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Analysis Of Banking Monetizing Sale In Islamic Law {Bay Al Tawarruq Al Masrafi} {بيع التورق المصرفي}

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ABSTRACT

Banking system is very important for mankind society and it is facilitating human-being in export and import business and internal and external transaction and it is providing wonderful services in the development of social life and strengthening the relationship between the people and societies throughout the world.

There are two system of banking working affectively in the world: 1- The first is the conventional system of banking and it is based on the interest which is considered backbone of economy according to this system. 2- The second is Islamic banking system and it is growing nowadays in the world and it is free from interest which is considered basic reason for the destruction of economy.

Each banking system is required to maintain particular amount of its liquidity at every time and Conventional banking system fulfills this requirement of liquidity by taking interest based loan from anywhere while Islamic banking system does not allow interest based loan, so it fulfills this requirement through different modes of financing which are permitted in Islamic Law and the monetizing sale is one of these tools for maintaining the liquidity instead of taking loan from other bank.

The arrangement for purchasing a commodity on deferred payment from Islamic banks and selling it in the market on cash payment to fulfill the need is called monetizing sale {Bay al Tawarruq}. It is an important instrument permitted by Islamic law to fulfill the immediate requirement of money for any individual though it is real person or fictitious person such as bank.

This arrangement is made by Islamic banks for those clients who need a loan from the bank and Islamic bank does not provide the loan {Qard Hasan} because money are deposited in bank for the purpose of investment and financing but not for loaning or advancing Qard Hassan without the consent of depositors and disposing property of others without their consent is not valid in Islamic Law.

This article aims to define banking monetizing sales and describe its elements and conditions imposed by Muslim scholars. The article discusses the ingredients of monetizing sale and explains it's relevant and highlights it's distinguishing features. It also elaborates the conflict of contemporary Muslim scholars explain their views regarding the validity of banking monetizing

sale and analyzes their arguments in the support of their views and gives the preference on the basis of strong evidence and it also makes certain recommendations.

Keywords: Banking monetizing sale, validity, opinions, and their evidence.

INTRODUCTION:

Banking monetizing sale is an arrangement to ovoid usurious contract through this sale. A client needs money and goes to the Islamic bank and discusses his problem with the bank. The bank says that it cannot provide loan either on the basis of usury because it is prohibited in Islamic law or on the basis of Qard Hassan because financers authorised bank to invest their finance but not provide loans by it.

a- The money with the bank is the property of other people and bank is a trustee, a trustee cannot dispose of trust property without the consent of owner and owner of property does not allow bank to provide the loan by their money.

b- The bank is a fictitious person and Qard Hassan is provided to client to get reward from Almighty Allah in the hereafter and a fictitious person is not capable to receive any types of reward in hereafter.

The Islamic bank does not provide loan to the client like conventional banks, but it comes forward to solve the problem of needy client. It tells him that the bank can sell him a commodity on deferred payment which will be payable on fixed future date or in instalments as would be easy for him to pay. And that he can go to market and sell the commodity.

Sometimes, the Islamic bank leads him to proper market where the client can sell the commodity. Sometimes, the Islamic bank signs contract of an agency and sells client's commodity as his agent in market to third party and hands over the cash to client and charges some fee for its services from client.

DEFINITION OF MONETIZING SALE {BAY AL TAWARRUQ}

Here, we will define monetizing sale and clarify the concept of monetizing sale by explaining its literal and technical meanings though these are explained in other article related to jurisprudential monetizing sale. The word Bay al Tawarruq is component of two words 'Bay' and 'Tawarruq, {بیع و تورق} so it requires to define each one of this component.

a- **Literal meaning of bay:** i- The word: 'Bay' literally is source/infinitive {masdar} of ba,a which means hand. When the Arabs conclude a sale contract, one party places its hand on the hand of the other party. That is why the sale contract is called 'bay'.[1]

b- **Technical meaning of bay:** The word: 'bay' technically means exchange of valuable property with another valuable property with the consent of parties, or it may involve exchanging a commodity with curr**e**ncy and it usually means {bay] sale.[2]

a:- Literal meanings of Tawarruq:- The word: 'tawarruq' literally is derived from the word 'worq' which means silver or silver's

coin such as Dirham which was used as a currency at the time of prophet [صلي الله عليه وسلم].[1]

b:-Technical meanings of Tawarruq:

Ibn al Faris says: al worq means the leave of any tree and property is analogous to leave of trees because when leaves have dropped from the tree, it becomes bare and empty. Similarly, when there is no property with somebody, he remains empty handed.[2]

The word {Tawarruq} is the source {masdar} of fourth chapter of Arabic grammar {Sarf} namely Taf'a'ull and Mutawarriq means a person struggling hard to get money in cash. A businessman is not called mutawarriq because he does not struggle to get cash, while mutawarriq struggles extremely hard to get cash through sale and purchase of commodity.

b:-Technical meaning of 'bay al tawarruq: It is technically means coins made of silver and used as a currency in Islamic state and it was called Dirham and its plural is Drahim. [i]This term was first introduced by Hanbli jurists and it means to buy a commodity from one party on deferred payment and sell it to third party on cash price at spot value. The deferred price always is higher than the cash price. This sale is made to get money in cash; this commodity is not bought to utilize it.[3]

C- a-**Literal meaning of al Masrafi**. The word {al Masrifi] is derived from the word al sarf and sarf means excess and recommended worship is called sarf because it is excess on the obligatory worship and the person who can distinguishes between principal and extra amount he is called [Sairfi, Sarrafi and sarraf] [الصيرفي، الصرافي، الصراف][4]

b- **Technical meaning of al Masrafi.**

The word al Masrafi is component of two words: a- one is Masraf related with the word and Second is [Ya] [ي] which is used for affinity such as Pakistan and Pakistani and Maraf is noun for place [اسم ظرف] where Money [Saraf] is taken and given and this place is called Bank.[5]

Islamic Bank [المصرف الإسلامي] is defined as follows:

Dr Ahmad al Kjjar defined it [هو مؤسسة مالية مصرفية لتجميع الأموال وتوظيفها في نطاق الشريعة الإسلامية بمايخدم بناء مجتمع التكامل الإسلامي وتحقيق عدالة التوزيع ووضع المال في المسار الإسلامي.][6]

The Bank is money properties related institution to collect the money and investment these under the scope of Islamic law to be beneficial for the completion of Islamic society and for the achievement of justice based distribution and putting a property under the Islamic circulation.

OBSERVATION: There are two observations mentioned below:

First is that definition must be short words while this definition is not in short words because [وتوظيفها في نطاق الشريعة الإسلامية] and [ووضع المال في المسار الإسلامي] These two portions of definition are in the same meaning and the second portion is totally useless. Second is that the definition of

Islamic Bank comprises from [دور][1] and such definition is void according to scholars of logic, so this definition is void.

Islamic bank is defined as follows; [المصرف الإسلامي هومؤسسة مالية تقوم بجمع أنواع النقود من أصحابها، تيسيرالحصول للناس عليها، تمويلها واستثمارها في نطاق الشريعة الإ سلامية]

Islamic Bank is financial institution receiving money from the people, facilitating the access for the people to obtain it, financing and investment of these under the scope of Islamic law.[2]

DEFINITION OF BANKING MONETYZING SALE:

Majallah al Ahkam al Shariyya defined: It is purchasing commodity on deferred payment on higher price and selling it by cash price to get money in cash.[3]

Shaikh Ibn Taimiyyah said: If the purchaser took a commodity and sold it to the third party, for example he bought it for one hundred and sold it for ninety on the basis of need it is a case of tawarruq.[4]

Shafei jurists named it 'bay al Zarnaqah' and this word is converted from Persian word {Zar nah} to Arabic word {Zarnaqah} and {Zar nah} means: 'there is no gold' or 'I do not have gold'. al Azhari said: bay al zarnaqah means, a person buys commodity on deferred payment, sells it to third party by cash and it is valid sale. [5]

Other Muslim jurists such as Hanfeis and Malkeis discussed this form of sale under the topic of buy back {bay al Einah} or deferred payment sale but they did not give any specific name to it as Hanbleis and Shafeis jurists had given it proper name.[6]

DEFINITION OF BANKING MONETIZING SALE:

Banking monetization sale {Bay al Tawarruq al Masrafi} [بيع التورق المصرفي][7]. It means: A party buys commodity from bank on deferred payment and sells it through bank which is an agent, to the third party on cash payment. Or the bank purchases the commodity from original seller on the demand of second party or without his demand, sells it to second party on deferred payment. The second party sells it through bank which is an agent to the third party on cash price, gets money and fulfils his need with it. The cash price of any commodity is less than its deferred price.

Several persons are involved in this sale contract as explained below:

1- First party is the original seller sitting in the market; he sells the required commodity to the bank.

ii- Second party is the bank which is the middle man between first and third party. The bank buys this commodity from the party sitting on the demand of third party, the client, and the bank performs the role of middle man as an agent for the third party who is client.

iii- The third party is a needy person and he buys this commodity from the bank on

deferred payment on a fixed future date or different dates.

iv- The fourth party purchases this commodity from the needy party on cash payment.

DIFFERENT SITUATIONS: There are five situations of bay tawarruq in banking sector as follows:

i- Sometimes, the needy person sells the commodity to fourth party on cash payment to get money.

ii- Sometimes, the needy person sells this commodity to first original seller from whom bank bought this commodity, on cash price which is less than the price of deferred payment sale.

iii- Sometimes, the bank becomes the agent of the needy person and sells this commodity to fourth party on cash payment and hands over the money to the needy.

iv- In some cases, the bank sells this commodity to original seller on cash payment as an agent of needy person and hands over the cash to him.

v- Sometimes, the bank itself buys this commodity from the needy person on cash price which is less than the deferred payment price. However, this practice is not valid according to Hanfi, Malki and Hanbli jurists who hold that bay al einah is prohibited while, it is valid according to classical Shafei jurists.[1]

The second last situation is also disputed among contemporary scholars. If the sale and purchase price of commodity are different because the original seller is the seller as well as purchaser for the same commodity, and bank is the purchaser from original seller as well as seller to him for the same commodity as an agent of third party, it creates a doubt of being buy back even though the bank is selling this commodity to first seller as an agent of its client but not as owner of the commodity.

First three situations for banking monetizing sale are valid according to majority of Muslim jurists.[2]

INGREDINTS OF THIS SALE:

The ingredients of this type of tawarruq sale particularly the last situation of this sale are as under:

a- Islamic bank gets on undertaking from the client that when bank buys the commodity from market, the client will purchase it.

b- The Islamic bank buys commodity from market on cash payment.

C- The bank sells this commodity to client on deferred payment which is higher than the cash price of commodity and it is due to being deferred payment sale.

c- Some time, the commodity remains in the warehouse of the bank and it is only allocated to the client.

d- The bank signs agency contract with the client for selling the said commodity.

e- The bank sells this commodity to a third party in the market as an agent and hands over the cash to the client.

FEATURES OF THIS TYPE OF MONETIZING SALE:

a- The primary objective of this type of sale is to get cash.

b- There is prior understanding between the Islamic bank and the client to secure money through this sale.

c- The person who buys the commodity from the client is a third party, and he is neither first seller of commodity nor bank which sold this commodity to client. The seller and the purchaser in each contract are different parties.

d- The price of commodity in deferred payment sale is higher than the price of commodity in cash payment.

This type of monetizing sale is called Banking monetizing sale {bay al tawarruq al masrafi} [بيع التورق المصرفي].

VALIDITY OF BANKING MONETIZING SALE:

There are two opinions of contemporary Muslim scholars on the validity of Banking Monetizing Sale:

FIRST OPINION: Contemporary scholars such as Dr Ahmad Muhyi uddin, Dr Husain Hamid Hassan and Sami Suwailim hold that banking monetizing sale {bay al Tawarruq al Masrafi} is not valid and they base their opinion on the following evidences:

FIRST: The monetizing sale is prohibited on the basis of the principle [سد الذرائع]{blocking lawful means to unlawful end} because the banking monetizing sale involves Riba. For example, monetizing person gets cash amounting to forty thousand but pays fifty thousand and the difference of ten thousand is Riba which is prohibited.

ANALYSIS: This evidence is rebutted on the following grounds:

a- The principle of Saddy-e-dray is not agreed upon among Muslim jurists because Hanfi and Shafei jurists do not accept it as a general principle unless there is a text of Quran or hadith. For instance, the Quran says: Do not address Prophet Muhammad with the word of {Raina} [راعنا}] but address him with the word of {Unzurna} [انظرنا] meaning; look towards us. [**يَاأَيُّهَا الَّذِينَ آمَنُوا لَا تَقُولُوا رَاعِنَا وَقُولُوا انْظُرْنَا**]. [1]This is because when hypocrites address the Holy Prophet {blessing of Allah and peace be upon him} with this word, they disrespectfully use it in the meaning of shepherd. Although, the companions of the Prophet do not use this word in impudent meaning but they were not aware of the intention of the hypocrites.

Therefore, the companions were commanded to avoid addressing the Prophet [صلي الله عليه وسلم] with this word and it amounts to block the use of lawful means to achieve an unlawful end.

Wherever the means to unlawful end are not blocked by the text of the Quran or hadith, such means are not declared prohibited simply on the basis of principle of Sadd-e-Daraye because valid source of law permitted these means and whatever is declared permissible by the text of Quran and Sunnah, cannot be made unlawful by any secondary or controversial source of law.

SECOND: It is argued that the Bank's objective of monetizing sale is to charge interest because bank while concluding monetizing sale intends to charge an excess in price of commodity sold to client needing money and this objective is illegal and when

objective of contract is illegal, the contract is also invalid, so the monetizing sale is not valid.

ANALAYSIS: This evidence is also rebutted on the following grounds:

a- This evidence is not acceptable because interest is not involved wherever an exchange of properties takes place. Riba al fadl is involved only in exchange of two weighable or measureable properties exchanged by homogenous while Riba al Nasia is involved only in exchange of two homogenous or two homo-estimates in weight or measurement properties.

The banking monetizing sale is neither exchange of two weighable or measureable properties by the homogenous nor an exchange of two homogenous properties or two homo-estimates in weight or measurement, so interest is not involved in monetizing sale neither Riba al Fadl nor Riba al Nasia.

b- The legality of the objective is also a condition for the validity of contract according to Malki and Hanbli jurists although it is not a condition in the eyes of Hanfi and Shafei jurists.[1]

THIRD The opponents argued in the light of three traditions as follows:

a- Prophet {blessing of Allah and peace be upon him} said: All the acts are based on their intention.[2]

b- General legal maxim: All the matters are based on their objectives [الأمور بمقاصدها].[3]

c- Legal maxim: [العبرة في العقود للمقاصد والمعاني لا للألفاظ والمباني] the acknowledgement in the contracts is given to objectives and meaning not to words and spellings.[4]

ANALYSIS OF THESE EVIDENCES:

a- The first and the second evidences relate to worship matters and imply that performing any lawful act is not considered worship without intention of worship because intention is hidden matter related to the heart of a person. The acts of worship are based on intention because Almighty Allah knows the hidden matter while all other acts and matters are not based on the intention because these are concerning with mankind and he knows obvious things and knowing hidden things is out of the power of human beings and man is not required by Lawgiver to know the hidden matters and give a judgment on that basis.

c- The third evidence is analyzed on the following grounds:

a- Whether, the legality of objective of contract is a condition for the validity of contract or not There are two opinions of classical Muslim jurists in this regard:

i- Hanfi and Shafei jurists hold that the theory of contract is subjective. It means: when contract fulfils all the elements and conditions and it is free from the element of interest [riba] it is valid whatever are the objectives and intentions of the parties from concluding the contract except when there is a clear illegality.

They hold the view that: the legality of objective is not a condition for the validity of contract because the objective or intention is

hidden matter and hidden matter is not the basis of any contract. These jurists are called subjectivists and they argue on the basis of another legal maxim and it is: [العبرة في العقود للألفاظ والمباني لا للمقاصد والمعاني] The acknowledgement in contract is given to words and spelling not to objectives and meaning.[1]

ii- Malki and Hanbli jurists hold that the theory of contract is objective and legality of objective is stipulated for the validity of contact while Shaikh Ibn Taimiyyah and Ibn al Qayyim from Hanbli jurists are more rigid in this regard. They argue that simple legality of objective is not enough for the validity of contract but this objective must be in conformity with the objective of the Lawgiver otherwise this contract is invalid such as the jurisprudential monetizing sale.[2]

When this sale is valid according to all Malki and majority of Hanbli jurists because the objective of this sale is not to get interest but to get cash and getting cash and liquidity is not prohibited from purchasing commodity. However, Shaikh Ibn-e-Taimiyyah and Ibn al Qayyim hold that jurisprudential monetizing sale is not valid because the objective of Lawgiver from purchase is to benefit from the purchased commodity and utilize it. Thus this type of sale is not valid according to Shaikh Ibn-e- Taimiyyah and Shaikh Ibn al Qayyim.

b- The first and the second evidences relate to worship and imply that performing any lawful act is not considered worship without the intention of worship because intention is a hidden matter related to the heart of a person and Almighty Allah knows the hidden matters while all other acts and dispositions are not based on intention as these matters are concerned with people and they know the things which are obvious and knowing hidden things is out of their power and they are not required by Lawgiver to know hidden matters and give a judgment on that.

Note: 1- Two legal maxims are mentioned above and both are correct because implementation of each one of them is different and the first legal maxim is applied in worship matters while second legal maxim is applied in other than worship matters.

2- Second legal maxim is more powerful than first legal maxim because [الأصل في الألفاظ الحقيقة لا المجاز] the words are used in their figurative meaning but not in their metaphorical meaning unless intending a figurative meaning is impossible so utilization of first legal maxim is specified with worship matters and worship is made for Almighty Allah and He knows the intention and hidden matters, so applying first legal maxim in those matters occurred among the people such as contracts and dispositions is not valid because they do not know the hidden matters such as intention, that is the reason the first element of contract is form [صيغة] It means offer and acceptance though it is in shape of words or writing or act or indication and all these matters are not hidden.

SECOND OPINION: This is the opinion of some contemporary scholars on the validity of banking monetizing sale and these are: Doctor Musa bin Adam, al Shaikh Abdullah al Manie and Usman bin Bahr. They hold the banking monetizing sale [Bay al Tawarruq al Masrafi] is valid. They argue as under.

EVIDENCES:

a- Almighty Allah has permitted sale and prohibited interest.[1] Monetizing sale is a sale contract and sale is valid and there is no element of interest in it. When there is an exchange between a commodity and currency there is neither Riba al Fadl nor Riba al Nasia involved, so this sale is valid.

b- All the evidences mentioned in the validity of jurisprudential monetizing sale [bay al tawarruq al fiqhi] are the evidences for the validity of [bay al tawarruq al Masrafi] banking monetizing sale because this sale is an advanced form of jurisprudential monetizing sale and the validity of jurisprudential monetizing sale is established by evidences so the validity of banking monetizing will be established also.[2]

c- Jurisprudential monetizing sale is valid according to majority of Muslim jurists, so the baking monetizing sale will be valid according to them.

PREFERENCE:

The opinion of positivists of banking monetizing sale is preferable to the opinion of opponents of banking monetizing sale due to the reasons given below:

1- The evidences of positivists are stronger than those of opponents because the evidences of opponents are negated due to objections against them while there is no objection against the evidences of proponents.

2- The jurisprudential monetizing sale is valid according to all Muslim jurists including Hanfi, Malki, Shafei, and Hanbli jurists, while Shaikh Ibn Taimiyyah and al -Shaikh Ibn al Qayyim consider this sale as invalid and every verdict conflicting with consensus of Muslim jurists is rejected.

MALPRACTICES OF MONETIZING SALE:

However, it has been noticed that some Islamic Banks using tool of monetizing sale in objection able ways. For instance, a needy person comes to bank and requests for liquidity. The bank calls the manager of another bank, and these three parties sit together and conclude the monetizing sale. The first party, the Islamic bank, sells the commodity on deferred price to the client and the client sells this commodity at the spot to the manager of second bank on cash payment, receives money and goes away having no knowledge about the commodity, the quality of the commodity or its location.

Such malpractices of Islamic banking are prohibited due to following reasons:

1- The subject matter is not known. 2- It is not delivered and not possessed. 3- It may not exist. 4- It may not be owned by the first bank and same may be the case when the client sells this commodity to the second bank. These are the basic conditions for the validity of contract and when a contract does not fulfill any one of these conditions, it is not valid.[ii]

CONCLUSION:

The conclusion of the above study of banking monetizing sale is as follows:

a- The principle of blocking lawful means for an unlawful end {Sadd-e-Daraye} is constituted by Malki and Hanbli jurists while it is not acceptable as a general principle according to Hanfi and Shafei jurists except

in case where the text of the Quran or Hadith commands for the implementation of principle of Sadd-e-daraye.

b- Banking monetizing sale {Tawarruq al Masrafi} is valid according to majority of contemporary Muslim scholars because it is advance form of jurisprudential monetizing sale while it is not valid according to some followers of Saikh Ibn Taimiyyah.

c- The opinion of majority of Muslim jurist is preferable to the opinion of minority in the validity of monetizing sale.

d- Every verdict conflicting with consensus of Muslim jurists is rejected.

e- The element of agency adopted by Islamic bank should be eliminated from monetizing sale because it creates doubt in the validity of monetizing sale and doubt is that the banking monetizing sale is similar to buy back {bay al Einah} due the agency mentioned and buy back is prohibited according to majority of Muslim jurists .

f- It is appropriate for the bank to inform the client about the market where he can sell his commodity bought from bank on deferred payment and he can take cash immediately.