

ISLAMIC RULES FOR SALE (BAI)

'Sale' is defined in Shariah as 'the exchange of a thing of value by another thing of value with mutual consent'. Islamic jurisprudence has laid down enormous rules governing the contract of sale, and the Muslim jurists have written a large number of books, in a number of volumes, to elaborate them in detail. What is meant here is to give a summary of only those rules which are more relevant to the transactions of murabahah as carried out by the financial institutions:

Rule-1: The subject of sale must be existing at the time of sale.

Thus, a thing which has not yet come into existence cannot be sold. If a non-existent thing has been sold, though by mutual consent, the sale is void according to Shari'ah.

Example: A sells the unborn calf of his cow to B. The sale is void.

Rule-2: The subject of sale must be in the ownership of the seller at the time of sale.

Thus, what is not owned by the seller cannot be sold. If he sells something before acquiring its ownership, the sale is void.

Example: A sells to B a car which is presently owned by C, but A is hopeful that he will buy it from C and shall deliver it to B subsequently. The sale is void, because the car was not owned by A at the time of sale.

Rule-3: The subject of sale must be in the physical or constructive possession of the seller when he sells it to another person.

"Constructive possession" means a situation where the possessor has not taken the physical delivery of the commodity, yet the commodity has come into his control, and all the rights and liabilities of the commodity are passed on to him, including the risk of its destruction.

Examples :

(i) A has purchased a car from B. B has not yet delivered it to A or to his agent. A cannot sell the car to C. If he sells it before taking its delivery from B, the sale is void.

(ii) A has purchased a car from B. B, after identifying the Car has placed it in a garage to which A has free access and B has allowed him to take the delivery from that place whenever he wishes. Thus the risk of the Car has passed on to A.. The car is in the constructive possession of A. If A sells the car to C without acquiring physical possession, the sale is valid.

Explanation 1:

The gist of the rules mentioned in paragraphs 1 to 3 is that a person cannot sell a commodity unless:

- (a) It has come into existence.
- (b) It is owned by the seller.
- (c) It is in the physical or constructive possession of the seller.

Explanation 2:

There is a big difference between an actual sale and a mere promise to sell. The actual sale cannot be effected unless the above three conditions are fulfilled. However one can promise to sell something which is not yet owned or possessed by him. This promise initially creates only a moral obligation on the promisor to fulfil his promise, which is normally not justifiable. Nevertheless, in certain situations, specially where such promise has burdened the promise with some liability, it can be enforceable through the courts of law. In such cases the court may force the promisor to fulfil his promise, i.e. to effect the sale, and if he fails to do so, the court may order him to pay the promise the actual damages he has incurred due to the default of the promisor.

But the actual sale will have to be effected after the commodity comes into the possession of the seller. This will require separate offer and acceptance, and unless the sale is effected in this manner, the legal consequences of the sale shall not follow.

Exception:

The rules mentioned in paragraphs 1 to 3 are relaxed with respect to two types of sale, namely:

- (a) Bai' Salam
- (b) Istisna'

Rule-4: The sale must be instant and absolute. Thus a sale attributed to a future date or a sale contingent on a future event is void. If the parties wish to effect a valid sale, they will have to effect it afresh when the future date comes or the contingency actually occurs.

Examples:

(a) A says to B on the first of January: "I sell my car to you on the first of February". The sale is void, because it is attributed to a future date.

(b) A says to B, "If party X wins the elections, my car stands sold to you". The sale is void, because it is contingent on a future event.

Rule-5: The subject of sale must be a property of value. Thus, a thing having no value according to the usage of trade cannot be sold or purchased.

Rule-6: The subject of sale should not be a thing which is not used except for a haram purpose, like pork, wine etc.

Rule-7: The subject of sale must be specifically known and identified to the buyer.

Explanation:

The subject of sale may be identified either by pointation or by detailed specification which can distinguish it from other things not sold.

Example:

There is a building comprising a number of apartments built in the same pattern. A, the owner of the building says to B, "I sell one of these apartments to you"; B accepts. The sale is void unless the apartment intended to be sold is specifically identified or pointed out to the buyer.

Rule-8: The delivery of the sold commodity to the buyer must be certain and should not depend on a contingency or chance.

Example : A sells his car stolen by some anonymous person and the buyer purchases it under the hope that he will manage to take it back. The sale is void.

Rule-9: The certainty of price is a necessary condition for the validity of a sale. If the price is uncertain, the sale is void.

Example: A says to B, "If you pay within a month, the price is Rs. 50. But if you pay after two months, the price is Rs. 55". B agrees. The price is uncertain and the sale is void, unless anyone of the two alternatives is agreed upon by the parties at the time of sale.

Rule-10: The sale must be unconditional. A conditional sale is invalid, unless the condition is recognized as a part of the transaction according to the usage of trade.

Example:

(i) A buys a car from B with a condition that B will employ his son in his firm. The sale is conditional, hence invalid.

(ii) A buys a refrigerator from B, with a condition that B undertakes its free service for 2 years. The condition, being recognized as a part of the transaction, is valid and the sale is lawful.