /or lawfulness and unlawfulness of preliminary agreements. Therefore, the necessity of providing various reasons and jurists and lawyers' opinions is clear and it can reveal different aspects of this issue in order to find some solutions for the issues resulted from this entity. In this study, an attempt has been made to reveal legal fundamentals of preliminary agreements after the explanation its concept, Jurisprudential record, and the causes of its development.

Keywords: Law, Preliminary agreement, Commitment to the sale, Sale promise

INTRODUCTION

In the old days, signing a contract was exclusive to merchants and property owners and investors. Nowadays, economical and commercial developments have caused people to sign different contract to meet their needs. However, over time, signing a contract by ordinary people was further extended and families, managers and employees and in general all the people turned to sign contracts in order to meet their needs and social necessities, they turned to the signing various contracts. This development is more evident particularly in the last two centuries. Therefore, day-by-day life is getting more contractful because of the development of innovations, various

achievements, and new artifacts on the one hand and people's knowledge about laws and contracts and its twists on the other hand. Extension of contractual phenomena was not only quantitatively, but contracts also become more diverse and more specific. Preliminary agreements will be respected in contracts; In fact, people take other legal acts based on their agreements. So, one of the debates that is raised nowadays is the debate of preliminary agreement validity. Individuals who wish to have a transaction will be committed in a document to complete the transaction correctly before its full implementation. Preliminary agreement emergence dates back to the year 1931 and the enactment of Registration code. By the enactment of Registration code and people's committal to register official documents, obstacles such as property clearance, municipalities' clearance, etc. led people to tend to preliminary agreements. During the codification of the first volume of Civil Code in 1928, there was not any special prediction about preliminary agreement. Therefore, whenever the law is silent about an issue, the court judges are required to declare their judgment "according to Islamic authoritative sources or judicial decrees". Since there is no explicit provisions in Iran's Constitution regarding the preliminary agreement, one of the sources used in this field is Quran, Sunnah, and opinions of Muslim jurists. Fundamental questions facing this study consist of whether it is possible to validate primary agreements of the both parties before the will creation and sale with the legal price? In addition, oblige both parties to commit to it? Does religious law gives any credit to such agreements. Is preliminary agreement an independent contract or it is merely a promise to do something in future?

DEFINITIONS

Lexical Definition of Preliminary Agreement

"Ghol"(in Persian) is an Arabic Infinitive, which has come to mean: 1 – Telling, speaking, speech, 2- to promise and to take promise 3 - a written covenant , a document that the seller and buyer give to the broker that the object of sale will be sold at certain amount of money is equivalent to the term "promise" in English.(Dekhoda dictionary)

"Nameh" (in Persian) is a word taken from Pahlavi language which is equivalent to the word "Namak" meaning: writing, paper, and book(same) and in the common meaning, it means any written text on a paper. It is equivalent to the word "Letter" in English.

Therefore, from the combination of these two words i.e. letter and promise (ghol and nameh) the word "gholnameh" is formed which means a document which the both parties will write their future will about doing something and the obliged themselves to execute that contract

Idiomatic Definition of Preliminary Agreement

Preliminary agreement is an often general writing indicative of an agreement on signing a contract on a certain matter which paying the amount "dedit" is the guarantee of failure to its implementation. (JafariLangeroudi, 1993)

Preliminary agreement is a writing whereby one party promises to do a certain act in the future or to sign a contract in the future. The contract may be selling, leasing, or marriage. This subject is mentioned Under "Promesse" in the French law. (JafariLangeroudi, 1972)

In cases where buyers and sellers are going to do a transaction that they have not yet provided its necessary arrangements, they sign a contract where the two parties are committed to execute the transaction with certain conditions and within certain period. The document that will be set is the sale promise and it is called "preliminary agreement" in ordinary language. (Katouzian, 1993)

Goals of Preliminary Agreement Setting

Sometimes people want to buy or sell something, but its arrangements are not prepared. For example, the buyer does not have enough money, or the seller should clear the municipality accounts and assets, etc. In this case, the parties will set the normal contract of preliminary agreement. They are committed to attend at a determined time and place and execute the transaction with the defined conditions. Therefore, it will be clear that the purpose of preliminary agreement is primarily to ensure that the contract will be signed in accordance with the made agreement. Secondly, if a party does not fulfill their promise of the contract, and disregard primary agreements, and by this way causes the other party a loss, then the affected party could take back his losses without trying to prove his loss, and his righteousness. In fact, preliminary agreement is a leverage to lead the original contract parties toward executing the final contract.

Legal Nature of Preliminary Agreement and Its Effects

From Dr. Nasser Katouzian viewpoint", preliminary agreement is valid in court like other documents which are set for the creation of a Commitment and both parties are obliged to implement its provisions since its commitment relies on the contract buyer and seller (Article 10 of the Civil Code) (Katouzian, 1993) "But from the perspective of Dr. Kashani "preliminary agreement of sale or buy or a preliminary agreement in which the priority is given to a determined person is not considered as selling since in selling the possession of the sale object is transferred to the buyer, while preliminary agreement's nature is only a promise of selling and this promise of selling is not essentially obligatory. So commitment to the execution of transaction cannot be demanded. Article (10) of the Civil Code is not sufficient to prove the validity and compelling nature of preliminary agreement since Article (10) of the Civil Code, regardless of the status of its decline, is the observer of contract and preliminary agreement is nothing but a purchase promise and it cannot be considered as a contract. However, most of the courts consider these preliminary agreements as a commitment to sale although a part of the price is paid as an earnest, and both parties are referred to as the buyer and seller.

General Board of the Supreme Court in Vote No. 3570 on 26.12.1342 has approved the above terms as follows: "If in the Supreme Court Judgment on 31/5 41 the case document is nothing but

more than a convention whereby the appealee was committed to transfer half of the car share in one of public notaries to the appellant but before fulfilling the above car's commitment, the transaction did not executed because of an accident , whatever is stipulated in the appeal decree which made the case document indicative of the definite sale, is not in agreement with the case document and no other reason is stated indicating a sale".(Kayhan legal processes collection, 1952)

Therefore, it can be concluded that by signing the primary commitment, preliminary agreement takes place and by its effect, a fixed and determined right is created on which the committed person, which means that the primary contract is obligatory since it consists of contract title and obligation principle. But a pre-contract or preliminary agreement provision is the implementation and signing the original contract. Preliminary agreement, not only creates an obligation for the implementation of its provisions, but also it implicitly contains the waiver clause of lien with commitment provisions i.e. if an owner who has committed to sell his house in a Preliminary agreement sell the house to someone else, on the basis of this implicit condition, the revocation can be requested from the court. However, sometimes some clauses are mentioned in the preliminary agreement like for example if one of the parties refuses to fulfill the commitment he should pay a certain amount as compensation.

The Juridical Validity of the Preliminary Agreement

Preliminary agreement topic does not have a long history but among jurisprudence topics, some people consider the term Arbon synonymous with preliminary agreement. It is defined as a contract by which somebody buys something and pays a part of the price and they set a condition based on which if the contract is set the above price will be a part from the whole price, otherwise it belongs to the seller. (SherianSatari, 2005). In this kind of writings, different opinions are expressed regarding this kind of selling. Some consider Arbon the same as sale cancellation against interest some other consider it as "devouring the property falsely" and subject to the following verse: o you who believe! Do not devour your property among yourself falsely"

Some others resort to Abu Albakhtary Narration of Imam Sadiq (AS) who said: Imam Ali (AS) said: Arbon selling is not correct, except its cash be a part of the price. Some people consider some forms of Arbon to be correct and other forms to be incorrect. On the other hand, some authors rejected the opponents of this kind of selling and stated some reasons, which confirms its correctness.

Unfortunately one of the reasons of syntactic and modality confusion of preliminary agreement is the existence of these kinds of studies which represented the historical basis of preliminary agreement by progression of Arabic texts. Since as it is mentioned before, preliminary contract is a compound word composed of two Arabic, Persian and Pahlavi word that is formed by ordinary language meaning a document, which is the basis of a commitment and promise. basically it is not

a translated word. Therefore, comparison of this word with selling and especially Arbon selling is a wrong comparison. (Ebram, 1997)

JURISPRUDENCE AND LAW-BASED REASONS FOR THE VALIDITY OF PRELIMINARY AGREEMENT

Jurisprudence Basis of Preliminary Agreement Basis

The jurisprudential reasons that are mentioned for the validity of preliminary agreement consist of:

First reason: Resorting to some Quranic verses

1. The first verse of Al-Maeda chapter: "O you who believe! Fulfill your obligations"

One of the issues that are focused by Quran is the issue of commitment to promises. In this verse commanding verb of fulfill is used. Using this word by god and to humans include a concept of obligation. Therefore, it includes any kind of obligation on which there is a mutual agreement whether it is about giving possession or possessing or any other matter. So fulfilling such an agreement is obligatory and if the promisor refuses to fulfill it, the ruler can make him/her fulfill it. However, this is without considering the annulment option that is seen in today's preliminary agreements. Therefore, when this option exists, the ruler cannot make each of both parties to execute the transaction or execute it on their behalf. Because he has used stipulation option and annulated the contract. Of course, it is contingent upon paying the commitment payment. Finally, It should be taken into account the without proceeding to buy from promisor or the ruler no selling happens and transfer is not executed.

Second reason: Resorting to the prophetic hadith of: the faithful are loyal to the conditions they have admitted.

Great jurists and scholars have a dissent about the meaning of the term 'condition' in this famous hadith. However, lexicon scholars also have a dissent about its meaning Since here, "condition" means commitment and it cannot be believed that this rule will cover only the implicit conditions. Here the obligation of the contract and commitment itself is agreed upon, not that a condition is stipulated in another contract.

Third reason: jurisprudential theory of "breaching the privity of transactions in the commonalities"

According to the majority of Imamieh jurists, we have no reason to believe that all the correct transactions are one of the conventional transactions that are presented in the jurisprudence or we do not have any reason for monopoly and our jurisprudential principles tends to totality. We have a series of commonalities and generalities according to which each transaction and contract that takes place between two people is correct, except in special cases. Therefore, the principle in the transactions is validity.(same)

A considerable point is that whatever mentioned above were the jurisprudence reasons for the preliminary agreement validity itself, sometimes it is seen that there are problems among jurists concerning the provisions of the preliminary agreement. These conditions are as follows:

1- In the case of buyer absence in the notary public in order to set and sign the document and not paying the remainder of payment in cash this will be considered as a violation from the buyer and causes this preliminary agreement to be null and void. The Seller has the right to take the received earnest as a commitment payment to his personal benefit and in this case, the buyer does not have any right.

2-The absence of seller in the aforementioned date in the determined public notary to set and sign the document is considered as the seller violation. In this case, he is obliged to pay an amount to seller as the commitment payment, in addition to the earnest.

They believe that this is an evidence of taking other's property unlawfully and prohibition which exist in this verse includes such a taking and bode to its invalidity since the meaning of invalid in this verse "O you who believe! Do not devour your property among yourself falsely" includes any kind of taking on which there is neither replace nor a free giving from the owner. In our case, if the agreement is not made and the contract is not completed, taking earnest money without actually giving any changes is acceptable. From the other side, the discussion is on the assumption that the earnest is not given to the contract party freely, but it is a part of the price or fee. So taking earnest money, is an example of "taking money wrongly" and thus would be void. This view cannot be correct, since not fulfilling the commitment for each party may have some losses. Therefore, it can be said that since no loss should left uncompensated and according to the hadith of "There should be neither harming nor reciprocating harm" So the prediction of commitment aspect that has been accepted in all contracts (Article 230 of the Civil Code) be disagreed in preliminary agreement which is also an independent contract. Some resort to Abu-Albakhtary narration from Imam Sadiq (AS) who said that Ali (AS) said: Earnest money is not correct, unless it is a part of the price. The appearance of this hadith shows a prohibition of taking the earnest money except as a part of the total price that is paid in cash. Therefore taking the earnest money as a compensation or loss on the assumption of breach or violation is not correct. In addition, there is a problem on this aspect since although it clearly imply our case, its proof is not correct since Abu-Albakhtary is criticized in Rijal. (Hashemi, 1998)

The Legal Basis of Preliminary Contract Necessity

The majority of jurists consider Article 10 of the Civil Code as the legal basis of preliminary agreement legitimacy and obligation the provisions of this Article states that "private contracts are enforced to those who have signed them if it is not totally opposed to the law. Some also believe that whenever preliminary agreement which is a kind of private agreement is normally by considering the Rule 47 of the Registration Act, it is totally opposed to the law and consider it as a

lack of permit to oblige the committed person. However, it should be said that the provisions of Article 47 of the Registration Act is not enforced in the forming and accuracy step of this setting. the described right is formed after the observance of Article 190 for correctness, Article 191 of the Civil Code for the composition and in accordance with Article 10 (the principle of freedom of contract) being normal or official does not affect the correctness of the this agreement. The Only objection for this document is the proving of it as a document and proving its rightfulness which is a separate discussion and is not relevant to our discussion. (Shakeri, 2001)

In addition to the above article, other reasons are also provided of which a few cases are discussed briefly here:

First: the meanings of terms normal contracts are considered (Article 224 of the Civil Code) Therefore, whenever the parties consider the Committed as the future seller and obligee as the future customer, the court should not deviate from this and should not give a judgment on the lack of obligation on the seller or buyer of the preliminary agreement

The second reason: it is one of valid legal provision of in the civil law article 190. The legislator in this article considers the correctness of the transactions in the general sense on four conditions: the purpose and mutual satisfaction, capacity, specificity of the subject and legitimacy for the transaction. Therefore, All the transactions that are executed even based on specific laws (supposedly Registration Act) are nullified whenever one of these conditions are not met, which means the articulated regulations cannot nullify what is inherently created based on regulations so whenever the right is formed using all the conditions it required, registration in competent official authorities cannot be its correctness condition.

CONCLUSION

Preliminary agreement is not a sale contract; it is merely a commitment to do the sale. But this should not lead to a comparison of preliminary agreement with the sale (the initial agreements of sale or a stipulation) preliminary agreement is an independent agreement and the sale rules are not enforced in it. in the article 758 of civil code, legislator states that: although conveyance in transactions gives the results of its proceeding contract, it doesn't have its specific conditions. Therefore, using the criterion of unity it can be stated that if the preliminary agreement has a result similar to the bill of sale, again it is an independent contract and the commands of sale cannot be enforced about it. Moreover, setting a preliminary agreement does not cause the transfer of possession. Both parties should sign the original contract in order to transfer the possession according to the urgent vote of 11-5/24/1973 row 26, the guarantee of preliminary agreement lack of commitment is the committed obligation to execute the transaction, in addition to obligatory payment that both parties consider it for compensating the losses and the promisee can use one of these.

Preliminary agreement is a contract that recently became common among people they sign it when they are going to execute a transaction that they have not yet provided its necessary arrangements. They sign it and the two parties are committed to execute the transaction with certain conditions and within certain period. According to Dr. Hussein Safaee, a contract commitment happens when somebody accepts the responsibility to do something or not. Therefore, in order to verify its legitimacy we should seek reasons of contracts' correctness and freedom of will, not that compare it with contracts like Arbon sale, bring some wrong historical basis for it, and unnecessarily limit the principle of freedom of will.

Expectations

1. Enactment of an act about preliminary agreement and its setting method

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