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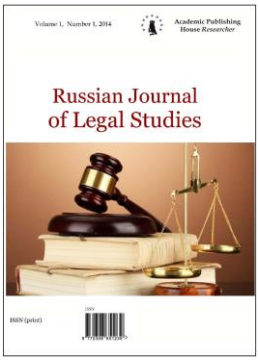

Impossibility of Surrender or Impossibility to Fulfill the Contract

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Abstract

The item of transaction is either a property (like goods) or an action (doing the work), and the promisor should surrender the property that is being traded and he must fulfill the action if the item of transaction is an action. If at the time of the conclusion of the contract, there is no power to surrender the sold good or the promisor had no power for doing the action, the contract is void from the outset because of its risk. However, if for example, the seller had the power to surrender and the promisor also had the ability to do the action from the beginning, but after the contract he has failed to surrender the item of transaction or do the action permanently and absolutely due to the fault or accidentally; in this case, the contract was correct from the beginning until the time of incapability. However, when they fail to surrender, the contract is dissolved or terminated. Therefore, the contract will not be voided if the impossibility of surrender or impossibility in the fulfillment of the contract is temporary. Rather, it brings the impossibility of surrender for the beneficiary. Considering the fact that the legislator did not use the term of the option of impossibility of surrender, so there is a dispute on the right to terminate the contract in this respect, however, it can be understood from studying some of the regulations of this sentence.

Keywords: permanent impossibility of surrender, temporary impossibility of surrender, dissolution of the contract, the option of impossibility of surrender.

1. Introduction

The contract does not require surrendering the price and possessing the sold good, rather the sold good is concluded by the offer and acceptance. For this reason, the article 338 of the Iranian Civil Code prescribes: "the sold good is owning an object which is exchanged with a known object". In this article, the conclusion of the sale contract has not been conditioned to surrendering the sold good; however, if it turns out that the seller does not have the power to surrender, and the customer also has no power to possess, the sale is void. This is due to the fact that the requirement of the contract is the surrender of the contract's item and if the requirement of the contract is not met, it will not actually be accomplished. Of course, if the seller has no power to surrender and the customer has the power to possess, and in this way the requirement of the contract has been met, the contract would have no disruption. Also, if the contract's item is doing an action, and the promisor is not able to do that action, the contract is void. The void of the contract in such cases is due to the risk of the transaction. If the inability in surrendering or inability in doing the

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commitment in the original contract and the fulfillment of the condition were not permanent, so what would be the right of the promise in the original contract and what would be the right of the one in whose favor a condition is made in the conditional contract?

This paper investigates the types of the impossibility of surrender and the impossibility of fulfillment of the contract, and it also discusses the effects of the permanent and temporary impossibility of surrender and their sentences. The main question is about the cases where the impossibility of surrender is in the original contract and the conditional contract. If the impossibility of surrender has been on the proviso, and the condition is doing an action or the result, the warranty of the fulfillment of the lack of condition or the impossibility of the condition should be acted based on the sentences and regulations of the provisos.

2. Materials and methods

The study was done on the basis of the general and specific scientific methods of cognition including the dialectical method, analysis and synthesis, deduction and induction, comparative legal and historical-legal method. The materials included the texts of the Iranian Civil Code and the legal interpretations whose content were scrutinized and analyzed carefully.

3. Discussion

3.1. The concept of surrender

The surrender means giving up and handing over and saying hello (Dehkhoda, 1374: 4). The idiomatic meaning of surrender is not far from the literal meaning. In its infinitive form, surrender means delivery of the sold good. This is done by the seller until the customer receives it or he possesses it. The legislator has enacted regulations from the articles 370-390 regarding the surrender. In these regulations, both the terms surrender and possession and the terms taking delivery and handing over have been used. Taking delivery is literally the opposite of expansion, in the same way as the contraction is opposite of expansion. It means getting the property, and even it could mean accepting the commodity without getting it (Ebn Manzor, 1410: 214). Article 367 of the Civil Code, also prescribes: Surrendering is delivering the sold good to the customer in a way that he could capture and use it. Taking delivery is the customer's dominance over the sold good. Article 368 of the Civil Code has also made the concept of surrender clearer: when the sold good has been made available to the customer, this results in the surrendering, although the customer has not yet actually possessed it.

3-2. Surrendering the sold good and performing the action

No doubt as a result of the sale contract, the sold good is any more in the possession of the seller and it becomes the customer's property (Article 338 of the Iranian Civil Code). So, if the surrender and possession of the sold good is possible, it is not necessary the surrender and possession happens while contracting. In other words, surrendering and possessing the sold good are not a condition of the validity of a contract, although, at the end and in any case, the sold good and the money must be exchanged and the two parties must achieve their principal and direct purpose, as in fact, such a purpose is also the cause of the commitment. The cause of the commitment is the direct purpose of the parties from the contract. The objective of the seller is to gain access to the property (the sold good) and possessing it. So, one of the seller's duties is to surrender and deliver the sold good to the buyer. If the seller fails to accomplish this duty or the buyer does not have access to the sold good under any circumstances, in this case, the continuance of the contract would be challenged. The direct purpose of the seller is also to access the money after the contract. If the buyer fails to pay the price, then the contract is also challenged. If the contract's item was not any good but an action and doing the action, and the obligor cannot fulfill his commitment, again the continuation of the contract is challenged.

3.3. The nature of surrendering and receiving

After the sale contraction, it is obligatory to surrender and handing over, that is, each party should obligatorily surrender what the other party deserves, although the surrender process is most likely done by the seller. For this reason, some jurists believe that the price entitlement is based on surrendering the sold good, therefore the seller should obligatorily surrender the sold good in order to be entitled to receive the money (Sheikh Tousi, 1411: 151). But the fact is that the power and effects of the contract on the seller and the customer are the same. Neither party has more rights. Rather, their rights and duties are the same unless there is a condition to the contrary.

Therefore, if both parties refused to surrender, they should be forced so that the surrender and receipt could be realized (Alamah Helley, 1419: 87; Mokhtalef, 1419: 291; Tazkareh, 1419: 473; Tahrir, 1419: 175; Karkey, 1411: 403; Shahid aval, 1417: 210). Because every contract requires surrender and receipt, generally any exchange involves a conformity signification or conformity obligation and also implied obligations. Surrender is one of the implied obligations (Na'ini, 1418: 188). However, some believe that surrender is the unilateral legal act (Shahidi, 1370: 14), while surrendering is one of the effects of the contract.

The customer is entitled to receive the sold good not because he owns it, but because the nature of the contract requires that the seller surrender the sold good. In fact, the conformity signification is the alternative contract which has been included in Article 338 of the Iranian Civil Code: the sale is owning the object which is exchanged with known object. It indicates the nature of the contract and its implied signification is surrendering and possession, because the nature of the contract may be fulfilled without surrender or it may not be possible to surrender even for a limited period of time.

Therefore, surrender is not a unilateral legal act because without the actual surrender, the customer is entitled to receive and even the legislator has authorized him to proceed with the receipt of the sold good without the authorization of the seller. In this regard, the article 374 of the Iranian Civil Code provides: Proceeding with the receipt is not conditioned to the authorization of the seller and the customer could receive the sold good without permission. In addition, it is important to note that power is not relevant to the surrender, but has the instrumentality over it. So if the seller does not have the power to surrender but the customer has the power to receive, in this case, the contract would not be disrupted. It can even be said that if the third party surrenders the sold good to the customer, there would be no disruption in the contract. It is necessary to explain that in some contracts the surrender and possession must be accomplished along with the offer and acceptance. In other words, in some contracts, taking delivery and handing over are required for the validity of the contract. As a result, the transfer is also done by surrendering, and there is no transfer until the surrender is made. In this regard, the article 364 of the Civil Code provides: In an optional sale, the ownership occurs during the sale contract, not from the time of the termination of the option, and in a sale whose validity is conditioned to the reception (of good), like gold, silver and money exchange, the ownership is conditioned to the transfer during the acquiring, not during the occurrence of sale.

3.4. Power to surrender

Although the contract of sale is one of the possessory contracts; however, it compliments and supplements taking delivery and handing over of this ownership. The validity and continuance condition of the contract is surrendering the sold good, so if there is no power to surrender, the contract is void from the outset, and if there is the power to surrender, but, it has been lost permanently for whatever reason, the contract would be dissolved from the time of the permanent inability. If it is said that the contract is void, it would be in the form of negligence as the legal dissolution happens any way.

Based on the rule of the nullity of the contract because of the impossibility of the fulfillment of significance (Mohaqqeq Damād, 1380: 145), this consists of all types of commitments, including the object itself or the performance of action. It might be said that the main reason and basis of the nullity of the contract is the lack of power to surrender the sold good which is in fact the ascertainment of the lack of capability of being owned (of the contract item). Whereas if the basis and criterion of the nullity of the lack of capability of being owned is having the sold good, then the seller must have the power to surrender it at the time of the contract. While in the Islamic jurisprudence and law, the necessity and power to surrender is not required at the time of the contract, but the necessity of surrender and the power to surrender is when the customer is entitled, which may be later after the contract. Moreover, if this theory is to be accepted as the basis of the nullity of the contract, then the issues of waste in the exchange liability rule (if the total of the sold good is lost before receipt, it is compensated from the seller's property) would be meaningless.

Also, if it was usurped property, it would lose its capablity of being owned due to the impossibility of being received, and in this case the compulsion of the usurper would not be possible. Because it is better to consider the power of surrender focused on the contracting parties (Khansari, 1394: 129). The condition of ownership is more important than the ownership, not the

condition of capability of being owned, as what is transferred to the other party is the ownership, not the capability of being owned.

Therefore, it is better to justify the nullity of the transaction on the basis of the risk of transaction due to the inability to surrender the sold good, i.e., the risk or uncertainty of the possibility of surrender because it might be the case that one of the two sale items cannot be surrendered (Naraqi, 1414: 96). In this case, the knowledge of the parties would be evaluated because they must be convinced or at least they should be suspicious about the power to surrender. Consequently, if the parties are skeptical about the power to surrender or the possibility of surrendering the sold good and the price, the transaction is void because of being risky. For this reason, if the proviso is not possible to surrender, this condition would be void due to its riskiness without disruption of the original contract. Of course, if a person in whose favor a condition is made has been uninformed about the nullity of such a condition, he would only be entitled to terminate the original contract.

3-5. The effects of the surrender in the Iranian law system

According to the Iranian law system, the seller has the exchange liability until the sold good has not been surrendered to the buyer. An exchange liability means the seller's liability on the destruction of the sold good. In the legal system of some countries, the exchange liability would be transferred to the customer with the sale contract along with the offer and acceptance. Consequently, if the sold good is wasted as a result of the celestial corruptions before surrendering to the buyer, the seller is not guarantor and he would have no responsibility. But according to the Iranian law system, the seller is guarantor from the time of the contract until the time of surrendering the sold good, even though the sold good is wasted due to the celestial corruption or it could not be surrendered. This means that if he (the seller) has received the price, he must return it to the buyer. Therefore, one of the most important effects of surrendering in the Iranian law system is the transfer of the exchange liability to the buyer.

3-6. The concept of the impossibility of surrender or impossibility to fulfill a commitment

The discussion on the option for the impossibility of surrender or impossibility to fulfill a commitment is accomplished when the impossibility is emerged after the contract, or in other words, to be incidental. In such case, the reciprocal justice and preventing the loss of promisee requires that he would be entitled to terminate the contract, so that he could get rid of the contractual constraints whose economic equilibrium has been disturbed and it is no more advantageous for him (Safa'i, 1395: 316). Therefore, it is clear that the impossibility of surrender is when the promisor has no power to surrender and the promisee also has no power to possess. In such a case, the contract would be terminated by force, and no longer has the option for the impossibility of surrender left any right for the termination of the contract.

3-7. The Cases of impossibility of surrender

As stated before, this option is not relevant in the cases that there is no power to surrender and the power to possess. Because this option is only useful in the cases that the contract remains valid. However, the contract is void basically in the cases that the seller does not have the power to surrender.

3-7-1. Non-fulfillment of the condition

If the present condition is included in the contract of the sale, and the person who is reponsible to perform the condition does not act based on the condition or is unable to fulfill the condition, then the person in whose favor the condition is made will have the right to terminate the contract. Article 240 of the Iranian Civil Code prescribes: If it becomes impossible to make a condition after the contract has been concluded or it becomes clear that it is impossible at the time of contracting, the one in whose favor the condition is made has the authority to terminate the transaction unless the refusal is based on the act of the person in whose favor the condition is made. Furthermore, in any case that the person who is responsible to perform the condition fails to fulfill the condition and his compulsion is not possible, then based on the Articles 238 and 239 of the Iranian Civil Code, the option of termination will be for the person in whose favor the condition is made. Article 238 of the Civil Code prescribes: whenever an action is stipulated in a contract as a condition and the compulsion of the obligor to do it is impossible, the judge can provide the possibility to do the action at the expense of the obligor.

Article 239 of the Civil Code prescribes: whenever it is not possible to compel the person who is responsible to perform the condition, to do the conditional act, and the conditional act is an

action that nobody can perform it instead of him, therefore the other party will have the right to terminate the transaction. In some cases that the person in whose favor the condition is made has the right to terminate the contract directly; there is no need for the court order. Also, in the cases that it is not possible to do the work or do the conditioned item at the expense of the obligor, the person in whose favor the condition is made has the right to terminate the contract directly.

Article 379 of the Civil Code provides an example to explain: If the customer is committed to provide a mortgage or guarantor to pay the price, but he fails to fulfill the condition, the seller will have the right to terminate the contract. However, if the seller has committed to provide guarantor for the compensation of the sold good, and do not fulfill it, in this case the customer has the right of termination of the contract.

3-7-2. Incomplete or partial waste of the sold good before surrendering

If a part of the sold good is wasted, if the price of that wasted part is devisable, so the contract is terminated considering the wasted part. In such cases, different parts of the price are devoted to the different parts of the sold good. Therefore, each part of the sold good is considered as a specific sold good and the unique contract is divided into the multiple contracts and each one is independently subject to the prophet's narration (Hadith) as "the total of the sold good is wasted before receipt." The whole is generalized to all these that has been broken down. For this reason, the price could be divisible; otherwise the price cannot be divided. In the cases where a part of the sold good is wasted and in fact the sold good is incomplete the customer could terminate the transaction based on the article 388 of the Civil Code, which is somehow the option of impossibility of surrender. Article 388 of the Civil Code prescribes: If a defect is found prior to surrendering the sold good, the customer would have the right to terminate the transaction.

Obviously, if the loss or defect is due to the customer's performance, or due to the fault of a third party, then the seller will have no liability. Rather, the customer must refer to the third party for compensation, and the third party is liable for damages under the rules of civil liability. If the loss or defect is due to the customer's own performance, the customer himself is responsible. Article 389 of the Iranian Civil Code prescribes: If, in the case of the two above, the loss or defect is due to customer's performance, the customer does not have the right to return the sold good to the seller and must pay the price. Therefore, as long as the sold good is not surrendered to the customer, the seller has the exchange liability.

This means that if the sold good is lost or defected as a result of coercion or force majeure, although the seller has not violated the rules, he in any case is the guarantor and responsible. This is the exchange liability. That is, if the total sold good is wasted, the total contract is dissolved. If some part of the sold good is wasted, the same part of contract will be dissolved. But if the sold good is not wasted or defected due to celestial corruptions, rather, it is wasted or defected due to the customer's behavior or the fault of the third party; in this case the seller will not be the guarantor. The customer's action in the waste and defect of the sold good is subjected to the receipt, provided that the seller does not deceive him.

If the price of the wasted part of the sold good cannot be reduced from the whole price, as the total price has been devoted to the whole sold good, also in this case, the exchange liability is dominant, but it has the defect contingency sentence after the contract and before the receipt.

3-7-3. Impossibility of the compulsion of the landlord to surrender

Although taking delivery (receipt) and handing over or surrendering and possessing are not required for the validity of the contract, however, in any case the object of a lease must be surrendered to the leaseholder. If the landlord does not surrender the object of a lease but compulsion and obligation is not possible as well, the leaseholder can terminate the contract based on the option of the impossibility of surrender. Article 476 of the Civil Code prescribes: The landlord must surrender the object of the lease to the leaseholder; if he refuses to do so, he will be forced. And if there is impossibility of compulsion, the leaseholder has the right to terminate the contract. The same rule also applies to the share-cropping contract. Article 534 of the Civil Code prescribes: whenever an operant gives up in the middle or at the beginning of an action, and there is no one to perform the action instead of him, the ruler compels the operant to do so, based on the demand of the share-cropping landlord or continues to operate at the expense of the operant and if it is not possible, the share-cropping landlord has the right to terminate the contract.

3-8. Impossibility to surrender or impossibility to fulfill the commitment due to surrender

If the item of the original commitment was not an object, but doing an action. The impossibility to fulfill the commitment may be temporary or permanent and absolute; each has its own particular sentence. In what follows, first temporary impossibility to fulfill the commitment and then the permanent impossibility to fulfill the commitment would be discussed.

3-9. Temporary impossibility to fulfill the commitment

Failure to fulfill the commitment for any reason will cause the termination of the contract whether due to the misfeasance and the fault of the promisor or the force majeure. The basis for the right of the termination is the option of the impossibility of surrender. However, the impossibility to fulfill the commitment may be temporary but in any case, to avoid possible loss; the beneficiary can terminate the contract based on the option of impossibility of surrender or waiting for the removal of the barrier to fulfill the contract. Obviously, if the obligor fails to fulfill the commitment, he will be the guarantor.

3-10. Permanent impossibility to fulfill the commitment

If the non-fulfillment of the commitment was absolute and permanent, in fact it meant inability to surrender and doing the job. Since in such cases, one element of the contract that is the fulfillment of the commitment is not possible and no money is paid for it, so the nullity of the transaction is obvious. Therefore, because of the nullity of the contract, the obligation and compulsion is not possible. This sentence can be deduced from the criteria set forth in the Article 387 of the Civil Code. Article 387 prescribes: If the sold good is wasted before the surrender without the seller's fault or negligence, so the sale contract would be terminated and the price must be returned to the customer. Unless the seller has referred to the judge or his successor for surrendering, in this case, if the sold good is wasted, the customer would be responsible.

Moreover, according to the jurisprudential principle of nullity: the nullity of any contract due to the impossibility to fulfill its content, that is, any contract whose content is impossible to fulfill is void (Mohageg Damad, 2009: 132). The concept of nullity is innate, primary and also it could be legally dissolved.

3-11. The effects of impossibility to surrender the sold good

The sale contract, is owning an object which is exchanged with a known object that will make the customer the undisputed owner of the sold good. So that even with option, the customer's ownership is inevitable. Moreover, after the conclusion of the contract, the benefits belong to the customer, which by itself indicates the customer's ownership. On the other hand, the seller has no right to distrain unless in the cases that the legislator has authorized or he did it rightly. So if the sold good is lost due to the celestial corruptions, some jurists believe that the contract is not dissolved because the sold good belongs to the customer.

Rather, it is a case of the liability possession and the seller must pay instead of the sold good, if it is fungible he should give the same good and if it is non-fungible, he should pay its price to the customer. There is an argument about the requirement of the rule: if the sold good is wasted before the receipt, it is the customer's property, however because of the seller's domination on that, he is responsible for the liability. Because generally the well-known tradition, "whenever you receive something belonging to others, you will be under fiduciary capacity and liability until you return it to its true owner" includes it, i.e., if a person dominates the other person's property, as its guarantor he would tolerate the liability effects such as conservation of goods and preventing them from being wasted, compensating for it, and the responsibility for the benefits until he restore the property. In the case of the impossibility of restoration, he would be the guarantor for the equivalent or its price (Bahr-alo-olom, 1403: 150). This opinion is in fact a consequence and also in accordance with the opinion of the jurists who indicate the seller's possession as un-confidential and based on the liability possession. It is also said that the waste of the sold good before the receipt voids the contract which should be paid by the customer. However, if the customer claims the sold good and the seller refuses to surrender it, then the seller is obliged to pay the price of the sold good to the customer the same price (Helli, Tadhkirat al-fuqahā, 113).

The reason for choosing the liability possession rather than exchange liability has been the well-known sentence: "the risk of loss of the object of sale before delivery rests with the seller", In fact, the loser would be the guarantor, i.e., the loss is compensated by the seller (Shahid Sani, 1413: 21). In return, most jurists resorting to the Prophet's tradition (Nouri, 1407: 303; Najafi, 2014 : 83; Shahid Sani: 21; Ansari, 1415: 270), i.e., "the risk of loss of the object of sale before delivery

rests with the seller" pronounce the seller's liability as the exchange liability and believe that the loss of the whole sold good before the receipt leads in the dissolution and termination of the contract. The presumption of this argument does not have any exception in jurisprudence and law, so that the seller's exchange liability includes the loss of the whole sold good, the loss of a part of the sold good and the defect in the sold good before the receipt.

3-12. Waiving the option of impossibility of surrender

The Iranian legislator in the Article 448 of the Civil Code has accepted the waiving of the total or some of the options while contracting, as the option is a financial right and people can neglect their rights. Article 448 prescribes: The waiving of the total or some of the options could be stipulated while contracting. However applying this rule on waiving the option of the impossibility of surrender is something that could be reflected upon. So some jurists consider the waiving of the option of the impossibility of surrender while contracting contrary to the public order. Because the concurrence of the consideration and an object in return for a consideration to one of the parties is contrary to the public order (Katoozian, 1376: 397).

Also, it has been said that the choice of waiving the option of impossibility of surrender is inconsistent with the requirement of the contract. Because the surrender in the possessory contracts or the fulfillment of the original commitment in reciprocal commitment contracts is the requirement of the exchange and it is due to the nature of these contracts. The choice of waiving the option of impossibility of surrender means that the promisor can receive the exchanged object without fulfilling the commitment and this is inconsistent with the requirement of the reciprocal commitment contract (Safai, 1395: 319). Finally, if any choice contradicts the requirements of the contract, the contract is void.

4. Results

Impossibility of surrender and impossibility to fulfill the contract will terminate the contract. If at the time of the conclusion of the contract the power to surrender was impossible or the obligor had no power to fulfill the action, the contract is void from the outset because of its risk. If the surrender subsequently occurs, it will terminate the contract. If the impossibility is temporary in any case, to avoid possible loss, the beneficiary can terminate the contract based on the option of impossibility surrender or he could wait for the removal of the barrier.

5. Conclusion

If at the time of the conclusion of the contract, there is no power for surrendering or the promisor had no power for doing the action, the contract is void from the outset because of its risk. However, if for example, the seller had the power to surrender from the beginning and the promisor also had the ability to do the action from the beginning, but after the contract he has failed to surrender the item of transaction or do the action permanently and absolutely due to the fault or accidentally; in this case, the contract was correct from the beginning until the time of incapability. However, at the time of the incapability to surrender, the contract is dissolved or terminated. Therefore, the contract will not be voided if the impossibility of surrender or the impossibility in the fulfillment of the contract is temporary. Rather, it brings the option of the impossibility of surrender for the beneficiary. Since the legislator did not use the term "the option of impossibility of surrender", so there is dispute on the right to terminate the contract in this respect. However, it can be understood from studying some of the regulations of this sentence. Obviously, if the case of impossibility was the proviso; it would be acted based on the warranty of its fulfillment. But if the fulfillment of the original contract was impossible temporarily, then the right of termination would be for the beneficiary.

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