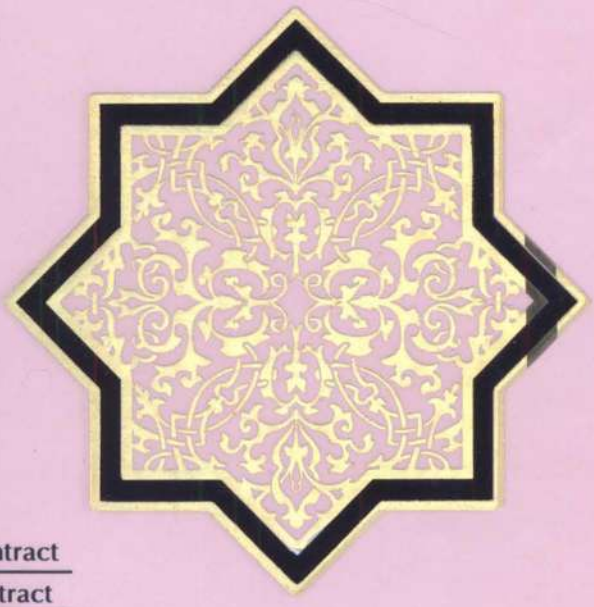
ECONOMY

The Islamic Approach

by
Mufti Nasim Ahmad Qasmi

INCLUDING
Islam & Modern Economic Issues
Dealings In Shares
Injunctions Regarding Shares at Stock Exchange
by
Justice (r) Mufti Muhammad Taqi Usmani



Mudharbah Contract
Musharkah Contract
Salam Contract
Partnership Contract
Murabahah Contract
Leasing Contract

DARUL-ISHAAT
Karachi-Pakistan.

ECONOMY

In

ISLAMIC APPROACH

ECONOMY

The

ISLAMIC APPROACH

by

Mufti Nasim Ahmad Qasmi

Including

Islam & Modern Economic Issues

Dealing In Shares

Injunctions Regarding Shares at Stock Exchange

by

Justice (r) Mufti Muhammad Taqi Usmani

Mudharbah Contract
Musharkah Contract
Salam Contract
Partnership Contract
Murabahah Contract
Leasing Contract

Translated by

Z. Baintner

DARUL ISHAAT

Karachi-1, Pakistan

FIRST EDITION
2009

PRINTED AT
H.MI GRAPHICS

PUBLISHER
DARUL - ISHAAT URDU BAZAR KARACHI-1 PAKISTAN.
E-mail : ishaat@pk.netsolir.com, ishaat@cybernet.pk

AVAILABLE AT
MAKTABA MA'ARIFUL QURAN, DARUL ULOOM, KORANGI, KARACHI

AVAILABLE IN U.K.
AZHAR ACADEMY LTD
54-68 LITTLE ILFORD LANE, MANOR PARK, LONDON E12 5QA

AVAILABLE IN U.S.A

DARUL-ULOOM AL-MADANIA
182 SOBIESKI STREET,
BUFFALO, NY 14212, U.S.A

MADRASAH ISLAMIAH BOOK STORE
6665 BINTLIFF, HOUSTON,
TX-77074, U.S.A

AVAILABLE IN SOUTH AFRICA

AL-HUDA PUBLICATIONS
35 CENTRAL AVE, MAYFAIR 2092
JOHANENSBURG S. AFRICA

CONTENTS

☆☆☆

بسم الله الرحمٰن الرحيم

ISLAM AND MODERN ECONOMIC ISSUES

A comparative study of three economic systems: Islam, Socialism and Capitalism

الحمد لله ربّ العالمين والصلوٰة والسلام على سيدنا ومولانا محمد النبى الامين وعلى اله واصحابه اجمعين وعلى كل من تبعهم باحسان الى يوم الدين ـ اما بعد

Today's topic

Honourable president, ladies and gentlemen, *As-salam alaikum wa rahmatullahi wa barakatuhu.* It has been decided that the topic of today's discussion shall be: Islam and modern issue.

One hour has been allotted for this topic. This time-allotment is quite insufficient. Rather, in my opinion even the word 'insufficient' is quite insufficient in this context. This is why I rather come directly to the topic, instead of giving any long introductory speeches, in the hope that I can in this short period of time present you some aspects of this topic, to the best of my ability. This topic is such it cannot be discussed in depth in one hour, a whole conference would not suffice to cover this topic on which a considerable number of voluminous books have been written, and in fact, are being written. So it is rather impossible to do justice to this topic during a short meeting.

Modern issues are so abundant and diverse that even selecting is nothing short of a trial. This is why I, instead of discussing in detail matters pertaining to modern economic

issues, would rather present you an outline of the fundamental economic teachings of Islam, so as to give you a proper concept of the same. Dr. Akhtar has pointed out some economic issues which are in fact all based on the basic concepts and the solution to these needs to be searched in the framework of these basic consepts. It is hence of foremost importance to give you a clear concept of an Islamic economy, so that it may become known what exactly is meant by 'Islamic economy', and what are its peculiar features which distinguish it from other economic systems. As long as this matter is not clarified, it seems not proper to discuss economic issues, or to work out their solution, even though only in theory. Hence, I would like to present you the basic concepts of an Islamic economy, and compare if them to other economic systems which are now adays in vogue all over world. I pray to Allah to assist me in accomplishing my task in a becoming manner and on time. Amin

Islam is a way of life

The first thing that needs to be kept in mind as far as Islamic economy is concerned, is that Islam is not on economic system in the sense in which the term 'economoic system' is used today. Islam is rather a whole way of life, and economy is an important branch thereof. But it would be improper to introduce or consider Islam an economic system, like capitalism or socialism. So when we talk about Islamic economics, or the fundamentals of the Islamic economic concepts, then we should not expect to find in the Holy Qur'an or the Sunnah of Allah's Messengerصلى الله عليه وسلم, fully formulated economic theories like those of Adam Smith, Marshall and other leading economists, because Islam, as such is not an economic system. Islam is a way of life, and economics constiute a small though important part thereof. However, Islam does not hold economic activities to be the purpose of life. So when I am now going to talk to about economics, then you should keep mind that if one was to look in the Holy Qur'an and the Sunnah for economic terminologies and

concepts as they are found in any economics book, then one would not find the same. But Islam provides man with the basic concepts of life on the fundaments of which one can build an economy. This is the very reason why I prefer to use in my talks and writings the term 'Islamic economic teachings' rather than 'Islamic economic system.' Now what kind of economy would result from these economic teachings, what kind of framework would appear? This question is of utmost importance for any student of economy.

Economics is not the main concern of life

Another point is that, although economics are an important part of the Islamic teachings and one easily estimate the importance thereof: if one was to divide any book on Islamic jurisprudence into four parts, then two parts would deal with matters pertaining to economics. You must have heard about Hidaya, one of the well-known books of Islamic jurisprudence. It consists of four volumes, and the last two volumes comprise of economic teachings. From this one can estimate the importance of the Islamic economic teachings. But one must always keep in mind that unlike in other economic systems economics are not considered as the main concern of life. All secular economies have declared that economics are the main concern of any human being's life. Islam however gives due importance to economics, but does not consider it to be the main concern of life.

The actual destination is the Hereafter

The main concern of life seen from the Islamic point of view is that this world into which man has come, is neither his final destination nor abode. It is a stage, a transistory phase, through which he has to pass in order to reach his actual destination. There is nothing wrong if one wants to pass this transistory phase in an agreable manner, but thinking that all one's efforts and energies ought to be directed towards acquisition of worldy goods is a consideration which is not according to the spirit of Islam.

On one hand Islam has given this world due importance-worldly profit has been termed 'goodness' and Allah's 'bounty' in the Holy Qur'an-and the Noble Messenger صلى الله عليه وسلم said.

طلب كسب الحلال فريضة بعد الفريضة

(Kanzul-Ummal Hadith No. 9231)

'Striving to earn one's livelihood in a lawful manner is an obligation after the (other) obligation'; but on the other hand it has been said that one should not put all one's efforts into this world, for after this world comes to an end there is another, eternal life to come, namely the life of the Hereafter. And prosperity in the Hereafter should in fact be the foremost concern of a human being.

The parable of this world

Mawlana Rumi has elucidated this viewpoint with an excellent parable. He said :

آب اندر زیر کشتی پشتی است
آب در کشتی ہلاک کشتی است

(Miftahul Uloom, Sharh Mathnavi Maulana Rumi 2/37)

The similitude of this world is that of water, and the similitude of man is that of a boat. Just like a boat cannot move on without water, man cannot stay alive without this world and its provisions. Well, as far as the water and the boat are concerned the water benefits the boat only as long as it surrounds the boat, as long as it supports the boat. But once water enters the boat it will be on longer of benefit. It will rather destroy the boat, causing to sink. The case of man and worldly provisions is not much different. Worldly provision are extremely beneficial for man. One could not stay alive without them. But this holds true only as long as the water of worldly provision is a means to keep the boat of one's heart afloat. Once the water of worldly provision enters one's heart, it causes one to sink and it becomes a means of one's ruin.

This is the Islamic viewpoint regarding economics. But this does not mean that Islam considers these matters a superfluous frivolity. Islam does not teach celibacy. Worldly provisions and matters pertaining to economics are extremely useful, provided one utilizes the same within certain limits, and provided one does not consider them to be the ultimate objective of one's existence.

After explaining these two basic points, we need to know what are the basic problems of any economy, and how were they solved in the present economic systems, namely capitalism and socialism.

The meaning and implication of 'economics'

As far as the first question namely' 'What are the basic problems of economy?' is concerned, well, even a person who has just begurn to study economics knows that there are four basic problems of economy, but before we try to understand these four problems, we need to keep in mind what economics means. The Arabic equivalent of economics is 'اقتصـــاد'. Now if we look up this word in a dictionary, then we find that it actually implies a person's fulfilling his need in a sufficient, prudent manner. This idea is conveyed by both the Arabic word 'اقتصـــاد' and the English word 'economics'. Hence the foremost problem of economics is that man's needs or rather desires are unlimited, where as the means and resources to fulfil those desires are limited. If means and resources were of such quantity so as to match man's needs and desires, then there would be no need for the subject economics. Economics however is needed because man's needs and desires are far more than the available means and resources to fulfil these desires. Now one needs to overcome this discrepancy, and bring about confirmity between these two, so that one can fulfil one's needs and desires ina sufficient and prudent manner. This exactly is the subject-matter of economics, and seen from this point of view, any economy has to solve four core issues in order to bring about the above mentioned confirmity. These four core issues are :

1. Determination of Priorities

The first core issue is that which is referred to as 'Determination of priorities'. Man has got countless needs and desires, but not as many means and resources to fulfil the same, now one has to decide which desires should get priority, and which not. This is the first problem of economics. If for example, I have got 50 Rupees, then I could go to the market and purchase a certain quantity of flour. I could also purchase some cloth. Or, I could sit in a restaurant and buy some refreshment. I could also purchase a cinema-ticket and watch a film. These are the options which I have. Now I have to decide which option to choose, how to use my 50 Rupees. This is called 'Determination of Priorities'.

Now just like an individual is faced with this problem, similarly a whole country, a whole state, a whole economy is faced by this problem. Let us take for instance Pakistan, which has got human resources, natural resources and financial resources, and all these resources are limited. Our needs and desires however are unlimited. Now, with the resources at our disposal we can grow wheat or rice or tobacco in our fields. We can also spend all our resources on luxuries. These options are available to us. Thus, the first issue of an economy is how to determine priorities and which activity is to be given precedence over others.

2. Allocation of Resources

The second core issue is that which is referred to as 'Allocation of Resources', namely which resources should be allocated for which purpose and in which quantity. We have got, for example, land, factories, and human resources. Now the question is how much land should be used to grow wheat, and how much for cotton, and how much for rice? In the terminology this is known as 'Allocation of Resources', namely which resource is to be allocated for which purpose and in which quantity?

3. Distribution of Income

The third issue is that once production starts, how should one distributie the income in the society. This is called 'Distribution of Income'.

4. Development

The fourth issue is referred to as 'Development' in the terminolgy of economics. It is basically the question how our economic activities can be developed further, so that the quality as well as the quantity of our produce increases, that new products come into existence and that new economic venues open up for the people.

These are four basic economic problems which every economy has to face. Now after having pinpointed these four problems, we need to see how the economic systems which are currently in vogue tackled these issues. Only thereafter one will be able to appreciate the Islamic solution to these problems, for, as an Arab poet has aptly said :

و بضدها تتبين الاشياء .

That means as long as one has not seen the opposite of a certain matter, one is not able to appreciate its actual virtue and beauty. Was it not for the darkness of the night, one could not appreciate the light of the day. Was it not for heat and congestion, one would never realize what a great mercy rain is. Hence we will first have to see how the current economic systems have resolved.

How capitalism attempts to solve these issues

Capitalism shall be examined first. According to the underlying philosophy of capitalism, there is only one way, one magic spell to resolve these issues: give people total freedom to make as much profit as possible, then, when everyone is concerned how to make as much profit as possible, and everyone exerts him or herself in that direction, then those

four issues will be automatically resolved. Now arises the question how these issues will be resolved automatically?

The answer to this question lies in a set of universally applicable laws, which are called the laws of supply and demand.

Besides students of economy even the common man knows so much about these laws that the price for a certain commodity goes up when its demand exceeds its supply, and that the price for a certain commodity goes down when the supply thereof exceeds its demand. Let us assume, for instance, that there are mangoes available in the market, and there are many people who want to buy mangoes because they like mangoes, and that there are not enough mangoes to meet the demand. That means the demand for mangoes exceeds the supply. As a result thereof, the market-price for mangoes will go up. Now let us assume that mangoes are brought to an area where people are not particularly fond of mangoes. There are only few people who feel inclined to have mangoes, so there is very little demand for mangoes, and hence their price will go down. This is a universal law and principle which everyone knows.

According to the capitalistic theory it is this very law of supply and demand which determines what is to be produced, and in which quantity, and how to allocate resources. All this is determined through the laws of supply and demand, so if we leave people free to earn as much profit as possible, then everyone will try to produce whatever is in demand in the market. So if want to start business today, I will first of all find out which procuct is in demand in the market, so that when I launch this product, I can earn as much profit as possible.

So if people work motivated by the prospect of earning profit, then they will make such products which are in demand, and when the demand for a certain product decreases, then they will refrain from increasing the produce thereof, as otherwise the price of this product will decrease, or at least because they will not be able to earn the full profit.

Hence it is said that the laws of supply and demand dominate the market in such a way that through them priorities are automatically determined as to what should be produced and in which quantity, and the allocation of resources is also based upon that, because a person will utilise his land and factories to make such products which are in demand, so that he can earn as much profit as possible. Thus the four core issues are resolved through the prospect of earning profit. The laws of supply and demand are basis of this system which is known as price mechanism; resources are allocated under this very price mechanism.

The case of distribution of income is similar. According to the capitalistic theory income is distributed keeping in view the laws of supply and demand. There is, for instance an entrepreneur who has set up a factory, in which he employs a number of workers. Now arises the question : How much of the generated income should go to the workers and how much to the entrepreneur? This decision is in fact also made under the laws of supply and demand. The more demand there is for workers, the higher will be their salaries, and the less demand there is for workers, the less will be their salaries. The income is distributed according to these principles.

The last issue, namely that of development, is resolved in the same manner, namely if everyone's concern is to earn as much profit as possible, then in order to do so people will keep inventing such things through which they can attract more and more customers.

So if one gives people complete freedom to earn, profit, then those four core issues are automatically resolved priorities are determined, resources are allocated, income is distributed accordingly, and economic development takes place, as well. Such is the capitalistic theory.

How socialism attempts to resolve these issues

When socialism came in vogue, it was said: Listen you put blind and deaf forces of the market in charge of the most vital

economic issues, because the forces of supply and demand are blind and deaf indeed, and you also said that people will produce whatever is in demand, and that they will do do as long as there is demand, well, this might hold true in theory, but once it is put into practice, it happens that a considerable period of time elapses before people come to know whether their product is in demand or not. Then there are also times when an entrepreneur thinks the demand for his product is increasing, whereas demand is actually decreasing. The entrepreneur however under the misconception that there is an increased demand increases production, which finally leads of a market slump, the perilious outcomes of which affects the whole economy. Hence it is not proper to leave such vital issues to blind and deaf forces.

Capitalism presented one magic spell to resolve those issues, and socialism presented another spell. According to this theory instead of permitting private ownership of resources of production, they should become common property. This can be achieved if all such resources are handed over to the government, and the government then plans on how much land wheat is to be grown, on how much land rice is to be grown, on how much land cotton is to be grown, how many factories are supposed to produce cloth and how many factories are supposed to produce shoes, etc. All this planning should be done by the government. The government will further arrange payment for those who work in the agricultural sector and those who work in factories, etc, and how much pay is to be given to whom is also decided by the government. Thus the government will determine priorities, allocate resources, distribute income and plan futher development.

Now since the government plans and controls all economic activities, socialism is also called 'planned economy', as opposed to capitalism which is also referred to 'market economy' since it left all of its resources to the forces of supply and demand, and 'laissez-faire economy' since the government does not intervene in economic activities.

These are two differently economic system which are currently in vogue.

The basic principles of a capitalistic economy

The first out of the basic principles of a capitalistic economy which result from its under lying philosophy, is that of private ownership, that means anyone can, as an individual, become owner of resources of production. The second principle is what is known as 'laissez-faire policy of state', that means everyone is free to earn profit without any intervention or restriction on part of the state. The third principle is that of the motivation to earn profit, namely to use the prospect of earning profit as a motivation for man to participate and accelerate economic activities. These are the basic principles of capitalism.

The basic principles of a socialistic economy

On the other hand, the first basic principle of socialism is to abolish private ownership of sources of production, that means or individual can own a source of production such as land od factories. The second principle is that of planning, that means each and every activity is thoroughly planned by the relevant authority. Thus we currently have two different economic theories.

Outcomes of Socialism

Everyone can see the result which different experiments carried out in both systems have yielded. After 94 years of experimentation the structure of the socialitic system has completely collapsed, so that all the giants ended up biting the dust and that although some time ago, nationalisation had been in fashion all over the world, if someone dared to speak against it, he was labelled as an agent of capitalism and backward.

But now even Russian leaders said :

'Alas ! Had the socialistic theory been tried out in any small African country, rather than Russia. Then at least we would have been spared the consequences thereof !'

Socialism was a completely unnatural system

Anyway, Socialism was a completely unnatural system which would not have worked in any case, for there are more social issues than just matters related to economy. If we were to resolve all those issues through planning, then rest assured no issue would be solved at all. See, marriage is also a social issue. A man needs a suitable wife, and a woman needs a suitable husband.

Now if anyone would claim that leaving such an important issue up to the people leads to all sorts of evil consequences such as divorces, broken homes, domestic disputes, and so on, and that this issue should rather be entrusted to the government who would then decide which woman is suitable for which man, and vice versa, well, if anyone wanted to resolve this issue through planning, then this would become a highly unnatural, artificial affair from which one can not expect much good.

This is just what had happened in the socialistic setup. Since all issues were left to be resolved through planning, one important question arose: Who is going to do the planning? Obviously, the government is going to do the planning. And what is 'government'? 'Government' definitely does not refer to a group of angels, rather it refers to a group of human beings. The socialistic theorem claims that capitalists grab vast resources and do as they please, but it failed to highlight one point, that although socialism finished many capitalists, it created one enormous new capitalist: bureaucracy. All resources, the whole economy has fallen into the hands of bureaucracy, and is there any guarantee that bureaucrats are not going to deal unjustly? They are no angels after all. Their innocence is not attested. This system is definitely faulty. It

was doomed to failure, and it has failed, as you all have seen, and now people feel shy of mentioning merely its name.

The evils of capitalism

Now that socialism has failed, the western capitalistic countries seen to have all reason to celebrate, for the failure of socialism proved that capitalism is the right thing. No other economic system could possibly work for mankind; this has been proven beyond doubt.

Understand it well, although the underlying philosophy of capitalism, namely a free markeet policy and freedom to earn profit are rational in theory, this very philosophy uprooted itself since it was put into practice without any restraint. It is correct that if man is left free to earn profit, the forces of supply and demand will adjust themselves thus resolving many an economical issue, but the forces of supply and demand can work only in a market where there is free competition and no monopoly.

Let me give you an example : I want to buy a knife. In the market there are many people who sell knives at different rates. One shop-owner sells a knife for 500 Rupees. Another shop-owner sells it for 450 Rupees. Now it is up to me whether, buy the knife for 500 Rupees or for 450 Rupees. In this case the forces of supply and demand work properly, and their proper functioning is apparent. But if there is only one shop-owner who sells knives, then I have got no choice. If I have to buy a knife, I have to buy it from that one shop-owner; and that shop-owner can sell the knife to me for any price he likes. I have got no other choice but to pay the price he demands. Here the forces of supply and demand fail to work. The price has been determined by only one party the monoplist, and I have no choice of my own.

The forces of supply and demand can work only were there is free competition; they cease to work where there is monopoly.

If man is left free to earn as much profit as possible in any manner he likes, then he is likely to adopt such means which

result in the establishment of a monopoly. Besides that, capitalism allows man to earn by charging interest, through gambling and through lotteries; whereas the Holy Shariah has strictly forbidden these sources of income. In capitalism, however man is at leave to adopt such means, as a result of which monopolies can come into being. Consequentially, the forces of supply and demand stop functioning. They get paralysed, so to say, hence the philosophy of capitalism cannot be translated into practice.

Another evil consequence of permitting man to earn profit in any way he pleases is that man's ethical concern as to what is beneficial for society and what not, are likely to deteriorate. A couple of days ago I read in the 'Time' magazine that a model girl earns 25 million dollars in a single day, just by posing in a photosession for a certain product. Now comes the question : From where does the industrialist and trader take those 25 million dollars? Obviously he will take them from his poor customers. Once the product is launched, the 25 million dollars are added to the cost price of the product. Thus it is actually you and I who pay.

One night in a five-star hotel costs around 2500 to 3000 Rupees. A person with an average income feels shy to even look at those hotels, but yet, all of those five-star hotels were built from the income of the common man. Have you ever seen who comes to stay in those hotels? Many of the guests are government officials who stay there at the expense of the government. And 'at government expense' actually means 'at the tax-payers' expense'.

Businessmen and industrialists also opt to stay in five-star hotels during their business-trips. How do they cover the expense of their stay? Definitely not from their own pocket! Rather they include these expenses in the price of their products, and this price is then paid by the common man.

There is no ethical code to tell one which way of earning profit is proper and beneficial for the individual and for society, and which way of earning profit is detrimental for

society. This result in all kinds of unethical behaviour, injustice and oppresion.

The economic injunction of Islam

Now let me come toward the economic injunctions of Islam, so that it can be understood well in the light of the above discussion. According to the Islamic point of view the resolution of economic issues should be left up to the market forces, rather than planning.

This basic philosophy is accepted by Islam. In the Holy Qur'an comes :

نحن قسمنا بينهم معيشتهم فى الحيوة الدنيا ورفعنا بعضهم فوق بعض درجت ليتخذ بعضهم بعضا سخريا

'We have apportioned among them their livelihood in the life of the world, and raised some of them above others in rank that some of them may take labour from others.' *(Sorah Zukhruf. Ayat-32)*

The last sentence how beautiful it is, 'that some of them may take labour from other' means that Allah has organised the whole universe, and He has apportioned provision for His creatures. In other words, allocation of resources. fixing of prices, distribution of wealth and income, all these principles are not the brainchild of human planning, rather Allah Most High Himself has arranged and organised things in such a manner that provisions are distributed on their own. His saying: 'We have apportioned among them their livelihood' does not mean that Allah Most High Himself has come to distribute income this much for you, that much for me..... Rather it means that He has made such laws of nature in the light of which the process of distributing provision among mankind taken place on its own.

In one Hadith the Noble Prophet صلى الله عليه وسلم has explained one of the highest economic principles :

دعوا الناس يرزق الله بعضهم من بعض

'Leave the people on their own. Allah shall provide for some of them through others.'

(Sahih Muslim, Kitabul Buyoo, Bab Tahreemul Ba, Al-Hadir lil Badi, Hadith No. 1522)

That means do not put them under unnecessary restrictions, rather leave them on their own. Allah Most High has arranged things in a strange manner. Let's assume I feel like going to the market to buy Lychee. In the market is a fruit vendor to whom it occurred to sell Lychee. Now that I have entered the market. I see a person selling Lychee. I go to him, ask him for the price, do some bargaining, pay him and take the Lychee. This is what the above Hadith means, leave the people on their own, Allah shall provide for some of them though others.

Islam confirms this basic principle, that it is the market-forces of supply and demand that regulate commercial transactions. Islam however rejects the distinct philosophy of capitalism to leave the market forces free to work on their own. According to the Islamic point of view, man should not be left fully free. So as to curtail the freedom of his fellow human beings and establish a monopoly in the market. Islam has imposed certain restrictions which limit this freedom. These restrictions can be divided into three groups :

1. Religious restrictions.
2. Moral restrictions.
3. Legal restrictions.

1. Religious restrictions

The first group of restrictions which is based on the religion of Islam is of utmost significance as it distinguishes the Islamic economic theorem from other ideologies. Once capitalism recanted its basic principles it has stooped so low that now the government has to interfere with it in one way or the other. This interference on part of the government

however, is based on human intellect and secular concepts. The restrictions imposed by Islam, on the other hand, are based on religious concepts. What exactly are these concepts? They are complete abstention from interest, gambling, hoarding, monopoly and speculation. Islam has rendered these restrictions absolutely unlawful. In general, Islam permits dealings between two persons or groups on the basic of mutual agreement, and it considers such dealings as lawful. However, Islam does not permit mutual agreement on dealings which might result in ruin of social morality and integrity, and which stand in contradiction to the laws of the Holy Shariah. For instance, mutual agreement on interest based transactions has been totally forbidden in Islam as this leads to serious corruption and allover degeneration of society. There are many books which deal with evils of interest, all of which cannot be enumerated here. Nevertheless I shall give you a little example so that you may get an idea about the disastrous consquences of this evil, namely interest.

The evils of an interest based system

The theory of interest is based on the fact that the gain of one party is guaranteed. while the gain of the other party is not If a man borrows money from someone on interest then the money-lender is sure to get the amount of interest that accrued on the money lent. As for as the borrower is concerned, he has to pay the amount of interest to the money-lender at an agreed rate every year regardless of whather the business carried out with take money resulted in profit or loss. So the debtor's gain is quite uncertain, and at times he suffers a great loss.

At other times it so happens that the debtor makes a huge profit with his loan. Let us assume a person starts business with a capital amount of ten crores Rupees, borrowed from a bank on interest. He then makes of profit of 50%. Out of this profit he pays the bank only 15% and the remanining 35% go into his own pocket. Now consider, with whose money did he conduct the business? It was public money (the investors's money, to be more exact) and 35% of that profit earned on that

money went into the pocket of one single person, i.e. the business-man. The remaining 15% went to the bank. After deducting its own share, the bank distributed a small portion of that profit, let's say 10%, percent among its depositors. The result was that out of 50% profit which had been earned through public money, only 10% are actually distributed among the public while 35% thereof go into the pocket of one man. The public is quite satisfied, for their deposit of one hundred Rupees become one hundred and ten Rupees at the end of the year. However, they do not know that even this meagre profit of 10% reverts to the capitalist business-man. This is so become the 15% interest which he had to pay to the bank will be included in the cost of the product, which will in turn be reflected in the price of the same.

Thus the business man will recover this amount from the consumers. As a result of this vicious circle, the business man ultimately reaps the profit in every respect, and he remains safe and secure from the risk of loss. Even if he ever happens to suffer a loss, the insurance companies are there to cover his loss and they also pay this compensation out of the money of the premiums charged from the policy-holders in periodical instalments. Thus the capitalistic system thriver in the public money. I have tried to in a few words to give you a faint idea how an interest-based system words, how it breeds injustice, inequity, and unfairness in the distribution of wealth, which is strictly forbidden in the Islamic Shariah.

The benefits of Musharakah and Mudharabah

If the same business was based on the principles of Musharakah and Mudharabah (cooperative profit and loss sharing), there would have been no need for the borrower and the bank to agree on an interest-rate of 15%. Rather the agreement of the parties would be based on the principle of profit-sharing, that means the businessman and the bank would share the profit say, on 50:50 basis. In other words, it the rate of profit was 50%, then 25% thereof would go to the bank and the other 25% would go to the business man. In this way,

the trend of wealth would be downward rather than upward because the depositors would receive on their diposits through the bank 25% of the profit earned. It is thuse apparent that charging interest has got a negative impact on the process of distribution of wealth, which, in turn, disturbs the smooth economic process.

Gambling is prohibited

Gambling is totally prohibited in Islam. In gambling a person places at stake some fixed amount of money. The money thus invested will either be lost or will bring with it a much larger amount that shall go to the gambler. Gambling has got money attractive forms. It is quite amazing that gambling is considered as unlawful in many western countries, but when it taken a civilized shape it becomes legal. If, for example, a poor man is gambling on the roadside, it is quite likely that the police is going to apprehend him. On the other hand, if gambling is given some other name, and if it is committed under the auspices and protection of some gambling association, it is considered to be lawful. Such forms of camouflaged gambling are quite common in a modren capitalistic set-up. Small amounts are taken from a great number of people. Pooled together these small amounts become a huge sum of money which is distributed among a few fortunate persons. Lotteries which are prevailing all over the world are nothing but a from of gambling. Islam has rendered gambling totally unlawful.

Monopoly

Monopoly is also forbidden in Islam. Since everyone ought to be well aware of this evil, there is no need to discuss this topic at length.

Hoarding is prohibited

'Iktinaaz' means hoarding of monetary resources, so as not to pay zakah and other dues levied by the Holy Shari'ah. This is also prohibited in Islam.

An example

The Noble Prophet صلى الله عليه وسلم is reported to have said :

لا يبع حاضر لباد

'No city-dweller should sell the merchandise of a villager.'
(Sahih Muslim, Book of Sales, Hadith No. 1522)

A villager brings his merchandies to sell it in a nearby city. A man who lives in the city intercepts him and offers him to sell the merchandise on his behalf. It seems like there is nothing wrong with this transaction since both parties agree to this arrangement. However, the Noble Prophet صلى الله عليه وسلم has forbidden this kind of deal, because the city dweller might withhold the commodity from the market so as to effect a price-rise resulting from the thus created artificial shortage. If, on the other hand, the villager himself sells his merchandise, he will want to sell it as early as possible and return home. In this case the price of the merchandise will be determined by actual supply and demand. If there is a middle-man, the free operation of the law of supply and demand will be disturbed, which leads to an increase in prices.

The Islamic Shari'ah has blocked all doors to the birth of dearness, injustice and inequity in the society. This is the first restriction which has been imposed on this free economic activity in trading.

2. Moral restrictions

The second kind of restrictions which have been imposed on free economic activities are moral restrictions. Many things are referred to as 'Mubah' (permissible) in the terminology of the Holy Shari'ah. These things are neither unlawful (so as to entail any sin) nor is there any order to do them. I have already said that Islam is not the name of an economic system. Rather it is a religion and a way of life. The first lesson which Islam teaches is that man's final destination is the Hereafter, and that ultimate blessings and prosperity are to be found in the Hereafter. Islam does not

prevent man from earning profits for himself, but it gives more importance to the efforts which a person makes towards a pleasant life in the Hereafter. Islam has, therefore, taught us to earn profit in this wordly life, employing lawful means, but not at the expense of the Hereafter which is after all our final abode.

Islam has taught us to shun evil and to do good deeds in this world. This will be beneficial for us in our worldly life, but the actual benefit which we shall reap in the Hereafter shall be beyond measure. If, for example, a person goes to the market with the intention of benefitting the whole society through his dealings apart from reaping benefits himself, then this deed of his becomes an act of worship for which he deserves to be rewarded.

In a capitalistic setting the capitalist satisfies the demands of the people, without having any concerns whether these demands are lawful or not. Islam however always considers the moral or immoral aspect of our activities.A worldly-minded businessman will not hesitate in opening a brewery when he finds that there is a brisk demand for alcoholic beverages and that he might earn much profit. Islam however does not allow this act. If a man invests his money in the construction of residential houses, knowing that the enterprise is not very profitable, with the intention of relieving people from a great difficulty by providing them with a suitably priced accommodation, them this act will be of high morality and value in the sight of Allah. Islam thus gives more importance to moral and religious values than to earning profit for worldly purposes only.

3. Legal restrictions

The third restriction is the legal restriction. If an Islamic government considers it in the interest of Islam as well as for the moral integrity of the people as necessary to issue a certain ordinance, then the people are bound to abide by this ordinance. In the Holy Qur'an comes :

يـاايهاالذين آمنوا اطيعوا اللّٰه واطيعوا الرسول و اولى الامر منكم

'O you who believer, obey Allah and obey the Messenger and those of you who are in authority'. *(Surah Nisaa, Ayat-59)*

The phrase 'those of you who are in authority' refers to the high officials of a truly Islamic government. Hence, if the government considers it as necessary for some reason or the other that the people should fast on a particular day, and issue an order to this effect, then the people will have to obey that order. Anyone who defies this order will commit a sin, becuase it is an obligation to obey such kind of orders, in compliance with the above verse of the Holy Qur'an.

(Shami 4/464; Roohul Ma'ani 5/66)

The jurists have further written that if 'those in authority' issue and order that the people should not eat melon, it becomes unlawful for the people to eat melon. 'Those in authority' have been given the right to issue such orders, provided such orders serve the interest of the people. This may include partial planning as well. For instance, the government may order the people to invest money in such and such scheme and to avoid investments in other schemes. The government can legally impose this kind of restrictions within the himself of the Shariah.

To sum up

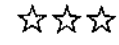
This highlights the basic difference between capitalism and the Islamic economic system. With regard to legal restriction, they are also found in capitalism but they are the product of the human mind. In Islam, restrictions are based on religion which is derived from Divine Revelation in which Allah Most High Himself made clean what is lawful and what is not, what is useful and what is not. Mankind cannot take the course of harmony and moderation unless it follows the ways shown by Allah, the Creator of the Worlds.

Socialism has indeed been defeated, but what about the evils and inequities of capitalism? Have they been defeated as

well? No! They are present today as much as they were yesterday. Their remedy lies in the restrictions imposed by Allah, through the Islamic Shariah. It is our misfortune that so far were not able to present the world a practical form of an economic system, based on Divine Restrictions. It is a great challenge for the Islamic Republic of Pakistan to present the world a practical example of these economic teachings, so that the world may know the basic characteristics of the Islamic economic system and how they can be adopted.

I think I have taken more of your time then I should have taken, and I also feel that I have kept you engaged in a rather uninteresting subject. I am also grateful to you that you have given me a patient hearing during this discussion.

May Allah Most High make this talk useful for us all and may He bring about a good result. *Ameen*



Dealing in Shares

Maulana Mufti Muhammad Taqi Usmani دامت برکاتهم .

- ☆ The reality of shares.
- ☆ Shares of companies.
- ☆ Conditions for buying and selling shsres.
- ☆ Shares and capital gain.
- ☆ Selling the shares prior to delivery.
- ☆ The possession of shares.
- ☆ Bartering.
- ☆ Zakah on shares.

بسم الله الرحمٰن الرحيم

DEALING IN SHARES

الحمد لله ربّ العالمين والصلوة والسلام على رسوله الكريم
وعلى اله واصحابه اجمعين ـ

There's one new feature of modern trade, namely shares. Since the business of shares came into being only in the last few centuries, we do not find any reference to it in the classical works of Islamic jurisprudence. Hence it seems appropriate to make a short mention of the issues involved in shares and other modern transactions that take place at the stock exchange.

The origin of shares

In olden days there used to be shirkah, a that means a partnership between a few people only. However in the last two, three centuries a new form of partnership came into existence. This new form of partnership is called Joint stock Company. The existence of this new form of partnership brought about changes in the world of business, as questions regarding the buying and selling of shares arose. Stock markets all over the world operate on basis of these issues. Financial transactions involve millions, if not billions of Rupees.

The reality of shares

First of all weneed to understand what shares are. In Urdu, 'shares' are referred to as 'hissay' of a company, while is Arabic they are called 'Sihm'. Infact, these shares represent the ratio of ownership which the shareholders have got in the assets of a company. If, for example, I decide to purchase the

company, then the certificate which is issued to me in trun of that purchase, represents my claim to (partial) ownership of that company. I thus become partial owner of the assets of that company, and my ownership is proportionate to the number of shares I purchased.

In the olden days, when business was conducted on a small scale only, some people would invest some capital and start a business on shirkat basis. However, big enterprises require big investments, and more often than not a handful of people is not able to meet such investment needs. This is how companies came into being. Usually, when a company is launched, it publishes its manifesto and prospectus and it issues its shares as well. Issuing shares means that the public is invited to take part in that company.

When the company comes into being, it floats its shares in the market. It invites the people to purchase those shares. Any person who purchases such shares actually participates in the business of that company, and he enters a shirkah contract with that company. It is usually said that such and such person has purchased shares but seen from the shara'i piont of view, it is not a matter of buying and selling. This is so become when I gave money to subscribe to those shares, I didn't get any goods in return, bocause neither has the company begun to operate, nor do its assets exist. Rather the company is just about to be established. This is just like a handful of people who get together and raise funds to start a business. Similarly, in the beginning a company invites people to become their business partners. Hence a person who acquires shares is actually entering a contract of shirkah. The shares certificate which is issued to that person as a result of his entering this kind of shirkah, actually represent the proportionate ownership is the company. This is the reality of shares.

The injunctions concerning the shares of new companies

It is permissible to purchase the shares of a newly founded company under the condition that the company is not going to

embark on any unlawful business. If the company has been established to conduct any unlawful business, like a factory is produce liquor, or a bank the transactions of which are based on interest, or an insurance company, then one must not purchase those shares. If the business is not of unlawful nature, that means if a company that intends to operate in any lawful business, floats its shares, e.g, a textile company or an automobile company, then there is nothing wrong with purchasing those shares. It is perfectly permissible.

The reality of buying and selling shares

When a person buying shares of a company, he becomes a share-holder of that company. Usually share-holders send their shares in the stock-market. Once the company is established and all shares have been subsribed to, the shares are traded in the stock-market. From the shara'i point of view, this is in fact selling and buying of shares. For examples, a company has been recently established. I bought ten shares of this company and now I am selling these shares in the stock-market. The person who buying these shares from me, he actually purchases my proportionate ownership in the company. Hence, as a result of this transaction, that person becomes proportionate owner in my stead. This is the reality of buying and selling shares.

Buying and selling shares is permissible if four conditions are fulfilled

If a person intends to buy shares at the stockmarket, he will have to see that four conditions are fulfilled :

The first condition

The first condition is that the company must not engage itself in any unlawful kinds of business, like for example interest-based banking, or insurance based on interest and gambling, or business involving liquor, or any other unlawful

business. Purchasing the share of a company that engages itself in unlawful business is not permissible at all, neither at the time of floating, nor afterwards.

The second condition

The second condition to be fulfilled is that the company's assets must not comprise liquid assets only, i.e. cash. The company must have acquired some fixed assets as well, like for example a building or some machinery. If the company does not get have any fixed assets, if all its assets are liquid, then it will not be permissible to trade these shares above par or below par of their face value.

That would amount to interest

The reason for that is that the money which people subcribed into that company has so far not been used to acquire any material, building or machinery. All the money is still present in cash. Hence, a share of ten Rupees actually represent a value of ten Rupees. This is just like a bond of ten Rupees that represents only a value of ten Rupees, or like a ten Rupees note that represents a value of ten Rupees.

Hence, if a share of ten Rupees represents a value of ten Rupees, then it is not permissible to sell it for nine or eleven Rupees, just like it is not permissible to sell a ten Rupees not for nine or eleven Rupees.

However, if some of the company's assets are fixed assets, e.g. the company has purchased some raw materials or some produced goods, or acquired some building or machinery, then it is permissible to trade a ten Rupees share at a higher or lower rate. The underlying principle here is that if gold is sold for gold, or if money is exchanged for money, it has to be done so on equal basis. If however several things are put together, like for example a golden necklace which is stand with gems, then, as for as the gold is concerned, there is the rule that it has to sold at equal rate. However, this rule does not apply to the pearls. It is hence permissible to sell ten pearls for twelve

pearls. If one intends to by a golden necklace which is studded with pearls, then it is proper to pay more gold than the necklace actually contains. Let us assume that the necklace contains ten grams of gold. It is laid in with some pearls. Now if a person intends to buy that necklace for 12 gram of gold, then this kind of transaction is permissible because he pays ten gram gold for the ten gram of gold contained in the necklace, and the remaining two gram of gold he pays for the pearls. Hence this transaction is completely in order.

Similarly, the same value applies in case the assets of a company cous'st of cash as well as fixed assets or raw material.

This can be illustrated through an example : A company has issued shares of altoghether hundred Rupees. Ten people bought those shares. Each share was ten Rupees worth. Each of those ten people gave the company ten Rupees to acquire those shares. After that, the company did not use the money to purchase any kind of goods. This means that those ten ten Rupees shares actually represent hundred Rupees. Now let us assume that person 'A' has got one share which he intends to sell for eleven, rather than ten Rupees. This is however not permissible since the company has not made any purchase get. Its whole capital is in cash form.

But if the company has, for instance, used forty out of its hundred Rupees to purchase a building twenty Rupees to purchase machinery and twenty Rupees to purchase raw material, and if it has kept ten Rupees cash reserve, and another ten Rupees are to be reclaimed from some people.

Company's total capital : 100 Rupees

Outstanding dues	:	10 Rupees
Building	:	40 "
Machinery	:	20 "
Material	:	20 "
Cash reserve	:	10 "

Now the company's assets have been divided into 5 parts. This would be reflected in A's ten Rupee share as follows :

Outstanding dues : 1 Rupees
Building : 4 Rupees
Machinery : 2 Rupees
Material : 2 Rupees
Cash reserve : 1 Rupees

If A intends to sell his ten Rupees share for twelve Rupees, he is allowed to do so because that would mean that A sells one Rupee outstanding dues for one Rupee, and one Rupee cash for one Rupee, while he sells everything else for ten Rupees. Thus A's sales-transaction shall be in order, because the profit he is earning has not been obtained from loans or from cash, rather he is earning profit on other things, and doing so is pemissible.

But if at any time a company's receivables and cash make up for more than ten Rupees, then A must not sell his share for less than ten Rupees. Let us assume that the company is doing well, as a result of which its receivables shoot up to hundred Rupees, cash goes up to hundred Rupees, the building is worth forty Rupees, machinery makes up for twenty Rupees and materials make up for twenty Rupees as well. Thus the company's assets are worth 280 Rupees, and the break up value of a share has become 28 Rupees.

This can be illustrated through the following table :

Company's present value : 280 Rupees
Current price of one share : 28

Building : 40 Rupees
Machinery : 20 "
Raw material : 20 "
Cash reserve : 100 "
Receivables/Outstanding dues : 100 "

In this case, if A intends to sell his share, he must not do so for less than 21 Rupees because ten Rupees stand against the cash, while one Rupee stands against the other assets.

Hence, if A would sell his share for 19 rather than 21 Rupees, then his doing so would no be permissible. This would be just like selling 20 Rupees for 19 Rupees which is clearly impermissible.

Hence, as long as the company has not acquired any assets, as long as all its assets are liquid (i.e. cash and receivables), it is not permissible to sell the company's shares above par or below par. Rather such shares will have to be traded at face value.

The shares of a company which has not come into existence yet, but it shares are traded at the stock market, like a provisional listed company, must not be sold for more or less than their face value. For example, in the recent past the stock-market experienced a high. Many companies were being floated and many a great deal was struck. At that time, the shares of a company were issued for ten Rupees; and the company has not come into existence yet. However, in the stock-market the shares of the same company were traded for 180 Rupees. Anyway, to sum up, the second condition is that as long as the company has not acquired any fixed assets, its shares must not be sold above par or below par.

The third condition

Before one can understand the third condition one must know that most of the companies that exist today are actually, engaging in lawful forms of business, like for example textiles mills, automobile factories, etc. yet there seems to be hardly any company which is not involved in interest-based transactions. Companies are usuallay involved in interest-based transactions in two ways :

1. In order to increase funds, companies take interest-based loans from banks.
2. The company deposits its surplus in a interest-bearing account. Thus the company receives interest from the bank, and the interest also constitutes a part of the company's income. Anyone who intends to purchase the

share of company that is not involved in interest bearing transactions has to face considerable difficulties. Now one might rightly object that under such circumstances buying and selling of shares should not be permissible at all.

Contemporary scholars hold different opinions regarding such companies. One group of scholars holds that these companies are engaged in unlawful activities, though their unlawful activities make up only for a small part of their activities, but yet since unlawful is unlawful in any case, it is not permissible for a Muslim to join such a company in its unlawful pursuits, which would definitely happen in case one purchases the shares of such a company, as thus one becomes a partner of that company. Partners in trade act as each other's agents, that would mean that the shareholder appoints the company as his agent to take interest -bearing loans and to acquire interest-based profit. Hence, according to these scholars, it is not permissible to purchase the shares of a company unless one is the certain that the company does not engage in interest-based dealings.

The second group of scholars holds that although these companies are not operating in an ideal manner, but yet, if overall the business is of a lawful nature, then one may deal in the shares of such a company provided two conditions are fulfulled : This stance has been adopted by Hadhrat Hakeemul Ummat Maulana Ashraf Ali Thanvi رحمة الله عليه as well as by my honourable father Hadhrat Mufti Muhammad Shafi'i رحمة الله عليه. Following the foot steps of my respected elders. I myself endorse this stance, too. The two conditions mentioned above are :

1. The shareholders must express their discontent regarding the company's interest-based dealings, even if they are over ruled. As far as my humble opinion is concerned, the best venue for expressing such discontent would be during the company's Annual General Meeting. This is quite a good opportunity to say that one does not consider interest-based dealings as appropriate, that one is not satisfied with this kind of activity and that hence this kind of activity should be suspended.

Obvoiusly, in a modern business context this kind of objection would not have much weight, and its being overruled is more likely than not, but according to Hadhrat Hakeem Ummat رحمۃ اللہ علیہ, simply raising this kind of objection under such circumstances, frees a person of his or her responsibility.

The fourth condition

The fourth condition is in fact a part of the third condition. That is that when the dividend is being distributed, a person should investigate how many percent of the income are based on interest. This can be easily done by perusing the income statement. So if for examply the income statement reveals that five percent of the company's earnings stem from depositing money in an interest-bearing account, then one should give five percent of the dividend in charity.

So if the actual business of the company is of a lawful nature, while at the same time the company takes interest-bearing loans or earns interest by depositing its surpluses in interest-bearing accounts, then one may yet deal in the shares of such a company provided one fulfils the two conditions mentioned above. This seems to be a just and balanced approach, completly in line with Islamic principles and duty considering the people's convenience.

From the above discussion can be concluded that buying and selling of shares is permissible if four coditions are fulfilled :

1. The company's actual business must be lawful.
2. The company must have acquired some fixed assets. The capital should not be in liquid form only.
3. If the company engages in interest-based dealings then one must voice one's discontent during the company's annual meeting.
4. When receiving the dividend one must deduce the amount that has been generated from interest and give it in charity.

If these four conditions are fulfilled, then it is permissible to buy sell shares.

Two objectives of buying and selling shares

Trading in shares as now a days done in stock markets has got two objectives. Some people purchase shares with a view of making an investment. They purchase shares to become share-holder of a company and to receive the annual dividend. The details regarding this have already been discussed above, namely that such people may buy and sell shares provided four conditions are fulfilled.

Shares and Capital gain

Then there are people who deal in shares not for the sake of investment but for the sake of capital gain. These people make an estimate whether the price of a company's shares is likely to increase. If that is so they buy the shares and then when the price has in creased after a couple of days, they sell the shares and earn profit. Similarly, if the price of a company's shares is down, they purchase the shares only to sell them once the price goes up again.

Their objective is to earn profit through buying and selling. They do not intend to become a share-holder and earn a dividend rather they consider shares as a kind of commodity to be traded. Now arises the question if this practice is permissible from the shara'i point of veiw.

This can be answered as follows: just as it is permissible to buy shares it is also permissible to sell them as well, provided one fulfills the conditions which were mentioned above, and just like one may buy one thing today and sell it tomorrow, or buy something tomorrow and sell it the day after tomorrow, it is also permissible to sell shares in the same manner.

Making up for difference is speculation

However, at times of speculation which constitute an important part of the stock exchange, it becomes difficult to

declare this kind of buying and selling as proper and in order. The objective of such speculation is usually not to deal in shares but to make up for the differences. Neither is there any delivery of the shares, nor is there any view of delivering them. Hence, when there is no delivery at all, where there is no intention of actually giving or taking those shares, rather where one only intends to make up for differences through such speculation, then this kind of dealing is absolutely unlawful. The Holy Shari'ah has not permitted it.

Selling the shares prior to delivery

The next question which arises is that sometimes a person buys shares and then sells them onward although the delivery of those shares has not yet taken place. For example, a company issues shares to the market. These shares have not been fully issued yet, and yet they have been sold and resold several times. This is so because even in case of selling the shares through Ready Contracts the delivery of shares takes at least a week. Now arises the question whether it is permissible to sell the shares onward prior to their delivery and possession.

As far as this is concerned, one principle needs to be understood. Thereafter it with be easy to analyse the situation. The principle is that it is not permissible to sell a thing onward prior to taking possession of it. However it is not necessary that taking possession always means physical possession. At times constructive possession, i.e. the fact that a thing has come into our risk, suffices to make the onward sale of that thing permissible.

The possession of shares

Now we need to examine what constitutes the possession of shares. This price of paper that we call shares-certificate are not the shares. Rather the shares are the ownership that one has in the company, and the shares-certificate is an indicator, a proof and an evidence for that ownership. Hence, if a person's onwership in a company has been established although he has

not yet received the shares-certificate, then yet, from the shara'i piont of view that person will be considered as owner.

This can be illustrated through an example. You have purchased a car, and the car is with you. But the car is still registered in the name of the person from whom you bought it. The registeration has not been changed yet. Now since the car is already in your possession, no one will say that only on account of the car not being registered in your name, your possession of the car is not complete.

The transfer of risk is sufficient

Shares certificates are hence not different from registered cars. Now comes the question whether that part of the company which is represented through the shares cetificate has come into that person's onwership or not. Now obviously, the person cannot simply go over to the company and ask to be given his share and then take possession of it. This is simply not possible. Hence, becoming owner of the actual share of the company means whether the person has become entitled to bear pros and cons of owning such a share, whether he has become entitled to the profits and liabilities or not.

For example, today I bought a share at the stock-market. The shares-certificate has not been delivered yet. In the meantime the company has been completely destroyed as the result of a bomb blast. None of the company's assets was spared. Now arises the question whose loss this is. If it is my loss, then that would mean that I have accepted the risk attached to the share. In this case I can sell the shares orward. However, if it was not my loss, if it was the loss of the person who sold me the share, then that would mean that the risk of the share has not been transferred to me. In this case I must not sell the share onwards until I obtain the shares certificate.

Now what exactly is the situation? Is the risk transferred right after purchasing the shares or not. This is one such question to which I could not find any answer yet. Hence I will not make any absolute statement in this regard. I have

however mentioned the principle that once the risk is transferred, it is permissible to sell the shares onward. Precaution however demands that one does not sell the shares onward until after their due deliver.

'Barter' is not permissible

Bartering is another way of buying and selling shares that is commonly practised at the stock exchange. Bartering is also one way of financing. It looks like this : one person needs money. He happens to own some shares. He goes to another person and says: 'I sell you these shares today for such-and-such amount, and next week I will by them back for an increased amount.' It is as though at the time of selling the shares a condition is stipulated that the shares will have to be returned against a higher amount. The shares cannot be sold to another person. The question is whether this kind of barter is permissible from the shara'i point of view or not.

It is quite obvious that this kind of transaction is not permissible. This is so because the principles of Fiqh that it is not permissible to stipulate in a sale any such condition which goes against the demand of the contract. And stipulating a condition of paying an increased price is particularly unlawful. Such condition is invalid. Hence this kind of bartering is just another manifestation of interest which is strictly prohibited in the Holy Shari'ah.

The issue of paying Zakah on shares

Another issue is that of paying Zakah on shares. The question is whether zakah has to be paid on shares or not, and if it has to be paid, then how is one to calculate the amount, and how is one to pay it? As I have already stated right in the beginning, shares represent a part of a company. If a person buys shares only to sell them onward and thus earn himself some profit, if capital gains is his objective rather then getting some profit on annual basis, then he has to pay Zakah according to the market price of those shares.

But if at the time of purchasing shares he had no view of capital gain, if his actual objective was to get paid the divided, but it also occurred to him that he might sell the shares if he gets a good price for them, then in this case Zakah will have to be paid on that part of the market price of the shares which stands against such assets of the company for which Zakah is to be paid. This can be illustrated through an example : The market price of a share is hundred Rupees.

Out of those hundred Rupees, sixty Rupees stand against the building, machinery, etc. while forty Rupees stand against raw materials, finished products and cash. Now since only forty Rupees stand against such assets for which Zakah is to be paid, one will have to pay 2.5% Zakah on those forty Rupees only. There is no Zakah due on the other sixty Rupees. The table below shall help to illustrate that.

Market price of the shares : 100 Rupees

Building	: 30 Rupees	= 60 Rupees
Machinery *(Zakah not payable)*	: 30 Rupees	
Raw material	: 15 Rupees	
Finished products	: 15 Rupees	= 40 Rupees
Cash *(Zakah payable)*	: 10 Rupees	

Amount of Zakah payable: 40 Rupee × 2.5% = 1 Rupee

To sum up

It is permissible to buy shares of such companies only whose business is lawful per se. Besides, the conditions which were mentioned above must be fulfilled. May Allah give us all the strength to live according to the Holy Shari'ah. *Ameen*

وآخر دعوانا ان الحمد لله ربّ العالمين

☆☆☆

ENQUIRY

Buying and selling of shares at the Stock Exchange and Examining the shara'i injunctions regarding their possession

Question

What do the honourable scholars say with regard to the following :

Buying and selling of shares has become quite common. The honourable scholars hold that it is not permissible to sell shares onwards before having taken possession of the same. Keeping in view the common conditions at the stock exchange, how is it possible to take possession of the shares, and when will the possession of the shares, be considered as complete? When will it be permissible to sell these shares onward and when not?

Please grant a detailed reply in the light of the Holy Shari'ah.

(This question was put by Abdullah Ibrahim, Korangi Karachi, Pakistan)

الجواب حامدًا ومصليًا

الحمد لله ربّ العالمين والصلوٰة والسلام على رسوله الكريم

وعلى اله واصحابه اجمعين وعلى كل من تبعهم باحسان

الىٰ يوم الدين

Many questions arise regarding the legal status of the different ways in which the shares of companies are dealt at the stock market. In order to answer these question to find out about the applicable shara'i injunctions, it is first of all necessary to get a proper understanding of how these dealings work. The subject of discussion rightnow are the shares of such companies the business of which is considered as lawful by the Holy Shari'ah, and the buying and selling of which has been declared as lawful by Hadhart Hakeem-ul-Ummat Maulan Ashraf Ali Thanvi قدس سرہ in his Fatwa entitled :

القصص السنی فی حصص الکمبنی

In order to acquire this necessary information a group of scholars affiliated with the Darul Ifta of Darul Uloom Karachi, went to visit the Karachi Stock Exchange. They discussed the practices at the stock exchange with the concerned in-charge, and they also perused the rules and regulations that apply at the stock exchange.

This initial research revealed the following : There are basically three issues which call for further research :

1. Day Trading, i.e. buying the shares of a company and selling them on the very same day.
2. Future Trading.
3. Bartering.

Day Trading

Day Trading means that a person buys the shares of a company and then sells them on the very same day to another person. Day Trading is found in Spot Transaction as well as in Future Trading. First however we shall examine Spot Trading.

Spot Trading

Spot Trading means that when a person buys the shares of a company, his purchase is immediately registered in the KAT, that is the computerised record of the transactions that

take place at the stock exchange. The stock exchange guarantees for the liabilites of both parties.

This kind of transaction is also known as Ready contracts. In case of spot transactions, the buyer has to pay the agreed price for the shares within three days, which the seller has to arrange for the delivery of the shares. Delivery, in this context, means that the shares of the company are, in the record of the company, transferred to the buyer through CDC. One point is noteworthy from the fiqhi point of view, namely that when a person buys a thing, he is necessitated by the Holy Shariah to take possession of that thing before he can sell it onward. It is not permissible to sell a thing which one has ot taken into one's possession. Now as far as the buying of shares is concerned, their delivery takes place three days after the purchase. The question is whether the buyer is allowed to sell the shares onward during those three days?

If the delivery is to be considered as shara'i possession, then selling shares prior to delivery would amount بیع قبل القبض, i.e. sale prior to possession, which is not permissible. Another possibility however is that of not interpreting delivery as shara'i possession. Delivery means nothing else but geting the name of the buyer registered with the company. Otherwise, as far as the benefits and losses related to the shares are concerned, they are transferred to the new buyer right after the purchase. That means if the company incurs any loss in the period between the purchase and the delivery, then the loss will have to be borne by the buyer. And likewise, if the company makes any profit during that period, then the buyer will be entitled to share that profit.

Here it must be remembered that a sale of the shares of a company means to the sale of shares issued, hence this amounts to what is known as بیع المشاع, and in this kind of sale it is not possible to take physical possession of the sold goods. On the other hand, the underlying reason for the prohibition of بیع قبل القبض is that as long as the buyer does not take possession of the sold goods, or the seller vacates the sold goods, the

sold goods remain in the risk of the seller. That means if the sold goods happen to be destroyed, then the sale is cancelled. Hence if the buyer sells the goods onward without having taken possession, and then the goods which still happen to be with the first seller are destroyed then the first sale stands cancelled, and as a consequence, the second sale stands cancelled, too. Hence the second sale was overshadowed by an uncertainly (namely that may be the sale will be cancelled) right from the beginning.

Allamah Kasmi رحمة الله عليه wrote the following regarding the prohibition of بيع قبل القبض :

ولانه بيع فيه غرر الانفساخ بهلاك المعقود عليه، لانه اذا هلك المعقود عليه قبل القبض يبطل البيع الاول ، فينفسخ الثاني۔

(بدائع الصنائع۔ ج٤،ص٣٩٤۔مؤسة التاريخ العربى)

One far more obvious reason for prohibiting بيع قبل القبض is that this kind of transaction necessarily implies ربح مالم يضمن because the risk related to the sold goods is not transferred to the buyer prior to his taking possession. If he nevertheless sells that goods and makes some profit, then this would amount to ربح مالم يضمن , i.e. earning profit for something one did not take into one's risk. The prohibition for doing so has been stated in the following Hadith :

لا يحل سلف وبيع ولا شرط.ان فى بيع ولا ربح مالم تضمن ۔

(سنن ابى داؤد ۔ ج٢،ص٢٨٣۔ كتاب البيوع، باب فى الرجل يبيع ما ليس عنده)

And in Jami Tirmidhi comes :

نهى رسول الله ﷺ عن سلف وبيع عن شرطين فى بيع وعن ربح مالم يضمن۔ (جامع الترمذى ۔ ج٣،ص٥٣٥ ۔ باب ماجاء فى كراهية بيع ماليس عندك)

Allamah Mulla Ali Qari رحمة الله عليه wrote the following regarding this Hadith :

يريد به الربح الحاصل من بيع ما اشتراه قبل ان يقبض و ينتقل من ضمان البائع الى ضمانه ، فان بيعه فاسد، في شرح السنة : قيل : معناه ان لرابح في كل شئ انما يحل ان لو كان الخسران عليه ، فان لم يكن الخسران عليه كالبيع قبل القبض اذا تلف فان ضمانه على البائع ـ (مرقاة المفاتيح ـ ج٦،ص٨٩)

Allamah Tayyibi رحمة الله عليه stated :

وربح مالم يضمن ، يريد به الحاصل من بيع مااشتراه قبل ان يقبضه و ينتقل من ضمان الباء الى ضمانه ، فان بيعه فاسد ـ (شرح الطيبيؒ ـ ج٨٢،ج٦)

Allamah Sindhi رحمة الله عليه wrote :

(وربح مالم يضمن) هو ربح مبيع اشتراه فباعه قبل ان ينتقل من ضمان البائع الاول الى ضمانه بالقبض ـ

(حاشية السندى على المجتبى للنسائى ـ ص٢٩٥،ج٧)

Hadhrat Maulana Khalil Ahmad Saharanpuri قدس سره wrote:

ولا ربح مالم تضمن اى لايحل ربح شئ لم يدخل في ضمانه وهو ربح مبيع اشتراه فباعه قبل ان ينتقل عن ضمان البائع الاول الى ضمانه بالقبض ـ

(بذل المجهود ـ ص١٨٠،ج١٥ ـ كتاب البيوع، باب في الرجل يبيع ماليس عنده)

The gist is that it is not permissible to sell a thing prior to having taken possesion of it because without his taking possession, the risk is not transferred to the buyer. If he wants to sell the goods onward for a profit, then this would amount to ربح مالم تضمن . Besides that, as has been pointed out by the

author of Badai-us-Sanai, if the goods are destroyed before the buyer takes them into his poosession, then, since the goods were still in the seller's risk, the sale will be cancelled, as a result of which any subsequent sale will be cancelled, too. Hence the second sale is overshadowed by uncertainty (of being cancelled), right from the beginning.

But if the seller evacuates the sold goods (Takhliyah) so as to transfer the risk to the buyer, then that objective is achieved, even if not physical or actual possession has taken place. In the case the buyer may sell the goods onward as there is neither apprehension of ربح مالم تضمن nor uncertainty. This is only the honourable jurists have stated that this kind of evacuations amounts to taking possession. In Fatawa Alamgiri comes :

واجمعوا على ان التخلية فى البيع الجائز تكون قبضًا وفى البيع الفاسد روايتان والصحيح انها قبض ..... رجل باع خلاً فى دن فى بيته فخلّى بينه و بين المشترى فختم المشترى على الدن وتركه فى بيت البائع فهلك بعد ذلك فانه يهلك من مال المشترى فى قول محمد وعليه الفتوى ـ (فتاوى عالمگيريه ـ ج٣،ص١٦ ـ كتاب البيوع ، باب ٤فصل ٢)

Now needs to be seen how possession is materialised in case of بيع المشاع? The honourable jurists wrote that in this case the possession materialises through evacuation (Takhliyah). Allamah Surkhi رحمة الله عليه differentiated between اجارة المشاع (which Imam Abu Hanifa رحمة الله عليه deems inpermissible) and بيع المشاع as follows :

وهذا بخلاف البيع، لان التسليم هناك بالتخلية يتم و ذلك فى الجزء الشائع يتم ـ (مبسوط السرخسى ـ ج١٥/١٤٦ ـ كتاب الاجارة)

The author of Hidayah mentioned this difference as follows :

ولابى حنيفة انه اجر مالا يقدر على تسليمه فلا يجوز، وهذا لان تسليم المشاع وحده لايتصور ، والتخلية اعتبرت تسليمًا لوقوعه

تـمـكـيـنـًا وهـو الـفـعـل الـذى يـحصل به التمكن ولا تمكن فى المشاع ، بخلاف البيع لحصول التمكن فيه ـ

That means since in the case of Ijarah usufruct is the objective rather than ownership and since in the case of a part of joint tenacy the capacitation of usufruct is impossinble, hence evacuation is not conceived therein. On the other hand, in the case of sale ownership is the objective, hence capacitation can be achieved through evacuation. In the commentary on Inayah comes :

بخلاف البيع فان المقصود به ليس الانتفاع ، بل الرقبة ، ولهذا جاز بيع الححش فكان التمكن بالتخلية فيه حاصلاً

The author of Kifayah made the point even clearer. He wrote :

ان التـخلية اعتبرت تسليماً اذا كان تمكينًامن الانتفاع،وانما يكون تـمـكـيـنـًا اذا حـصـل بها التمكن ، والتمكن لا يحصل به فلم يعتبر تـمـكـيـنـًا بخلاف البيع ، لحصول التمكن ثمه من البيع والعتاق و غير ذلك ـ (فتح القدير مع العناية والكفايه ـ ج٨،ص ٤١ و ٤٢ ـ باب الاجارة الفاسدة)

In case of joint tenacy evacuation shall be considered as possession, even though possession has not taken place in the physical sense. The buyer shall thus be entitled to the expenditures of ownership which include selling (his part of the joint tenacy) onward.

Now it needs to be seen whether in the sale of shares capacitation and evacuation become ascertained from the side of the seller or not.

The incharge of the stock exchange as well as the people working there seen to be agreed that the rights and liabilites pertaining to the shares are transferred to the buyer right at the time of the sale, in other words the shares pass into the buyer's

risk (and hence, if the buyer decides to sale them onward this would not amount to reaping profit of something the risk of which one had not borne), but yet, a through study of the Rules and Regulations of the stock exchange has clearly shown that possession in the shara'i sense is not ascertained until after the delivery, as the following points shall prove :

1. One point that is quite well-established in the Islamic jurisprudence is قبض كل شيء بحسبه i.e. the possession of each thing customarily differs according to the nature of that thing. The common practice as far as shares are concerned is that registration at the stock-exchange at the time of purchase is not considered as possession. Rather it is said that delivery shall take place in three days, means to give possession, hence, as per common practice, delivery is considered as equal to possession.

2. The practice ofبيع مالا يملك الانسان (short sale) is quite common at the stock exchange. When we visited the stock exchange we were told that short selling has been prohibited in spot trading, however from the rules and regulations is learnt as has been later on verified by the president of the stock exchange that it was blank selling that has been prohibited. A blank sale is a sale where the seller neither owns, the shares him self, nor has he entered a loan agreement with anyone to purchase the shares. However, short sales have been allowed in spot trading previded that the seller informs the buyer that he is short selling and that he has arranged for a loan to deliver the shares. (Regulations for short selling under Ready Market, 2002).

From this is learnt that there exists a possibility of short selling in ready contracts. And even of we were to assume that short selling has indeed been forbidden in the regulations then there is still no guarantee that the other party abides by the regulations.

Now obviously, if one person is short selling, that means if he doesn't own the shares and yet sells them, then that is not onlyبيع مالا يملك الانسان , which is, from the shara'i point of view void ab initio, it moreover shows that those gentlemen who

state that the rights and liabilities pertaining to the shares are transferred to the buyer right at the time of purchase, or that the risk is transferred to the buyer, do not make that statement as it would be understood in the Holy Shari'ah, because they make similar statement also regarding short-sales, whereas in this case the question of transferring risk does not arise at all in the Holy Shari'ah. If the seller does not even own the shares, then how could be possibily turn them over to the buyer? And how could hence the risk be transferred?

3. In the first clause of the Rules and Regulations for Ready delivery contracts which we were given at the Karachi stock exchange has been stated that the clearance fo all ready sales must be done by the following Monday, that means on Monday the seller must deliver the shares to the buyer, and the buyer pays the price of the shares to the seller. However in point 'b' of the same clause has been clearly stated that if the seller does not deliver the shares, on the said day, then the buyer shall have the right to purchase the same amount of shares of that particular company from the market. This is known as 'buy in' in the terminology of the stock exchange. In point 'c' has been stated that if in the scenaro mentioned in point 'b' the buyer suffer any kind of damage or loss (e.g. the price of shares is higher in the market), then in this case the seller will have to reimburse such damage to the buyer.

This regulation clearly shows that possession had not taken place at the time of the sale, because the seller's failure to deliver is possible in only two cases, either the seller was short selling, i.e. he sold shares that he did not even own. The fact that this transaction is void ab initio has been stated already under point 2. The second possibility is that the seller was not short selling, but he changed his opinion and decided to keep the shares either for himself or sell them to someone else. If it is possible for him to change his mind to keep the shares for himself or sell them to someone else, then how can it be said that at the time of the transaction the shares were passed on to the buyer or that the seller gave up his right in the shares in favour of the buyer? Besides that, the regulations of

the stock exchange do not state that in this case the seller can be compelled to deliver the shares. Rather, the regulations state that the buyer shall have the right to purchase the same amount of shares (of the same company) from the market, and that the seller will have to reimburse any loss the buyer thus incurs. That means that the first shall be cancelled unilaterally, and that a new sale shall be contracted with a third person.

4. The gentlemen at the stock exchange also said that the rights and liabilites pertaining to shares are transferred immediately not only in case of ready sales but also in case of forward sales. But in case of forward sales it takes a bit longer to register the name of the buyer at the company. In spite of that, short selling is more common in forward sales than in ready sales. From this can be understood that the transfer of rights and liabilites, as mentioned by the gentlemen at the stock exchange, does not refer to transfer in the shara'i sense. And the point that becomes clear from the whole compilation is that on the transaction which is referred to as 'ready sale' in the terminology of the stock exchange, possession in the shara'i sense does not become ascertained at the time of the transaction. And those gentlemen who say that right at the time of the transaction all rights and liabilities are transferred to the buyer actually mean that the stock exchange is liable to finalize the transaction, and that the seller will have to deliver the shares at the rate at which they were purchased, no matter if the rates go up or down, and that the buyer will have to pay the amount for which he had purchased the shares. If any of the parties does not discharge its liabilities, and if in the case of non-payment by the buyer the seller has to outsell his shares, or if the buyer has to purchase the shares from the market since the seller did not give him possession of the shares, then, if this result in any damage or loss, such damage or loss will have to be covered by the other party.

In the light of the above arguments, the rule of the Holy Shari'ah is that one must not sell shares onward unless they have been properly delivered to him. If the seller had down a

short sale that means if he had sold shares which were not in his possession, then this sale shall be null and void. And if the shares were in the seller's possession, and if it has been ascertained that all the Arkaan of sales transaction have been ascertained, them the sale shall be in order.

Futures

The above discussion revolved around 'Spot Sales' or 'Ready Contracts.' Just as it is not permissible to sell shares the delivery of which one has not received yet through this kind of transaction, it is also not permissible to sell shares through what is known as 'Future' or 'Forward' sale, short selling is practiced more commonly in Futures than in Ready contracts, for the simple reason that there are less restrictions regarding short selling in Futures than in Ready Contracts.

During our visit to the stock exchange we were told that there is not much difference between Ready Conratcts and Futures, except that in case of Futures the delivery takes longer. However, the rights and liabilities pertaining to the shares are transferred immediately. This statement in particular shows that at the stock exchange the expression 'transfer of rights and liabilities' is not used in the sense that is endorsed by the Holy Shari'ah. At the stock-exchange this expression is merely used to denote that no matter if the price of the shares increases or decreases prior to delivery, the buyer will have to pay whatever amount he and the seller had agreed upon. Keeping in view this situation the injunction pertaining to Future or Forward sales is as follows :

1. If the seller does not own the shares and he short or blank selling them, then this transaction shall not be permissible as it coustitites بيع مالا يملك .

2. If the seller ownes the shares and they have been delivered to him as well, and if the offer and acceptance of sale are executed with reference to the future (which is known as Forward sale), then this kind of transaction shall not be permissible as it constitutes بيع مضاف الى المستقبل .

3. If the seller owns and possesses the shares (i.e. the shares have been delivered to him), and the sale does not refer to any date in the future but to the present (i.e. today), but the sale has been contracted on deferred payment, that means the buyer will pay for the shares any time later, then in this case the shares will have to be delivered to the buyer. It is not permissible to retain the shares without delivering them to the buyer until he has paid their price. This is so because this transaction constitutes Bai Muajjal (sale on deferred payment) and in this kind of sale it is not permissible to withhold the subject matter of the sale until the price has been paid.

In Fatawa Alamgiriya comes :

قال اصحابنا رحمهم الله تعالىٰ : للبائع حق حبس المبيع لاستيفاء الثمن اذا كان حالاً كذافى المحيط وان كان مؤجلاً ، فليس للبائع ان يحبس المبيع قبل حلول الاجل ولا بعده ، كذافى المبسوط ـ (فتاوى عالمگيريه ـ ج٣،ص١٥،باب ٤من كتاب البيوع)

4. The seller owns and possesses the shares. He sells them today, and delivers them to the buyer. However, the payment for the shares is delayed and the seller keeps these shares (which had been transferred to the buyer already) as a pledge. Doing so is permissible. Allamah Haskafi states in Durr-e-Mukhtar :

ولو كان ذلك الشيئ الذى قال له المشترى : امسكه ، هو المبيع الذى اشتراه بعينه لو بعد قبضه ، لا نه حينئذ يصلح ان يكون رهناً بثمنه ، قبله لا يكون رهنًا ، لا نه محبوس بالثمن ـ

Allamah Ibn Abideen Shami رحمة الله عليه wrote :

قوله : لانه حينئذ يصلح ..... الخ "اى لتعيين ملكه فيه ، حتى لو هلك يهلك على المشترى ، ولا ينفسخ العقد ط قوله

"لانـه مـحبـوس بالثمن" اى وضمانه بخلاف ضمان الرهن ،
فلا يكون مضمونًا بضمانين مختلفين ..... الخ" ـ

(رد المحتار ، كتاب الرهن ـ ج٦،ص٤٩٧)

This passage clarifies the difference between the cases described in point 3 and point 4. For further details one may refer to my book 'بحوث فى قضايا فقهية معاصرة'.

5. The seller owns and possesses the shares. He does not sell them right now but promises to sell them at a certain price anytime later. And the buyer in turn makes a promise to purchase them at that price anytime in future. The sale has not been concluded yet. A great number of contemprary scholars (including scholars belonging to the Islamic Fiqh Academy in Jeddah) consider this kind of bilateral binding promise to be governed by the same injunctions as a contract. Hence they hold this arrangement to be impermissible. Even those scholars who hold bilateral binding promises to be permissible in certain transactions (like in Bai Wafaa), consider this to be so only to fulfil the needs of the public. In Fatawa Qazi Khan comes :

ان المواعده قد تكون لا زمة فتجعل لا زمة لحاجة الناس ـ

(الفتاوى الخانية ـ ج٢،ص١٦٥)

However in the case mentioned above there is no such need which, if left unfulfilled, would cause the public any harm. Rather in order to check the tendency toward speculation at the stock exchange any 'promise' ought to remain 'non-binding'. (Note: under the current legislatoin however even such a promise is binding, hence such an arrangement is not to be considered as permissible). Hence, if both parties make a non-binding promise and one party afterwards fails to fulfil his promise, then he shall have committed a sin from the moral point of view, but legally he cannot be forced to fulfil his promise.

Barter

Al times it happens that a person purchases a considerable quantity of shares but he does not have the money to pay for the shares. he thus sells the shares to a third person under the condition that after a certain period of time he will buy back the shares at a higher price. For example, on 01.04.08 A has purchased from B ten thousand shares which are worth one hundred thousand Dollars. A however does not have one hundred thousand Dollars. He thus sells C the shares for one hundred thousand Dollars, under the condition that on 03.04.08 he will buy back the same shares for one hundred two thousand Dollars.

From the shara'i point of view, this practice is wrong for two reasons. The first reason is that this kind of barter is usually carried out prior to delivery. It has been already disscussed above that selling shares prior to delivery is impermissible as this constitutes بیع قبل القبض. The second reason is that the shares which are sold to C, are sold under the condition that A will buy them back at a higher price. This kind of condition is invalid and hence the sale is invalid, too. In fact, the objective of the whole transaction is to acquire one hundred thousand Dollar and to return one hundred and two thousand Dollar. This is nothing but interest for which this invalid sales transaction was made a pretext. Hence this kind of barter is impermissbile from the shara'i point of view.

واللہ اعلم وعلمہ اتم واحکم

Signed by :

Maulana Mufti Muhammad Rafi Usmani

Maulana Mufti Muhammad Taqi Usmani

Jamia Darul Uloom Karachi,

21.02.1426 A.H. corresponding to 02.04.2005 C.E.

The views stated in this paper have been corroborated by the following scholars :

Maulana Mufti Mahmood Ashraf Usmani
Maulana Mufti Abdur Rauf Sakarvi
Maulana Mufti Abdullah
Maulana Mufti Abdul Manan
Maulana Mufti Asghar Ali Rabbani
Maulana Ismatullah
Maulana Mahfooz Ahmad
Maulana Zubair Ashraf Usmani
Maulana Muhammad Imran Ashraf Usmani
Maulana Muhammad Yaqoob
Maulana Muhammad Iftekhar Baig
Maulana Khalil Ahmad Azmi
Maulana Hassan Kaleem
Maulana Zubair Haq Nawaz
Maulana Ejaz Ahmad Samdani.

☆☆☆

بسم الله الرحمن الرحيم

MUDHARABAH CONTRACT

Allah's Law, the Holy Shariat, has forbidden interest and permitted trade. It has made all those who engage in interest-based transactions object of blame and reproach, and it encourages those who engage themselves in lawful commercial activities. One of the most liked and auspicious contracts and transactions in the sight of Islam is that of Mudharabah.

Mudharabah is a most significant shara'i contract which is instrumental in promoting commercial activities among people as well as healthy economic growth. It happens quite often that a person has got considerable capital or assets, but he does not have any personel, or he has got personnel but lacks the skills and know-how to invest his capital in industry and commerce; so as to bring about an increase in his capital. Thus his capital remains idle until it is fully consumed. On the other hand there are many people who have all the necessary skills, expertise and know-how to engage in extremely profitable industrial and commercial activities, but unfortunately they do not have any assets, thus they become victims of poverty and indigence, and since they are not in a position to make use of their talents, the some slowly but steadily become rusty and hence useless.

The Holy Shariat aims at keeping wealth in circulation. Neither should capital become stagnant, nor should individual skills and talents remain unutilized until they are lost. This is the reason why the Holy Shariat declared the contract of Mudharabah to be lawful. The gist of this contract is to combine capital and labour in such a way that it results in economic well-being of all the parties involved. In other words,

one party provides the capital, and the other party puts in his labour, and both parties share the thus acquired profit.

The jurists of Iraq refer to this kind of contract as 'Mudharabah', the jurists of Hijaz call it 'Qardh', and some jurists call it 'Ma'malah'. *(Vide, Al Mughni, Ibn Qudamah 5/26)*

Mudharabah, where one party provides capital and the other puts in labour, should be considered as shirkat of sorts, and this kind of contract also falls in the category of Ijarah, for the one who puts in labour receives his remuneration because of his having a share in the profit.

The jurists definition of Mudharabah

In the terminology of Fiqh, it is a partnership contract where one party provides capital and the other puts in labour. Both parties shall share the profit according to certain conditions.

In 'Muajjam Lughatul Fuqahaa' Mudharabah has been defined as follows :

عقد شركة يكون فيه المال من طرفٍ والعمل من طرفٍ اخر

والربح بينهما علىٰ ما شرطا

'It is a partnership contract where one party provides capital and the other party puts in labour, and the profit is divided among them according to the ratio agreed by them.' *(P. 434)*

In 'Kanz-ud-Daqaiq' Mudharabah has been defined thus :

هي شركة بمال من جانب و عمل من جانب

'It is a kind of partnership where capital comes from one side and labour from the other.' *(Al Bahr, 7/262)*

The author of Durr-e-Mukhtar gave the following definition of Mudharabah :

'Mudharabah is the name of such a contract according to which one party provides capital and another party puts in labour, and both parties share the acquired profit.

(5/645, Majmaul Anhar, 2/321)

Ibn Qudamah defined Mudharabah in these words :

ان يدفع رجل ما له الىٰ اخر يتجر له فيه على ان ما حصل من الربح بينهما حسب ما يشتر طانه

'One person gives his wealth to another so that he may do commerce through it on the condition that the thus acquires profit is divided among them according to a ratio agreed by them.'

(Al Mughni 5/26)

Some scholars have defined Mudharabah in these words. They write :

'Mudharabah means that the owner of the capital entrusts his capital to another person so that he can do business with it and whatever profit is thus acquired shall be devided among them according to a ratio upon which both of them had agreed beforehand. And if forbid the business suffers any loss, it shall be solely borne by the owner of the capital, his agent shall not have to bear the loss. In this case however the owner's capital will have gone waste, as well as the agents labour.' *(Mughni-ul-Muhtaj, 2/309)*

Elements of Mudharabah

From the above definitions is learnt that Mudharabah has to contain the following elements :

1. In Mudharabah one party has to provide capital. Profit or benefit can hence not be declared as capital. Any right concerning accomodation is a benefit. It cannot be considered as capital in Mudharabah.
2. Making over of capital. It is hence not proper to declare a loan which is still due from someone as capital. So it, for example, Khalid owes Zaid 1000 Rupees, then it is not proper for Zaid to say to Khalid: 'Do business on Mudharabah basis with those 1000 Rupees which you owe me and let us share the profit in equal parts'. Such a Mudharabah will not be in order because the capital was not made over to Khalid. *(Badai, 7/92, 309)*

3. Both parties have to share the profit. If the profit has been totally allotted to the owner, them this is known as 'Bida'a in the terms of Fiqh . In this kind of transaction the agent receives no remuneration for his labour and the whole profit goes to the owner of the capital. And if the whole profit has been allotted to the agent, then this is termed Qardh. In this case the owner of the capital is entitled to nothing more than whatever capital he has invested.

Some terms introduced

The jurists refer to the owner of capital as Rabb-ul-Maal, the agent in a Mudharabah contract is known as Mudharib and Amil, and the capital is known as *Ra's-ul-Maal.*

Trade in general has been declared lawful in the Holy Qur'an. Allah Most High said :

احل اللّٰه البيع وحرم الربوا

'Allah has permitted trade and forbidden interest.'

At several places the believers are encouraged to go forth and travel in order to earn their livelihood in a lawful manner :

واخرون يضربون فى الارض يبتغون من فضل اللّٰه

'While others trade in the land in search of Allah's bounly.

And at another place the believers were enjoined to go forth in search of their livelihood after having offered the Friday-prayer :

فاذا قضيت الصلوٰة فانتشروا فى الارض وابتغوا من فضل اللّٰه

'And when the prayer is ended, then disperse in the land and seek of Allah's bounty.'

It has also been said :

ليس عليكم جناح ان تبتغوا فضلاً من ربكم

'It is no sin for you that you seek the bounty of your Lord.'

The general meaning of the above Ayaat extends also to Mudharabah, which is an excellent means of conducting business, earning one's livelihood in a lawful manner and attaining economic well-being. When perusing the sacred Ahadith it appears that Mudharabah was quite common during the life-time of Allah's Messenger صلى الله عليه وسلم, who neither stopped nor discouraged his companions from conducting business in this manner.

Tabarani recorded in Al Awsat the following through Habib bin Yassar from Sayyidina Ibn Abbas رضى الله عنه : The people used to give Syyidina Abbaa رضى الله عنه money to do business on Mudharabah basis.

And in order to securitize their money they would impose certain conditions like that he is not to undertake any voyage or travel through any wadi or purchase any cattle with the money, otherwise he would be resposible in case of loss. When the Messenger of Allah صلى الله عليه وسلم got to know about this he confirmed it and declared this kind of condition as permissible. (رواه الطبراني ... كتاب القراض)

Mudharabah contracts are a source of blessing

Ibn Majah related from Sayyidina Suhaib رضى الله عنه that the Messenger of Allah صلى الله عليه وسلم said :

ثلاث فيهن البركة : البيع الى اجل و المقارضة و اخلاط البر بشعير

'There is blessing in three things : Sale on deferred payment basis, Mudharabah and mixing wheat with barley.'

In another Hadith comes that the Noble Messenger صلى الله عليه وسلم said :

من عال ثلاث بنات فهو اسير فاعينوه يا عباد الله ضاربوه داينوه

'Whoever has brought up three girls is a prisoner, so help him, o servants of Allah, give him money by ways of Mudharabah and grant him loans.'

During the days of the companions, there was a consensus among the companions regarding the permissibility of

Mudharabah. Sayyidina Umar bin Al Khattab, Sayyidina Uthman Ghani, Sayyidina Ali, Sayyidina Ibn Mas'ud, Sayyidina Abdullah bin Umar, Sayyidah Aishah, Sayyidina Ibn Abbas, Sayyidina Hakim bin Hizam and Sayyidina Jabir رضی اللہ عنہم, they all considered Mudharabah as permissible. Imam Shafii رحمۃ اللہ علیہ recorded in Ikhtilaful Iraqiyin of authority of Imam Abu Hanifa رحمۃ اللہ علیہ that Sayyidina Umar رضی اللہ عنہ gave the wealth of an orphan to Ubaid Ansari on Mudharabah basis, so that he could do business in Iraq.

(البیهقی بسنده الی الشافعی بحواله فتح العزیز علی هامش
المجموع شرح المهذب للنووی)

Baihaqi recorded on authority of A'laa bin Abdur-Rahman that Sayyidina Uthman رضی اللہ عنہ has given his father's wealth on Mudharabah basis. *(Sunan-ul-kubra, 6/112)*

It has been recorded concerning Sayyidina Ibn Mas'ud رضی اللہ عنہ that he had given Zaid bin Khalidah money by ways of Mudharabah :

انه اعطی زید ابن خلیده مالا مقارضة

(vide : Kanzul Ummal 7/323)

An interesting incident concerning Sayyidina Umar رضی اللہ عنہ

There is an interesting incident concerning Sayyidina Umar رضی اللہ عنہ . Sayyidina Zaid bin Aslam رضی اللہ عنہ reported from his father that Sayyidina Umar's رضی اللہ عنہ two sons Abdullah and Ubaidullah had accompanied a troop on the expedition to Nahawand.

On their way back they passed through Basrah where they met Sayyidina Abu Musa Ash'ari رضی اللہ عنہ who was then governor of Basrah. He gave the sons of the Amirul Muminin a warm and cordial welcome and said : 'If there was any way I could benefit you, I would surely do so!' Thus he said : 'Well, there is some money in the Baitul Maal which I would like to send to the Amirul Muminin. I shall give you this money. You can use the money to purchase some goods in the markets of

Iraq and then sell those goods in the markets of Madinah. Then you hand over the original amount to the Amirul Muminin, and you can keep whatever profit you have earned.' The two accepted this offer.

Sayyidina Abu Musa ؓ then wrote to Sayyidina Umar رضی اللہ عنہ that he is sending him such-and-such amount, and that he should take it from his sons. They then went back to Madinah where they sold their goods and earned some profit. When Sayyidina Umar ؓ got to know about this matter he asked his two sons whether Sayyidina Abu Musa رضی اللہ عنہ had given all soldiers money like that. They said : 'No'. Sayyidina Umar رضی اللہ عنہ then said : 'You were given this preferential treatment because of your being the sons of the Amirul Muminin. Deposit whatever amount you received as well as the profit you earned in the Baitul Maal.' Hearing this order Sayyidina Abdullah رضی اللہ عنہ kept quiet, but Sayyidina Ubaidullah رضی اللہ عنہ said : 'O Amirul Muminin, had the money been lost we would have been responsible for it and we would have had to pay compensation to the Baitul Maal.' Sayyidina Umar رضی اللہ عنہ however insisted : 'Deposit whatever amount you received as well as the profit you earned in the Baitul Maal.' Sayyidina Abdullah رضی اللہ عنہ kept quiet, but Sayyidina Ubaidullah رضی اللہ عنہ continued to argue. Sayyidina Abdur Rahman bin Awf رضی اللہ عنہ who had overheard the conversation suggested, 'O Amirul Muminin, why not treat this matter as Mudharabah? Let half of the profit go to the Baitul Maal, and let them share the other helf.' The Amirul Muminin accepted this suggestion and hence half of the profit was deposited in the Baitul Maal while the other half was handed over to his two sons. *(Muwatta Imam Malik, Daraqutni, Sunanul Kubra 6/11)*

From this insident is learnt that Mudharabah was in vogue during the days of the companions, and that they conducted business in this manner.

The Ummat is agreed on the permissibility of Mudharabah

After citing the above incident, Allamah Kasani رحمۃ اللہ علیہ wrote :

'Right from the blessed era of Allah's Messenger صلى الله عليه وسلم; up to this day, the whole Ummat in all townships-agrees on the permissibility of Mudharabah. No one has raised any objection.' *(Badai, 7/385)*

The legitimacy of Mudharabah is also the demand of reason and analogy. Just as Musaqah and Muzara'ah have been declared permissible, keeping in view human interests and needs, similarly Mudharabah ought to be lawful, too, for there are people who have got wealth but lack the necessary expertise and skills to do business, and there are people who have got expertise and skills but no capital. Through Mudharabah as affluent person can keep his wealth in circulation, while a person in straitened circumstances can bring about a positive change in his economic standing.

The Arkaan of Mudharabah

The Hanafi scholars maintain that there are two Arkaan of Mudharabah : Ijab (i.e. offer) and Qabul (i.e. acceptance). The Ijab-o-Qabul should be formulated in such a way that the nature of the contract, namely Mudharabah, can be understood from it. Referring to Mudharabah as Muqaradha, Ma'malah or any other word that carries the same meaning, is sufficient. The Rabbul Maal can say (for instance): 'Take this by means of Mudharabah. Whatever profit you earn shall be divided among us at a ratio of 1:1, 1:2 or 1:3.' In English it is sufficient if one phrases the Ijab as follows : 'I am giving you this wealth by means of Mudharabah. Whatever profit you earn shall be equally shared by us.' And the Amil should say in reply : 'I have taken it', or : 'I agree', or : 'I have accepted', or something like that. After the *Ijab-o-Qabul* the Mudharabah shall be considered as contracted.

The other Imams hold that three are there Arkaan of Mudharabah :

1. Aqidan, i.e the parties of the contract, namely the Rabbul Maal and the Amil.

2. Ma'qud alaih, i.e. the subject-matter of the contract like the capital, kind of business, division of profit.
3. Ijab-o-Qabul, i.e. offer and acceptance.

Imam Shafi'i رحمة الله عليه, has enumerated five Arkaan :

1. Maal, i.e. the capital to be invested.
2. Aml, i.e. the kind of business.
3. Nafa, i.e. the acquired profit.
4. Ijab-o-Qabul, i.e. the offer and acceptance.
5. Aqidan, i.e. the parties of the contract.

Imam Abul Qasim Abdul Karim Ar-Rafii Shafii holds that the owner of the capital and the Amil are two seprate Arkaan. Hence, according to him, a Mudharabah contract consists of six Arkaan. *(Fathul Aziz, 5/12 f)*

Conditions

The parties of the Mudharabah contract must fulfil, besides their being sane, the following conditions for the Mudharabah to be valid and in order :

1. The capital *(Ras-ul-Maal)* must be of intrinsic value, *(Thaman Khalqi)*, such as gold or silver. According to a mufta bihi statement things which have no value as such but are considered as valuable by custom *(Thaman Urfi)*, like, for instance, currency notes, can be used as capital for Mudharabah. This is held by the conglomerate of scholars. Imam Malik رحمة الله عليه, maintains that the capital does not necessarily have to consist of cash. Fixed assets can also be invested in Mudharabah. *(Fathul Aziz, 5/12)*

Allamah Shamsuddin holds that the mufta bihi statement in this regard is that it is not permissible to invest fixed assets in Mudharabah, whereas the Maliki scholars consider it permissible. *(Badai, 7/359)*

2. The capital has to be known, specified and certain at the time of contracting Mudharabah, so as to avoid any dispute between the parties. If the capital is not known, then the

Mudharabah will not be in order, as ignorance regarding the invested capital leads to ignorance of the profit, whereas it is a condition for the validity of Mudharabah that the profit be known.

3. The capital must not consist of receivables. If one was to declare a loan capital to be invested in Mudharabah, then the Mudharabah would not be in order. The author of Badai wrote :

> 'If the Rabbul Maal has given someone o loan and then says to his debtor : 'Use the loan which I have granted you to do business on Mudharabah basis, and let us share the profit in equal proportions', then, in this case, the Hanafi jurists are agreed that such a Mudharabah is not in order.
>
> If the debtor is any other person then the Amil, and the Rabbul Maal instructs the Amil to go to such and such person, recover my dues from him, use the amount to do business on Mudharabah basis, and let us then share the profit in equal proportions, in this case the Mudharabah will be in order, as the Mudharabah has not been affiliated with the loan, but rather with the recovered amount.
>
> *(Mabsoot Surkhi)*

4. It is a further a condition for the vaildity of the Mudharabah that the capital is handed over to the Amil, so as to authorise him to conduct business in any way he deems suitable.

5. The Amil's share of the profit must be ascertained, i.e. whether he is to receive one half, one third or one quarter of the profit.

6. The Mudharib's share has to be determined on basis of the acquired profit, not on basis of the capital invested. So if the owner would say : 'Do business with such-and-such amount by means of Mudharabah, and you shall get one half, one third or one fourth thereof.' then the Mudharabah will not be valid.

7. The terms and conditions of the Mudharabah should be put into writing, and both parties should have with them a copy of

the contract, so as to avoid disputes. If there is any other way of reassurance, then there is nothing wrong with adopting it.

8. In case of Mutlaq Mudharabah it should also be decided when the profit is to be calculated and divided.

Types of Mudharabah

There are two types of Mudharabah : Mutlaq and Muqayyad.

Mutlaq : It means that the Amil is not put under any kind of restriction regarding the nature of his business, nor is he bound to do commerce at any particular place. Rather he is given absolute freedom and authority to do business in any manner and at any place he wishes. The Rabbul Maal says for example : 'Here are one thousand Rupees. Do business with this money by means of Musharabah, and you shall have half, or one third, or one quarter of the profit.

Muqayyad : In this case the Rabbul Maal lays down certain conditions regarding the place where business is to be done, for how long business is to be done, or what kind of business is to be done. He says for example : 'Take this money and

1. Do business at a certain place and no where else.
2. Do business for one year only.
3. Deal only in cloth and nothing else.'

Imam Abu Hanifah رحمة الله عليه and Imam Ahmad bin Hanbal رحمة الله عليه hold that Mudharabah Muqayyadah is valid just like Mudharabah Mutlaqah. According to them the Mudharib is bound to abide by these conditions and restrictions which had been thus imposed upon him, and in case he fails to do so, he will be held responsible. In ifsah has been mentioned :

واما ابو حنيفة واحمد فلم يشترطا هذا الشرط وقالا ان المضارب

كما تصح مطلقة فانها تجوز كذالك مقيدة

Imam Abu Hanifah رحمة الله عليه and Imam Ahmad رحمة الله عليه did not lay down any such condition. They hold that both, Mudharabah Mutlaqah and Muqayyadah are permissible.' *(P.258)*

The author of Badai wrote :

واما المضاربة المقيدة فحكمها حكم المضاربة المطلقة

في جميع ما وضعنا

The injunctions regarding Mudharabah Muqayyadah aer the same as those of Mudharabah Mutlaqah with regard to all characteristics we have mentioned.' *(Badai, 7/2631)*

Allamah Ibn Qudamah Hanbali رحمة الله عليه, too, explicitly mentioned the permissibility of Mudharabah Muqayyadah.

(vide : Al Mughni, 5/69)

Imam Malik رحمة الله عليه and Imam Shafii رحمة الله عليه wrote :

'It is essential that the Mudharabah is free of restrictions. If the Mudharib is told to do business at a particular time or in a particular city, then the Mudharabah will not be in order, as in case of imposing such restrictions if happens at times that the very objective of a Mudharabah contract (i.e. acquisition of profit) is defeated. It is hence a demand of this type of contract to grant the Mudharib full authority to do any kind of business any where he pleases.'

(Fiqhus-Sunnah, 3/206), Fathul Aziz, 12/13)

The role of a Mudharib

The honourable jurists have mentioned in detail the various roles of a Mudharib, and the ensuing injunctions concerning the investment. The gist thereof is as follows :

(a) After completition of the Mudharabah contract, when the Mudharib has taken possession of the investment, he becomes the Rabbul Maal's Amil (i.e. trustee), and the investment is governed by the injuctions regarding entrusted goods, so if the investment perishes without any fault on behalf of the Mudharib, then he shall not be responsible. This is held by Imam Abu Hanifah رحمة الله عليه, Imam Malik رحمة الله عليه, Imam

Shafi'i رحمہ اللہ علیہ, and Imam Ahmad bin Hanbal رحمہ اللہ علیہ, *(Mabsoot Surkhi 22/84, Majmaul Anhar 2/321,171 Badai 7/3599, Bidayatul Mujtahid 2/232, Mughni ul Muhwa adillatah 4/854)*

(b) Once the Mudharib has began to do business with the capital he becomes the Rabbul Maal's wakil (i.e. agent), as he has used another person's property with his pemission, which is the very objective of Wakalah (i.e. agency). All the regulations pertaining to Wakalah become thus applicable. Thus the Mudharib will for instance have to keep in view current market prices during any commercial transaction. He should not sell or buy goods at a very high or extermely low rate(Ghabn Fahish).

(c) Then after having earned profit on the investment, the Mudharib's role becomes that of a partner (Sharik). Now he is entitled to a share of the profit as per the agreed conditions.

(d) If for any reason the Mudharabah becomes invalid, then the Mudharib will be considered as the Ajir (i.e. employee) of the Rabbul Maal, and as such he would be entitled to what is known as Ujrat-e-Mithl i.e a salary which would be given to a similarly capable regular employee under similar circumstances. *(Al Fiqh Al Islamiyah wa Adillatahu, 4/854)*

(e) And in case the Mudharib violates any of the conditions imposed by the Rabbul Maal, then he will be considered as Ghasib (i.e. usurper) of the investment, and he will he held responsible.

The rights of the Rabbul Maal and the Mudharib

As a result of the contract of Mudharabah the Rabbul Maal and the Mudharib were endowed with certain rights and options, the details of which are given below :

The rights and options of the worker

After persuing the writings of the honourable jurists, one can divide the rights and options of the worker into three catagories.

(a) Such rights and options which the Mudharib obtains by virtue of the Mudharabah contract, and which do require the Rabbul Maal's permission, as all these rights and options either pertain directly to the Mudharabah itself or to which are subject to it, namely :

1. Bai' wa Sharaa

As a result of the Mudharabah contract the Mudharib obtains the right of selling and buying, no matter if he does so for cash or on credit, because both kinds of transactions are common pratice among traders. Thus the Mudharib is at liberty to sell and buy on credit, but he does not have the right to give credit for longer then what is considered as common market practice. *(Inayat-wa nataij ul afkar alal Hidayah, 7/63)*

2. Tawkil

The Mudharib has got the right to appoint someone as his Wakeel (agent) to carry out all such commercial and other transactions which he himself is entitled to carry out.

3. Istijar

The Mudharib has got the right to rent a house for safe keeping of the capital. He may also hire others to work for him.

4. Travelling

The Mudharib has go the right to travel with the invested capital, no matter whether he travels by land, sea or air, because travelling plays a vital role in promoting trade.

5. Ida'a

The Mudharib has got the right to deposit the capital with someone as a 'Wadi'ah' (i.e. trust), as there occassionally arises the need to do so.

6. Ibdha'a

In the terminology of Fiqh, Ibdha'a means that a person uses another person's capital for trade, and then gives the profit he thus earned to the actual owner, without taking any recompensation for his services. Whatever he does, he does voluntarily. Now since earning profit is the objective of Mudharabah, one can consider Ibdha'a as an excellent means of achieving this objective. This is why the Mudharib has got the right to give the capital to another person, on basis of Ibdha'a.

7. Ihtiyal

The Mudharib may if he needs to give the capital to another person by means of 'Hawalah'.

8. Rahn

The Mudharib many give something from the investment as a pledge, and similarly he may accept something as a pledge.

(b) Such rights which the Mudharib does not obtain solely by vritue of the Mudharabah contract, but which he obtains in case the Rabbul Maal clearly states that he is at liberly to act as he deems appropriate. These rights are mentioned below :

1. Mudharabah

The Mudharib does not have merely by virtue of the Mudharabah contract the right to give the investment on Mudharabah basis to a third person. If however the Rabbul Maal authorises the Mudharib to act as he deems appropriate, then he is permitted to give the investment on Mudharabah basis to another person.

2. Shirkat

Shirkat here refers to Shirkat-e-Uqd, that means the Mudharib may enter a contract of partnership with another person, that they shall both contribute to a joint commercial

venture and share the accruing profit as per agreement. The Mudharib may use the Mudharabah capital for this purpose. Again, the right to do so does not ensue from the Mudharabah contract itself, but from the Rabbul Maal's permission.

3. Khalt

Khalt means that the Mudharib mixes the capital of Mudharabah either with his own capital or with the capital of someone else. This right too, does not result merely from the contract of Mudharabah, but from the Rabbul Maal's statement : 'Do what you deem appropriate.'

(c) Those rights which neither ensue from the contract of Mudharabah itself, nor the Rabbul Maal's saying : 'Do what you deem appropriate, but which require the Rabbul Maal's explicit permission, like for example :

☆ Giving a loan from the capital of Mudharabah.

☆ Taking a loan from the capital of Mudharabah.

☆ Giving a gift from the capital of Mudharabah.

☆ Giving a charity from the capital of Mudharabah, etc.

(For details please see Mabsoot lis-surkhi 22/38, An-Natf fil Fatawa 1/537-542, Al Hidaya ala Hamishi Nataaijil Afkar 1/44)

The rights of the Rabbul Maal

The Rabbul Maal enjoys the following rights and privileges :

1. He may determine the duration of the Mudharabah contract. He may, for instance say I am giving you this capital on Mudharabah basis for two years only.
2. He also may determine any particular city or place where the Mudharib is to do business. He may for instance say : Do business with this capital only in Patna or in Calcutta.
3. The Rabbul Maal further has got the right to prescribe any particular kind of business.

He may for example say : 'Deal only in wheat, barley and similar grains.'

4. The Rabbul Maal however does not have the right to impose any such condition which would render the business unprofitable, like : 'Do not sell these goods for cash'. A condition of this kind would not be valid.

Giving the capital to a third person on basis of Mudharabah

It has already been mentioned above that the Mudharib does not have merely by virtue of the Mudharabah contract the right to give the capital to a third person on basis of Mudharabah, for the Rabbul Maal has expressed his willingness to share the profit accruing on the capital only with the Mudharib, not with a third person. If however the Rabbul Maal has authorised the Mudharib to do with the capital whatever he deems appropriate, then the Mudharib shall have the right to give the capital to a third person on Mudharabah basis. If however he has done so without the Rabbul Maal's permission, then he shall be held responsible. Imam Abu Hanifah, Imam Abu Yusuf and Imam Muhammad رحمة الله عليهم hold different opinions whether the Mudharib will be held responsible right at the time of contracting a secondary Mudharabah and when handing the capital over to him, or when the other person begins to act as second Mudharib, and profit accrues.

Imam Abu Hanifah رحمة الله عليه holds that the first Mudharib shall not be held responsible merely on account of contracting a second Mudharabah and when the second Mudharib begins to operate, but when profit accrues on this transaction, then the first Mudharib will be responsible for the Rabbul Maal's investment. Imam Abu Yusuf and Imam Muhammad رحمة الله عليهم however hold that the first Mudharib shall be held responsible right at the time when the second Midharib begins to operate, regardless of whether his activities yield any profit or not.

The author of Hidayah wrote the following in this regard :

'If the Mudharib gives the capital to any other person on basis of Mudharabah, although the Rabbul Maal has not permitted him to do so, then yet the Mudharib shall not be held responsible only on account of his handing the capital over to another person, or on account of the other person's commencing any commercial activity with that capital. When however the second Mudharib begins to earn profit then the first Mudharib shall be responsible for the Rabbul Maal's investment. This is what Hasan bin Ziyad related from Imam Abu Hanifah رحمة الله عليه .

Imam Abu Yusuf and Imam Muhammad رحمة الله عليهم hold that the first Mudharib is obliged to take responsibility for the Rabbul Maal's right when the second Mudharib begins to operate, regardless of whether his activities yield any profit or not. This is the Zahir Riwayah. Imam Zafar رحمة الله عليه holds that the first Mudharib shall be held responsible right at the time of handing the investment over to the second Mudharib, no matter whether the latter began any commercial activity or not. A tradition to the same effect has been related from Imam Abu Yusuf رحمة الله عليه as well.'

(Hidayah ma'a nataail-ul-afkaar, 7/429-430)

From the above passage is learnt that the first Mudharib shall be held responsible. Now remains the question whether the second Mudharib shall be held responsible for the capital which he acquired on basis of Mudharabah, or not. As far as this is concerned the statement according to which verdicts are issued is that the Rabbul Maal is at liberty to hold either of the two Mudharibs responsible. He can hold the first one responsible, since he when giving the investment to another person without being authorised to do so, has becomes an usurper. So if the Rabbul Maal held him responsible and took a compensation from him, then the Mudharabah contract between the first and the second Mudharib shall remain effective along with its mutually agreed upon conditions. After deducting the share of profit which had been previously

determined for the Rabbul Maal, the remaining profit shall be divided according to the conditions agreed upon by the first and second Mudharib. This is so because the first Mudharib has become owner of the investment by virtue of his compenstion.

And if the Rabbul Maal pleases, he can hold the second Mudharib responsible, for he took possession of the investment without being authorised to do so. The second Mudharib shall then receive the compensatory amount from the first Mudharib who had deceived him. In this case, too, the Mudharabah will remain effective and the profit shall be divided between both according to the agreed upon conditions.

(Baharur Raiq, 7/226)

The author of Hidayah wrote :

وقيل رب المال بالخيار ان شاء ضمن الاول وان شاء ضمن الثانى بالاجماع وهو المشهور

(Hidayah ala hamish nataaijul, 7/430-431)

Allamah Shamsuddin Surkhi elucidated this matter as well. *(Mabsoot ils-surkhi, 22/98)*

Imam Shafii's رحمة الله عليه *maslak*

Also according to the Shafi'ite jurisprudence, it is not permissible for the Mudharib to give the investment to a third person on basis of Mudharabah without having obtained the Rabbul Maal's permission to do so. If the Mudharib still does so, then he will be considered an usurper, and accoring to the most authentic statement the accrued profit shall be divided equally between the first and the second Mudharib. In Al Wajiz has been mentioned :

ليس لعامل القراض ان يقارض عاملاً اخر بغير اذن المالك .....
واصحهما وهو المذكور فى الكتاب انه يكون بين العاملين بالسوية وبه اجاب المزنى

'It is not permissible for the Mudharib to give the investment to another person on basis of Mudharabah ··· According to the most authentic statement the profit thus accrued shall be equally divided between both Mudharibs. Imam Mazani has given the same verdict. *(Al Fathul Wajiz ala Hamishul Majmoo, Sharhul Muhazzib)*

Imam Ahmad bin Hanbal's رحمة الله عليهم maslak

Imam Ahmad bin Hanbal رحمة الله عليه, too, holds that it is not permissible for the Mudharib to give the investment to any other person on Mudharabah basis, unless the Rabbul Maal has permitted him to do so. If he does give the investment to anyone else by means of Mudharabah, without being permitted to do so, then he shall be considered an usurper. Ibn Qudamah Hanbali wrote with regard to the conpensation that the Rabbul Maal is at liberty to hold either the first or the second Mudharib responsible :

ولرب المال مطالبة من شاء منهما برد المال ان كان باقيًا و برد بدله ان كان تالفًا او تعذرردّه

'And the Rabbul Maal may hold either of the two responsible to return the investment to him, if it still remains, or demand that his investment be replaced in case it has been lost and the returning thereof is difficult. *(Al Mughni il Ibn Qudamah, 5/49)*

The Mudharib's expenses

Can the Mudharib cover his expenses from the capital of Mudharabah or will he have to cover his expenses from his own pocket?

There are three statements in this regard :

1. Imam Shafii's well-known statement is that the Mudharib cannot cover his expenses from the capital of Mudharabah, regardless of whether he has to travel with it or do business in his hometown. If however at the time of contract it is agreed that the Mudharib's expenses shall be covered from the capital of Mudharabah, then his expenses become due from the capital. Imam Shafii's student Buwayti related that the

Mudharib's expenses are not due from the capital of Mudharabah. There is a second statement by Imam Shafii رحمة الله عليه according to which the mudharib's expenses are due to be covered in case of travel but not in case of residence.

(Fathul Aziz, 12/53)

In Bidayatul Mujtahid Imam Shafii's Mazhab has been interpreted as follow :

فقال الشافعي في اشهر اقواله لا نفقة له اصلاً الا ان ياذن له رب المال

'According to Imam Shafi'i's most well-known statement the Mudharib has go no right to cover his expenses from the capital unless, the Rabbul Maal permits him to do so.

(Bidayatul Mujtahid,2/290)

Dr. Wahab Az-Zuhaily wrote the following in this regard :

فقال الشافعي في الاظهر من توليه لا نفقة للمضارب على نفسه من مال المضاربة لا حضراً ولا سفرًا الا ان ياذن له رب المال

'Imam Shafi'i holds that according to the Zahir Riwayah the Mudharib's expenses are not due to be covered from the capital of Mudharabah, neither while travelling now while residing, unless the Rabbul Maal has given explicit permission (for the expenses to be covered in this manner)'. *(Al Fiqh ul Islami wa Adallatah, 4/864)*

This is also Imam Ahmad bin Hanbal's maslak, that the Mudharib can cover his expenses from the capital of Mudharabah only when he had stipulated a condition to this effect or when the Rabbul Maal has permitted him to cover his expenses in this manner. In Al Insaf has been mentioned :

وليس للمضارب نفقة الا بشرط_هذا المذهب نص عليه

وعليه الاصحاب

2. The second opinion is that the Mudharib has got the right to cover his expenses from the capital of Mudharabah, no matter whether he does business in his hometown or has to travel for this purpose. In both cases his expenses are to be

covered from the capital of Mudharabah. This is the maslak of Ibrahim Nakha'i and Hasan Basri رحمة الله عليهم. There is one tradition by Imam Shafi'i رحمة الله عليه to the same effect.

The author of Bidayatul Mujtahid Ibn Rushd Maliki wrote :

وقال قوم له نفقة وبه قال ابراهيم النخعي والحسن وهو احد ماروى عن الشافعي

'And some scholars hold that he is entitled to (recover) his expenses from the capital of Mudharabah). This is also maintained by An-Nakha'i, Hasan Basri رحمة الله عليهم, and something to this effect has also been reported from Imam Shafii رحمة الله عليه.

(Bidayatul Mujtahid, 2/290)

3. The third opinion is that while residing the Mudharib will have to cover his expenses from his own pocket, and while travelling his expenses are due to be covered from the capital of Mudharabah. This is the maslak of Imam Abu Hanifah, Imam Malik, Sufyan Thawri and the majority of scholars. Imam Malik however has stated that the Mudharib's expenses are to be covered from the capital of Mudharabah only in case the coverage of such expenses can be easily accommodated. Sufyan Thawri has stated that only the costs of at the time of embarking on a journey are to be covered and not the costs at the time of returning. Laith bin Saad holds that the Mudharib may cover the expenses of food taken during day-time only from the capital of Mudharabah, and not the expenses of food taken at night.

In Bidayatul Mujtahid has been mentioned :

'Some jurists hold that while travelling the Mudharib's expenses, food, clothing etc. or to be covered from the capital of Mudharabah nothing however will be due in case the Mudharib does not travel. This is the maslak of Imam Abu Hanifah, Imam Malik, Thawri and the majority of scholars. Imam Malik holds that coverage of expenses is due in case such coverage can be easily accomodated.'

(Bidayatul Mujtahid, 2/290)

Here it should be pointed out that 'travelling' and 'journey' do not refer to a sharai journey of 48 miles. It rather means that if the Mudharib has for the sake of conducting business move so far away from his family that it is not possible for him to spend the night at this home, then his expenses are due from the capital of Mudharabah, because he is kind of bound by this capital, and hence, so as to compensate this restriction, his expenses are to be covered from the capital of Mudharabah; just like the wife's expenses are due from the husband and the Qadhi's expenses are due from the Baitul Maal. And if the Mudharib leaves his home in the morning in order to do business and returns to his family in the evening so as to spend the night with them, then in this case his expenses will not be due from the capital of Mudharabah, since he is not bound on account of this capital.

In Bahrur-Raiq has been written :

اعلم ان ليس المراد بالسفر الشرعي المقدر بثلثة ايام بل المرادان لا يمكنه ان يبيت في منزله وان خرج من المصر وامكنه ان يعود اليه في ليلته فهو كا لمصر لا نفقة له

'Know you well that a shara'i journey the distance of which is covered in 3 days is not intended here. Implied here is that the Mudharib leaves his house (in order to do business) and that he goes so far that it is not possible for him to return to his family at night. And if he leaves the city but can return to his family at night, then the rules regarding being stationed in the city apply, and his expenses are not due to be covered from the capital of Mudharabah.' *(Bahrur Raiq 7/269, Inagah 7/242)*

What kind of expenses are to be covered?

The word 'Nafqah' which has so far been translated as 'expenses' refers to all those things which a person might need on a journey, e.g. the costs for the journey itself, food, drink, clothing, shelter, costs for laundry, oil for the lamp, fuel, employees, costs for the public bath, bedding, an animal to ride on (in the present age this would mean the fare for a car,

train, aeroplane, ship, etc) and its fodder, and besides that all those costs which are usually incurred by traders during a journey will have to be covered from the capital of Mudharabah. Allamah Ibn Nujaim Misri wrote :

'While on a journey, the Mudharib has got the right to spend as much from the capital of Mudharabah on himself, as is commonly done by traders. 'Nafqah' refers to the cost for getting the laundry done, the wages for a cook, fodder for one's riding animals and one's beasts of burden, wages for labourers, cost for oil as per requirement like in Hijaz the charges for using the public bath. All these expenses fall in the category of Nafqah'.

(Bahrur Raiq 7/269, Majmaul Anhar 2/323, Inayah 7/442)

Allamah Shamsuddin Surkhi worte :

'And the Mudharib's Nafqah consists of food, clothing , oil, charges for laundry, etc. These costs are due to bo covered from the capital of Mudharabah for as long as the Mudharib is on a journey, until he returns home, as per costom. The Mudharib is entitled to what is known as Nafqah-e-Mithl, i.e. the kind of Nafqah which is customary for a person from a comparable family background.'

(Al Mabsoot, 22/63)

Fruits also form part of the Nafqah, but only in such quantity which is customary among traders. And if the Mudharib is accustomed to the use of dye, then he may cover also this expense from the capital of Mudharabah. In Khulasatul Fatawa comes :

'The costs for dye and fruits can be covered from the capital of Mudharabah to the extent that is customary among traders. This has been stated by Imam Abu Hanifah and Imam Abu Yusuf رحمة الله عليهم.' *(Khulasatul Fatawa 4/189)*

Allamah Kasani wrote :

'The use of fruits in a reasonable quantity is considered like condiment. Bishr wrote in his Nawadir : I asked Imam Abu Yusuf رحمة الله عليه whether the Mudharib is permitted

to use meat or not. He said : 'He may eat whatever he is accustomed to eat at home.' *(Al Badai 7/3650)*

Medicines and medical treatment

If the Mudharib happens to fall ill while on a journey, shall the costs for his treatment be covered from the capital of Mudharabah, or shall he have to bear the costs himself? The Zahir Riwayah in this regard is that the costs of medicines and medical treatment is not considered as Nafqah. The Mudharib will have to cover these costs himself. The reasons for this is that medicines and medical treatment do not fall in the category of daily necessities; medicines and medicat treatment are required only rarely, and rarely required items cannot be included in the list of daily necessities.

In a Ghair Zahir Riwayah, Hasan bin Ziyad related from Imam Abu Hanifah رحمه الله عليه that the cost of medicines and medical treatment is to be included in the Nafqah, and that the cost thereof is to be covered from the capital of Mudharabah. The reason for this is that medicines and medical treatment are meant for the betterment of the human body, and the Mudharib is not in a position to carry out commercial activities unless he enjoys sound health. Medicines are hence absolutely indispensable. One cannot do without them. In Mabsoot Surkhi has been mentioned.

'The costs for medicines, cupping, surmah etc. will have to be borne by the Mudharib himself. They will not have to be covered from the capital of Mudharabah. Hasan bin Ziyad related from Imam Abu Hanifah رحمه الله عليه, that all these things will have to be paid for from the capital of Mudharabah. *(Mabsoot Surkhi 22/83, Majmaul Anhar 2/333)*

Keeping in view current circumstances it seems more appropriate to issue verdicts in accordance with the Ghair Zahir Riwayah.'

The amount of Nafqah

The Nafqah shall be according to the Mudharib's status. He shall be permitted to spend according to his (genuine) need

and necessity. When taking something from the capital of Mudharabah, the Mudharib should be careful not to spend beyond his status. If he is accustomed to travel in the second class, and eat bread and pulses while at home, then he shall not be allowed to travel in the first class or take better food than what he is used to. If his expenses cross this limit, then he shall be held responsible.

(Hidayah ala Hamish Nataaij ul Afkaar, 7/443)

Allamah Kasani wrote regarding the amount of Nafqah:

'There is concession to take as much as Nafqah as is customary among traders. It shall not be permissible to make any lavish expenses. If the Mudharib crosses the limit as far as his expenses are concerned, he shall be held responsible, because the Mudharib is allowed the Nafqah on basis of tradition and custom. Hence it shall be proper to spend only as much as what is customary.'

(Al Badai 7/3650)

Here is should be clarified that the Mudharib's expenses are actually to be covered from the profit accruing on the capital of Mudharabah. If however the capital has yielded no profit, then there is nothing wrong if these expenses are covered from the actual investment.

In Al Fiqhul Islami wa Adillatah comes :

'The accrued profit shall be used to cover the expenses. In case no profit has been earned, the expenses shall be covered from the actual investment.'

(Al Fiqhul Islami wa Adillatah).

If the Mudharib had used his own money to cover his expenses, then this shall be a debt against the capital of Mudharabah, and the Mudharib shall be permitted to take the required amount. The author of Badai wrote :

'The Mudahrib has got the option to recover his expenses in case he has done that from his own money from the capital of Mudharabah. This amount would be a debt against the capital of Mudharabah, and he has got all right to get the amount reimbursed.' *(Al Badai 7/3649)*

Difference between the Rabbul Maal and the Mudharib

Difference between the Rabbul Maal and the Mudharib can crop up in the following instance :

(a) There might be differences as to whether the Mudharib had general authority to act or whether certain restrictions were imposed on him. The Mudharib might for example say that he got permission to trade in all kinds of goods, or he might say that he got permission to do business wherever he likes, or that he got permission to do business with such and such person in such and such city.

(b) The Rabbul Maal as well as the Mudharib both state that permission to engage in a certain type of business, but they differ regarding the nature of the business. The Rabbul Maal might for example say that he gave the Mudharib money so that he may deal in cloth, while the Mudharib claims that he was given the money to deal in food stuff.

(c) Differences might concern wastage or misappropriation of the capital on part of the Mudharib.

(d) There might be difference as far as the returning of the capital is concerned. The Mudharib might claim to have returned the capital whereas the Rabbul Maal denies that.

(e) There might be differences as far as the amount or quantity of the capital is concerned. The Mudharib might for example claim to have been given only one thousand Rupees, while the Rabbul Maal claims that he had given the Mudharib two thousand Rupees.

(f) Along with differences regarding the capital, there might be difference regarding the conditional profit, too. The Rabbul Maal might for example say that the capital consisted of two thousand Rupees, and that the conditional profit amount to one third, while the Mudharib might claim that the capital consisted of one thousand Rupees, and the conditional profit amounts to one half.

(g) There might be differences regarding the nature of the capital. The Rabbul Maal might for example say : 'I gave you the money on basis of Mudharabah/Wadi'at/Bida'a,' while the Mudharib might claim : 'You gave it to me as a loan.'

(h) The Mudharib might fully deny the Mudharabah. He might say that the Rabbul Maal had not given him the money on Mudharabah basis, while the Rabbul Maal might claim that he had given the Mudharib the money on Mudharabah basis.

In the first instance where there is difference regarding the granting of general authority, the statement of him who lies claim to general authority shall be considered as reliable. The reason for this is that his statement is more akin to the objective of Mudharabah. And if both parties have given a proof for their claim, then the proof of him who claimed general authority shall be accepted. *(Al Badai 7/3655, Majmaul Anhar 2/336, Hidayah ala Hamish Natnaij ul Afkaar. 7/449, Bahrur Raiq 7/273)*

In the second instance where both parties differ regarding the nature of the business, the statement of the Rabbul Maal shall be considered as reliable, because neither of the two statements can be given preference as far as the objective of the contract is concerned; Mudharabah in cloths is as proper as Mudharabah in foodstuff. The Rabbul Maal's statement is considered as reliable because his permission determines the nature of business. *(Al Badai 7/3656, Takmalah Fathul Qadir 7/449)*

In the third case where the differences evolve around wastage or misappropriation of the capital, the Ulama are agreed that the Mudharib's statement shall be considered as reliable, for the Mudharib also plays the role of a trustee, and the absence of dishonesty in all forms is considered as the essence of trust, hence his statement shall be considered as reliable. *(Al Fiqh ul Islami wa Adilluh)*

In the fourth case, when there are differences regarding the returning of the capital, the *Rabbul Maal's* statement shall

be considered as reliable. This is held by the Hanafi and Hanbali scholars. The Maliki and Shafii scholars maintain that accordindg to the most authentic statement, the Mudharib's statement shall be considered as reliable. *(Al Badai 7/3661, Al Mughni Ibn Qudamah 5/70, Mughni ul Muhtaj 2/322, Ash-shar'a ul Kabir 3/536)*

In the fifth case, where the subject of difference is the quantity or amount of the capital, the Mudharib's statement shall be considered as reliable. The scholars are agreed on this point. *(Tabyeen ul Haqaiq 5/72, Al Bahr 7/272, Takmalah Fathul Qadir 7/448, Al Mabsoot 22/91, Al Badai 7/3556)*

As quoted above, as far as the quantity or amount of the capital is concerned, the Mudharib's statement shall be considered. In the sixth case, as far as the profit is concerned, the Rabbul Maal's statement shall be considered as reliable.

(Al Badai 7/3556, Takmalah Fathul Qadir 7/428)

If both parties differ only regarding the quantity of the conditional profit, e.g. the Mudharib says that at the time of contracting the Mudharabah one half of the profit had been decided for him, while the Rabbul Maal claims that one third had been decided for him, then in this case, according to the Hanafi scholars and the preferred statement of Imam Ahmad bin Hanbal the Rabbul Maal's statement shall be considered as reliable. The Maliki scholar hold that the Mudharib's statement regarding which he will have to take an oath shall be considered as reliable, provided two conditions are fulfulled :

1. The Mudharib claims only as much conditional profit for himself as is customary among traders.
2. The capital must be with the Mudharib, either physically or constructively.

The Shafii scholars maintain that in the above case both parties will have to swear an oath. After the oath either one or both parties should cancel the contract of Mudharabah; or the contract should be cancelled by the ruler. In this case the Mudharib shall be entitled to receive wages similar to those of an equally skilled employee *(Ujrat-e-Mithl)*, no matter how

much these might be. *(Al Mabsoot 22/89, Al Badai 7/3662, Al Mughni ul Muhtaj 2/322, Al Muhazzib 1/389)*

If there are differences regarding the nature of the capital, e.g. the Mudharib claims to have gotten the money as a loan, and the Rabbul Maal claims to have given it for the sake of Mudharabah or as Wadi'ah or Bida'a, then in this case according to the Hanafi and Hanbali scholars the Rabbul Maal's statement shall be considered as reliable. *(Al Mabsoot 22/91, Al Badai 7/3659, Takmalah Fathul Qadir 7/449, Al Mughni 5/71)*

And if the Mudharib says to have gotten the money on Mudharabah basis, while the Rabbul Maal claims to thave given him the money as a loan, then the scholars are agreed that the Mudharib's statement shall be considered as reliable.

(Ash-Sharhul Kabir 3/536, Mughni ul Muhtaj 2/321)

And if the Mudharib denies the Mudharabah, while the Rabbul Maal claims to have given him money for the sake of Mudharabah, then the Mudharib's statement shall be considered as reliable because he is the one who denies, and in the absence of evidence the denier's statement accompanied by an oath shall be considered as reliable.

(Al Badai 7/3659)

Distribution of Profit

Both parties have to be present at the time of distributing the profit. It is not permissible for the Mudharib to divide the profit in the Rabbul Maal's absence, and to take his share of the profit. The Rabbul Maal's presence at the time of distributing the profit is conditional. Ibn Rushd Maliki who reported consensus of scholars in this regard, wrote :

> 'The scholars are agreed that it is not permissible for the Mudharib to take his share of the profit unless the Rabbul Maal is present. The Rabbul Maal's presence at the time of distributing the profit is conditional. It is not sufficient if the Mudharib divides the profit in front of witnesses.'

(Bidayatul Mujtahid 2/290, Fiqh us sunnah 3/210)

Invalid Mudharabah (Mudharabah-e-Fasidah)

According to the Hanafi scholars the Mudharabah shall be considered as invalid in the following cases :

1. Any such condition because of which the profit cannot be clearly determined, renders the contract of Mudharabah invalid. (Raddul Mukhtar 5/648). If the condition does not lead to the indeterminability of the profit, then the condition will be considered as null and void, but the contract of Mudharabah will be in order, e.g. a condition to the effect that the Mudharib shall bear any kind of loss, or that both parties shall bear the loss. Such a condition shall be null and void, but the contract itself shall be in order. Or, if one person gives another 1000 Rupees to do business one Mudharabah basis, and that they shall divide the profit equally, and they put a condition to the effect that the Rabbul Maal shall let the Mudharib cultivate his fields for one year, or that the Rabbul Maal shall provide the Mudharib with housing for one year, then the thus imposed conditions shall be void, but the contract itself shall be in order. The reason for which such conditions shall be void is that they are not aligned with the objective of Mudharabah.
2. Similarly imposing any such condition which negates one party's participation in the profit, invalidates the contract of Mudharabah. In Multaqal Abhar has been mentioned :

كل شرط يوجب جهالة الربح و يوهب قطع الشركة فيه يفسد ها

و مالا فلا يفسد وانما يبطل الشرط فقط

"Any such condition which results in the profit's becoming inderterminable, or which leads to negation of participation therein, renders the contract of Mudharabah invalid, and any such condition which does not have any such effect does not render the contract invalid, but the condition itself will become null and void.'

(Majma'ul Anhar 2/323-324)

If, for example, any of the parties claims certain amount of the profit for himself, e.g. if the Rabbul Maal says that he shall

take hundred Rupees of the profit, and that whatever is left thereafter shall belong to the Mudharib; then both the conditions as well as the contract of Mudharabah shall be invalid, because the nature fo the Mudharabah contract aims at letting both parties get a share of the profit, and the above condition defeats that objective, for it is well possible that the total profit amounts to 100 Rupees only, and that would negate the participation of one party in the profit.

(Raddul Mukhtar 5/648)

If the whole profit has been assigned to the Rabbul Maal, and the Mudharib expressed his willingness to work for free, then this shall not be considered as a contract of Mudharabah, but as Ibda'a, i.e. an arrangment where one partner contributes capital and the other puts in labour, voluntarily foregoing his share of the profit. Under such an arrangment the whole profit goes to the Rabbul Maal.

And if the whole profit has been assinged to the Mudharib, then, according to the Hanafi and Hanbali scholars, the matter shall be treated as a loan transaction. The Mudharib shall get all the profit, while the Rabbul Maal shall get back his capital, and nothing beyond that.

The Shafi' scholars hold that such a Mudharabah shall be invalid, and that the Mudharib shall get what is given to similarly capable employees who carry out similar duties (Ujrat-e-Mithl). *(Fiqhul Islami wa Adillah 4/8497)*

In case the Mudharabah is invalid, the Mudharib is not entitled to a share in that profit. The whole profit shall go to the Rabbul Maal. The Mudharib's labour shall be remunerated through Ujrat-e-Mithl. *(Bidayatul Mujtahid 2/292)*

Fix seperately any wages for the Mudharib

In a Mudharabah the Mudharib is given a share of the profit this is after all why he puts in labour and effort and his share in the profit constitutes the remuneration for his efforts. Hence it is not proper to fix any seperate wages for him; and if the Mudharib puts any such condition, then the condition

would not be valid. The contract of Mudharabah however would remain unaffected.

In Mabsoot Surkhi has been mentioned :

Imam Muhammad رحمۃ اللہ علیہ stated : If a person has been given thousand Dirhams to do business on Mudharabah basis, and it has been agreed that he shall get half of the profit, and a condition has been put that the Mudharib shall get ten Dirhams a month as wages, then such a condition would not be valid. It is not proper for the Rabbul Maal to put a condition that the Mudharib shall get a share of the profit, as well as wages, because the Mudharib keeping in view his mutually agreed upon share in the profit has got already his share in the capital of Mudharabah, and if a person already has a share in the capital, then it is not permissible to pay him any wages for his labour. *(Mabsoot 22/149-150)*

Putting any condition to the effect that the Rabbul Maal shall contribute labour

One of the conditions that has to be fulfilled so that the contract of Mudharabah is valid and in order is that the Rabbul Maal puts the Mudharib in complete charge of the capital, and that the Rabbul Maal does not interfere in the Mudharib's activities.

Besides that, one of the characteristics of the contract of Mudharabah is that one party contributes capital and the other party puts in labour. Hence, if the Rabbul Maal put any condition to the effect that he shall not only contribute capital but also labour, then the contract of Mudharabah shall be considered as invalid.

In Mabsoot Surkhi comes :

If the contract of Mudharabah states that the Rabbul Maal shall work together with the Mudharib, then the Mudharabah shall be invalid. It is one of the conditions for the Mudharabah to be valid and in order that the

Rabbul Maal does not intefere in the Mudharib's activities, and any condition regarding the contribution of labour stands in contradiction to non-interference. *(Mabsoot 22/149)*

The author of Khulasatul Fatawa wrote :

'Any condition to the effect that the Rabbul Maal shall contribute labour, renders the Mudharabah invalid.'

(Khulasatul Fatawa 4/188)

Null and void Mudharabah (Mudharabah-e-Batilah)

(Dismissal of the Mudharib)

In the following cases the Mudharabah shall become null and void, and the Mudharib shall stand dismissed :

1. Breaking the contract of Mudharabah, preventing the Mudharib from doing his work :

If the Rabbul Maal has cancelled the contract, or prevented the Mudharib from doing his work, or dismissed him, then in all those cases the Mudharabah shall become null and void. *(Al Badai 7/3696)*

2. Death of a party :

In case either party of the contract dies, the Mudharabah shall become null and void. The majority of scholars holds that the death of the Rabbul Maal or the Mudharib shall cause the Mudharabah to become null and void. The reason for this is that Mudharabah comprises Wakalah (i.e. agency), and the death of the Muwakkil (i.e. the one who appointed the agent) or the Wakeel (i.e. the agent) causes the agency to become null and void. Similarly it happens in the case of Mudharabah. The Mudharabah shall become void no matter whether the Mudharib knew about the Rabbul Maal's death or not. *(Al Badai 7/3662)*

The Maliki scholars hold that the death of a party does not render the contract null and void. In case the Mudharib passes away, his heirs are to execute the Mudharabah, provided they

are trustworthy, otherwise they should entrust the matter to any other suitable person. *(Qawaneenaul Fiqhiyyah 283, Al Fiqhul Islami wa Adillah 4/873)*

3. Insanity of a party :

In case either party of the contract becomes insane, the Mudharabah becomes null and void, provided the insanity is of continuous nature. *(Al Badai 7/3662)*

4. Apostacy on part of the Rabbul Maal :

In case the Rabbul Maal apostates (العياذ بالله) and dies as an apostate, or is put to death in that state, or moves to a place which is ruled by infidels (Darul Harb), and the Qazi confirms his having re-settled in Darul Harb, then according to Imam Abu Hanifah , in all the above cases the Mudharabah shall be considered as null and void right for the day on which the Rabbul Maal apostated.

(Al Badai 7/3663)

The Mudharabah will not become null and void in case the Mudharib apostates, for his apostating does not end his capability. So after becoming an apostate, he did business with the capital of Mudharabah and earned profit, then he and the Rabbul Maal shall share the profit according to the mutually agreed upon ratio. *(Takmalah Fathul Qadeer)*

5. Destriction of the capital of Mudharabah :

If, after concluding the contract of Mudharabah and before commencing any business, the capital is destroyed at the hands fo the Mudharib, then the Mudharabah shall be null and void. The reason is that once the Mudharib took possession of the capital, the capital become assigned to the Mudharabah.

Hence, if the capital is destroyed, the Mudharabah becomes null and void, too. This can be compared to Wadi'yah. If the capital of Wadiy'ah is destroyed, then the Wadiy'ah becomes null and void. Similarly, if the Mudharib destroyed the capital of Mudharabah, or

he gave it to another person who destroyed it, then in either case the Mudharabah will become null and void.

Here it should be keept in mind that in all those cases in which the Mudharabah is annulled, if, at the time of annullation, the capital of Mudharabah is in asset-from rather than in cash-from then the Mudharib shall have the right to sell the assests so as to convert them into cash. This is because the Mudharib's right is established in the profit, and the issue of distributing the profit depends on whether the actual capital is in cash-form already or whether it needs to be converted into cash. Hence, in all those cases, in spite of the Mudharib's having been dismissed, he shall have the right to selling the assets.

(Takmalah Fathul Qadeer 7/436)

☆☆☆

MUSHARAKAH CONTRACT

One of the distinguishing feature of the Islamic economic system is that it gifted mankind with such eternally true golden rules and principles which can provide each member of society - rich or poor, educated or uneducated, farmer, worker, artisan or industrialist with means to fulfil their needs through their lawful income. In the economic system which is founded on interest, capital plays a fundamental role. A capitalist earns maximum profit with minimum labour or risk of loss invoved. Thus, through interest-based transactions, he sucks the blood of the down-trodden members of society; trying to extinguish the conflagration of his greed by earning more and more money. It is naught but the perfection of the Islamic economic system that allows on one hand the rich to augment their income through trade, and on the other hand it give the poor the opportunity to earn a decent living only by virtue of their skill and their labour, if they opt for Mudharabah. Similarly if there are people who got some capital, they can from a partnership and do business together.

Partnership or Shirkat is one of the cornerstones of the Islamic economy. Islam which has been interpreted as just and equitable code of life, has keeping in man's various needs and requirements-made partnerships lawful. This not only promotes industry and trade, but also provides protection to small capital owners in their quest to generate lawful income. Partnership can be set up in trade, industry, agriculture and all kinds of services and professions. While there need to be at least two individuals to enter a partnership, there is no upper limit. In the present age partnerships are highly in vogue. Many industrial and commercial institutions and factories run

on the pattern of partnerships, but unfortunately only grand capitalists and high-ranking managers seem to reap any benefit. Small capital owners are usualy badlly exploited.

If however the people would duly implement the golden principles which the Islamic Shariah has laid down for partnership-based businesses, and fulfil relevant conditions, then not only the greatest of joint ventures would run smoothly, but also all partners would be able to benefit as per their capital and labour contribution. This would not only promote national economic growth but also provide a decent income to thouands of supportless people and owners of small capital..... Partnership-based business or joint venture means that a couple of people get together, channel their capital into a common pool, and agree to work together and then divide the accruing profit according to the capital, i.e. one partner might get one third of the profit, another one half or one quarter, and in case of loss all partners agree to bear the loss according to the capital ratio.

The legitimacy of the contract of Shirkah

The Holy Qur'an has in general declared all kinds of business and commerce that are based on mutual acceptance to be lawful and permissible; and Shirkah is one form of business. Allah Most High staked in the Holy Qur'an:

"Allah permitted trade and prohibited usury."

(Surah Baqarah, Ayat 275)

Elsewhere has been stated:

"And when the prayer is ended disperse in the land and seek of Allah's bounty ....."

(Surah Juma'ah, Ayat 10)

"Allah's bounty" refers to all permissible forms of business and trade, which includes the contract of Shirkah which is an excellent means for promoting economic growth in particular and human welfare in general.

Some Ayaab have clearly stated the the permissibility of Shirkah, like example:

فهم شركاء في الثلث

'Then they shall be sharers in the third.' *(Surah Ni'saa, Ayat 12)*

With regard to the spoils of war has been said:

واعلموا ان ما غنمتم من شيء فان لله خمسه وللرسول ـ

'And know that whatever you take as spoils of war, to lo! One fifth thereof is for Allah and the Messenger and for the kinsman.'

(Surah Anfal, Ayat 41)

In this Ayat has been ordained that one fifth of the spoils of war shall belong to Allah and His Messenger صلى الله عليه وسلم, the kinsman, etc. This is hence one form of what is known as Shirkat-e-Ain.

About inheritance has been said:

يوصيكم الله في اولادكم للذكر مثل حظ الانثيين ـ

'Allah charges you concerning your offspring to the male the equivalent of the portion of two females.'

(Surah Ni'saa, Ayat 11)

Likewise it has been said with regard to Zakah and other obligatory charities:

انما الصدقات للفقراء والمساكين ـ

'The alms are only for the poor and the needy.'

(Surah Tawbah, Ayat 60)

This Ayat, states that serval people shall have a share in the Zakah and other obligatory charities.

With regard to Sayydina Dawood's عليه السلام story has been said:

وان كثيرًا من الخلطاء ليبغي بعضهم على بعضهم ـ

'And lo! Many partners oppress one another.'

(Surah Sa'ad, Ayat 25)

The word 'Khulataa' means partners.

A thorough study of the sacred Ahadith reveals that the Arabs practised partnership-based trade during the days of the Noble Prophet صلى الله عليه وسلم . Allah's Messenger صلى الله عليه وسلم was very well aware of this practice but he did not raise any objection against it, nor did he stop the people from it. He let them continue their business in this manner.

Imam Abu Dawood recorded a tradition from Sayydina Abu Hurariah رضى الله تعالى عنه according to which the Noble Prophet صلى الله عليه وسلم said:

قال الله تعالىٰ : انا ثالث الشريكين مالم يخن احد هما صاحبه فاذا خانا خرجت من بينهما ـ

Allah Most High says:

"I am the third among two partners as long as they do not betray one another. And when they betray, I leave them.

Abu Dawood and Majah recorded from Sayydina Abu As-Saib رضى الله عنه that on the day of the conquest of Makkah, he said to the Noble Prophet صلى الله عليه وسلم . 'During the days of ignorance you were my partner, and you were an excellent partner indeed. Neither did you raise an objection, nor did you ever fight or quarrel.' *(Musnad Ahmad, Mustadrak Hakim, Nisb-ur-Raya 3/474)*

In another Hadith comes:

فا وضوا فانه اعظم البركة ـ

'Practise Shirkatul Mufawadhah for it is a thing of great blessing.' *(ibid)*

In another Hadith has been mentioned:

يد الله على الشريكين ما لم يتجاوزا ـ

'Allah's hand is over partner (in trade) as long as they do not exceed the limits'.

(Al Mughni 5/73; As-Sunan Al Kubra 6/78)

Sayydina Ibn Abbas رضى الله عنهما is reported to have said: "Do not form a partnership with Jews, Christians or Magians'. When asked far the reason, he replaced: 'Because they engage in interest-based transactions'.

Right from the days of the Noble Prophet صلى الله عليه وسلم until our era the whole Ummah is agreed on the permissibility of Shirkah.

In Mabsoot Surkhi has been mentioned:

"Shirkah-based trade was commonly practisted by Arabs at the time when the Noble Prophet صلى الله عليه وسلم commenced his mission; and even after him صلى الله عليه وسلم , up to this age, people practise it. No one ever denied its permissibility."

In Al Majmoo' comed:

"There is no difference of opinion among the scholars regarding the permissibility of Shirkah."

In Al Mughni has been stated:

"There is consensus among the Muslims regarding the permissibility of Shirkah."

Besides that, rationality and various human needs require that Shirkah be permissible. People usually do not have enough capital to start a business on their own . Shirkah gives also small capital owners an opportunity to operate, it promotes of lawful income to the weak and supportless and has an all-over positive effect on the national economy.

The Shara'i meaning of Shirkah

'Shirkah' literally means to combine two things in such a way that it becomes difficult to distinguish one from the other. In the terminology of Fiqh it refers to a particular form of business in which two or more individually combine capital and effort and then share the accruing profit as per agreement.

In the Hanafi jurisprudence, Shirkah has been defined as follows:

"Shirkah is a contract in which some people share the capital and the profit." *(Raddul Mukhtar 3/364; Majma'ul Anhar 714)*

In Mujallatul Adliyah Shirkah has been defined thus:

"Shirkah refers to a joint venture of two or more people in which each partner got a share in the capital and the profit." *(Mujallatul Adliyah, 1329)*

In Mughni Al Muhtaj comes;

"In the terminology of the Holy Shari'ah. Shirkah refers to a contract in which two or more persons are entitled to something at a percentual ratio."

Allamah Ibn Qudamah Hanbali رحمۃ اللہ علیہ, hold that Shirkah refers to a group of people getting together to have a joint right to do or to get something. *(Mughni ul Muhtaj)*

The Maliki scholars holds that Shirkah is a contract in which the partners who actually work for the partnership have got the right to make expenditures with the capital of Shirkah, and the partners who do not work of the Shirkah retain right of making expenditures, too. *(Sharh ul Kabeer)*

The Arkaan of Shirkah

In the case of sale there has to be an offer from one side and acceptance from the other; the offer made by one party is known as 'Eejab' in the terminology of Fiqh and the acceptance coming from the other party is known as 'Qabool.'

According to the Hanafi scholars the contract of Shirkah has got two Arkaan-Eejab and Qabool. The words being used during Eejab are to be such that the actual purpose of the contract, i.e. Shirkah, becomes clear, and for the Qabool it suffices to use any such words through which one's consent is clearly conveyed. One partly might for example say: 'Take my ten thousand Rupees for Shirkah. The money shall be our joint capital, and we shall both work together. Whatever profit Allah shall grant us, we shall divide 1:1, or 1:2 or 1:3.' Or one can also say: 'I am giving you this money for Shirkah, and whatever profit shall accrue, we shall divide as per agreement.' And far the Qabool one may say: 'I accept' or: 'I agree' or something like that.

The other Aimma hold that Shirkah has got three Arkaan:

1. Parties of the contract.
2. Offer and acceptance.
3. Capital and entrepreneur in.

The written agreement

At the time entering a contract of Shirkah it, one should not content with a mere verbal agreement, but the matter should be put into writing, and each party should have a copy of the agreement, so as to easily resolve any potential difference and disputes in the light of this kinds of docoment.

"This agreement is between---- and---- both have agreed to form a Shirkah, duly fearing Allah, and duly keeping His trust shall contribute---- capital and---- shall contribute---- capital. The capital shall belong jointly to both partners who may do business either individually or together. Both of them shall have the right to make expenditures as they deem proper. They may trade on cash-basis as well as on credit. Whatever profit accrues shall be distributed among them as per the mutually agreed conditions, and case of loss both partners shall bear the loss in proportion to their contributed capital."

The date should be written at the bottom of the agreement; the agreement should be signed by both parties as well as at least two witnesses.

Conditions

The Hanafi scholars hold that there are four conditions pertaining to Shirkah:

1. Conditions which pertain to all kinds of Shirkah.
2. Conditions which pertain to Shirkatul Amwal, no matter if it be Shirkatul Amwal Mufawadhah or Shirkatul Amwal Inan.

3. Conditions perataining to Shirkatul Mufawadah and the different types thereof.
4. Conditions pertaining to Shirkatul Inan only.

Conditions which pertain to all kinds of Shirkah

The conditions which pertains all kinds Shirkah are of two types:

One is related to the 'maqoodah alaihi' i.e. the matter regarding which both parties decided to enter the contract of Shirkah; and the other type is related to the profit.

The condtion which is related to the 'maqoodah alaihi is that either party can act as 'Wakeel', i.e. of the other partner. Hence, if two people would get together to start a Shirkah-based trade of such items which may be taken into possession by anyone without, like for example grass, pieces of wood that can be found in the forest, or game; that means if they would agree to go in the forest to collect fire wood, or to hunt birds and then sell them in the market means of Shirkah, then this transaction would not be in order since the items for which they decided to form a partnership may be taken into possession by anyone. Anyone who takes such items into his possession will be considered their owner. Hence, it is not possible to appoint anyone as one's agent to take possession of these items.

In Badai-us-Sanai coms:

> "Capability of agency is one the conditions pertaining to Shirkah, because agency is vital for all kinds of Shirkah. Agency means that each partner should be capable of acting as agent on behalf of the other as far as managing the capital of Shirkah, buying and selling and accepting of orders is concerned. The contract of Shirkah demands that each partner should be authorised by the other to buy, sell and accept orders; and an agent is a person who manages affairs of the other by virtue of his being authorised to do so by the person who had appointed him as his agent.

Hence capability to act as agent is vital for all kinds of Shirkah.'

Conditions pertaining to the profit

The second type of conditions are those that pertain to profit, namely:

1. The quantity of profit be known. If at the time of forming the Shirkah it is not known how the profit shall be divided, i.e. how much profit shall go to each partner, then contract of Shirkah shall not be in order. This so because in the case of Shirkah the profit becomed 'maqood alaihi,' i.e. subject matter of the contract, and if the subject matter of the contract is not known, them this leads to invalidation of the contract.

   Shamsul Ulema Allamah Kasani wrote:

   "The quantity of the profit must be known and defined. If the ratio of the profit is unknown, then the contract of Shirkah shall be considered as invalid. The reason for this is that the profit is considered as part of the subject matter of a Shirkah contract, and its being unknown results in the invalidation if the contract, just as in the case of sale and lease. *(Badai-us-Sanai, 59)*

2. One of the conditions for the validity of the Shirkah contract is that the ratio of the profit be defined, e.g. one quarter, one third or one half of the total profit, i.e. how many percent of the total profit shall go to which partner, so as to ensure that each partner shall get a share of the total profit. If any particular a amount is fixed for any of the partners, e.g. if it is decided that Khalid shall get 50 Rupees (of the total profit, no matter how much or how little it might be), then the contract of Shirkah shall not be valid since there is apprehension that the total profit does not exceed the amount thus fixed, and in this case the other partner would remain deprived, which is contrary to the spirit of Shirkah. Likewise, the other partner would have no share in the amount thus fixed (in case the profit exceeds this amount), where as it is a pre-requisite of for

the legitimacy of Shirkah that each partner shall get a share of the total profit.

In Majma'ul Anhar Sharh Multaqal Abhar comes:

"One of the condition for the contract of Shrikah is that the profit must not be allocated in a manner which would result in the end of the Shirkah, e.g. fixing a certain amount of Dirhams for one of the partners. Doing so would eliminate the factor of both partners' sharing the profit, since there is apprehension that the total profit might not exceed the thus fixed amount.

(Majama'ul Anhar Sharh Multaqal Abhar)

In Badai has been mentioned:

"In the contract of Shirkah the profit needs to be allocated in such a way that the element of sharing permeates the total profit. If a certain amount, like for example ten Dirham, is allocated for one of the partners, then this would render the contract of Shirkah invalid, since the contract of Shirkah demands that the profit contains an element of sharing. Fixing a certain amount for one the parties invalidates the Shirkah, since there is apprehension that the total profit might not exceed the amount thus fixed, hence element of sharing no longer remains with regard to the profit.

Types of Shirkah

The Hanafi scholars maintain that there are basically two type of Shirkah:

1. Shirkatul Amlak.
2. Shirkatul Uqood.

1. Shirkatul Amlak

This to the case in which two or more individuals become owner of some properly without any proper contract of Shirkah. Shirkatul Amlak is of two types:

(a) Jabri Shirkah (i.e. involuntary Shirkah)

(b) Ikhtiyari Shrikah (i.e. voluntary Shirkah)

A. Jabri Shirkah

In this case two or more people become owners of some property without any intention or effort on their part, e.g. two brothers who become heirs to their father's estate. The estate-prior to division-belongs to them jointly; without any intention or effort on their part. Acquisition of inheritance is involuntary. The heir shall get his due share, whether he wants it or not. Even if he refuses his share in the inheritance - saying that he does not want it or need it-his right in it would not cease mercely on account of his refusal.

Jabri Shirkah also occurs in case the property of two people becomes mixed in such a way that it becomes impossible or extremely difficult to distinguish one from the other, e.g. if wheat gets mixed with wheat, or wheat with barley, or barley with rice.

B. Ikhtiyari Shirkah

In this case two people become joint owners of some property on account of their free will, e.g. two people intentionally and voluntarily mix their property, or they purchase some property together, or anyone left a testament in their favour according to which they shall become joint owners of some property and they accepted, etc. All these cases shall be considered as Ikhtiyari Shirkah.

The Rukn of Shirkatul Milk is the combination of two people's property. If their property is combined, then each parner shall have a right therin.

In Mabsoot Surkhi comes;

> Shirkatul Milk means that a property belongs jointly to two (or more) persons. There are two possibilities:
>
> The first is that their ownership becomes established without any intention or effort their part, like in case of inheritance; and the second possibility is that ownership becomes established as a result of intention and effort, e.g. in case of their jointly purchasing some properly or

accepting a testament that had been made in their favour. Thus joint ownership comes into being.

As far as Shirkatul Milk is concerned all parties shall be considered as strangers regarding the right of the others. That means that no partner shall have the right to make any expenditure in the other partner's shares, unless, the latter permits him to do so. If the jointly owned property is some how increased, or something is added to it, then this increase or addtion shall be shared by the partners according to the same ratio in which actual property is shared by them.

In Majm'ul Anhar Sharh Multaqal Abhar comes"

"In the case of Shirkatul Milk all partners are strangers regarding the right of the others. No partner may make any expenditure regarding the other's share, without the latter's permission. This is so because Shirkatul Milk does not comprise Wakalah."

Allamah Surkhi wrote:

وكل واحد منهما بمنزلة الاجنبي في التصرف في نصيب صاحبه ـ

'And each of them is like a stranger as far as making expenditure in the other's share is concerned.'

2. *Shirkatul Uqood*

Shirkatul Uqood comes into being when two or more people invest some capital and agree to start a commercial or industrial joint venture, and that they shall distribute the Shirkatul Uqood is of three kinds thus accruing profit amongst themselves at pro rata basis.

Shirkatul Uqoof is of three kinds :

1. Shirkatul Amwal.
2. Shirkal A'mal or Shirkatus-Sanai.
3. Shirkatul Wujooh.

Each of the above is of two kinds:

1. Shirkatul Mufawadhah.
2. Shirkatul Inan.

That means that Shirkatul Uqood can be of six kinds:

1. Shirkatul Amwal Mufawadhah.
2. Shirkatul Amwal Inan.
3. Shirkatul A'mal or Shirkatus-Sanai Mufawadhah.
4. Shirkatul A'mal or Shirkatus-Sanai Inan.
5. Shirkatul Wujooh Mufawadhah.
6. Shirkatul Wujooh Inan.

Shirkatul Amwal

Shirkatul Amwal can be translated as 'Partnership in Capital.' All partners invest some capital into a commercial enterprise; they might decide to do business together or individually, and then share the profit amongst themselves at a pro-rata basis.

Shirkatul A'mal

Shirkatul A'mal may be translated as 'Partnership' in Services.' All partners jointly undertake to render some services to their customers, and the fee charged from them is distributed among them according to an agreed ratio.

Shirkatul Wujooh

Shirkatul Wujooh may be translated as 'Partnership in goodwill.' Here the partner have got no investment at all. They purchase commodities on deferred price by getting capital on loan because of their good will. They sell the commodities at spot. The profit thus earned is distributed among them at an agreed ratio.

☆☆☆

CONDITIONS FOR SHIRKATUL AMWAL

The conditions mentioned below to Shirkatul Amwal:

1. The capital of Shirkatul Amwal needs to consist of Dirhams or Dinar something of the like. In our age currency notes are considered as an apporpriate means of exchange, hence it is proper to use currency notes as capital. The majority of scholars hold that one cannot contribute capital in kind. Imam Malik رحمۃ اللہ علیہ however hold that capital can also be contributed in kind.

   In Fatawa Qazi Khan comes:"

   "Whether it be Shirkatul Amwal Mufawadhah or Shirkatul Amwal Inan, capital contribution needs to be of monetary nature, like Dirham or Dinar. Commodities do not have the quality to form capital of Shirkatul Amwal, regardless of its being Shirkaltul Mufawadhah or Shirkatul Inan."

   (Fatawa Qazi Khan ala Hamish Al Fatawa Al Hindiyah 3/613)

2. The capital has to be present at the time of the agreement. One cannot contribute receivables such as a debt, or capital which currently not at hand as capital for Shirkah, e.g. if Zaid would day:

   "Take the ten thousand Rupees which you owe me as my contribution to the Shirkah', or 'I contribute ten thousand Rupees which Bakr owes me', or 'I contributed the money which I deposited in the bank,' then this would not be in order. It does not matter whether it is Shirkatul Mufawadhah or Shirkatul Inan, because the objective of Shirkah is to earn profit, and profit cannot be earned unless the capital is at hand. This however is difficult in case of debt and other receivables.

The presence of capital is a pre-requisite for the contract of Shirkah to be in order. It is not proper to contribute a debt or any other receivable as capital for Shirkah, no matter if it is Shirkatul Inan or Shirkatul Mufawadah. *(Badai-us-Sanani 6/60)*

Shirkatul Amwal is of two kinds:

1. Shirkatul Mufawadhah.
2. Shirkatul Inan.

Shirkatul Mufawadah

Mufawadhah literally means equality. Shirkatul Mufawadhah got its name because in this kind of partnership all partners invest an equal amount, get an equal share of the profit, and have got equal rights as far as working for and managing the enterprise is concerned. Some scholars hold that the word Mufawadhah has been derived from Tafweedh, i.e. entrusting, because each partner entrusts his capital as well as the right to management thereof to the other. In the terminology of Fiqh, Shirkatul Mufawadhah refers to a contract between or more persons of the same conviction, that they shall all invest the same amount of capital into a joint commercial enterprise, that the shall all have the same rights. that they all shall be entitled to act as the others' agent in matters of sale and purchase, and that they shall be liable for the other. That means if their business, suffers any kind of loss, or any kind of compensation becomes due from them, then they shall all be equally liable to bear the loss. In case their enterprise yields profit, it shall be divided among them equally.

☆☆☆

THE CONDITIONS FOR SHIRKATUL MUFAWADHAH

1. All the participants must be capable of standing surety for the other. That means only such people can enter a contract on Mufawadhah basis who are capable of standing surety for the other parties of the contract. Hence, if among the partners there happens to be a slave, or a minor, or a lunatic, or a non-Muslim, then the contract shall not be in order since these people are not capable of standing surety of another.

2. All the participants must invest the same amount of capital. If one party invests a higher or lower amount than the other/s, then the contract will not be in order.

3. All the participants must get an equal share of the profit. If one partner get a higher or lower share than the other/s, then the contract will not be in order.

4. Shirkatul Mufawadhah has to be of general nature, that means it has to comprise all kinds of trade. If any one intends to enter a contract on Mufawadhah basis for a particular kind of business only, e.g. wheat or clothes, then contract would not be in order. Mufawadhah is to include all kinds of business. No partner has got the right to claim any particular kind of business for himself.

5. Imam Abu Hanifah, Imam Abu Yusuf and Imam Muhammad رحمهم الله hold that at the time of entering the contract it is necessary to use the word 'Mufawadhah' (or any of its derivatives). One might say in Arabic:

فاوضتك بكذا تكونا متسا ويين فى رأس مالنا وتصرفنا ويكون
كل منا كفيلا عن الأخر فيما يجب علينا من شراء وبيع ويكون
كل واحد منا فيما يجب بصاحبه بمنزلة الوكيل ـ

(P. 125)

In English one might say:

"I make you my partner on basis of Mufawadhah. Thus we shall be have equal rights and responsibilities as far as capital, management, purchase and sale are concerned. We shall stand surety for each other as far as our liabilites are concerned. We shall have the right to act as the other's agent in all matters relating to our business."

Imam Abu Hanifah رحمه الله عليه, and his two disciples maintain this view because there happen to be several conditions which have to be fulfilled for the contract of Shirkatul Mufawadhah to be valid and in order. The verification of these conditions however is not possible unless the contract is done by using the word Mufawadhah. The other jurists however maintain that it is not necessary to use the word Mufawadhah.

6. In case the business suffers any loss, all partners shall be equally liable to bear that loss.

7. In a Shirkatul Mufawadhah each partner has got the right to buy, sell and make expenditures as far as the capital of the Shirkah is concerned.

8. In a Shirkatul Mufawadhah each partner acts as agent on behalf of the other. Besides that, he is also acts as trustee and stands surety for others. As far as his role as agent is concerned, he has got the right to make all kinds of expenditures as far as the capital is concerned, regardless of whether the other partner/s are absent or present. As far as his standing surety is concerned, his liability shall be equal to that of the other partners. Any kind of loss or compensation will have to be borne by all partners in equal parts.

Shirkatul Mufawadhah is-provided the above conditions are fulfilled-permissible according to Imam Abu Hanifah, Imam Thawri, Imam Awza'i and Imam Malik رحمة الله عليهم اجمعين. Imam Malik رحمة الله عليه however holds a different opinion regarding some of the above-mentioned conditions.

(Bidayatul Mujtahid 2/307)

Their opinion is based upon the Noble Prophet's صلى الله عليه وسلم saying:

تفاوضوا فانه اعظم البركة ـ *(Al Mughni 5/30)*

The Hanbali scholars are of the opinion that Shirkatul Mufawadhah is not in order. The Shafi'i scholars hold that out of all kinds of Shirkah only Shirkatul Inan is in order. Allamah Ibn Qudamah Hanbali states that Shirkatul Mufawadhah is of two kinds:

1. Two or more people enter an agreement concerning all kinds of Shirkah. e.g. Shirkatul Inan, Shirkatul Wujooh, etc. Now since all those kinds of Shirkah are proper and in order per sc. hence, a combination thereof is proper, too.
2. The second possibility is that two or more people make an agreement of Shirkah as follows:

"If any of the partners acquires any kind of asset, whether inheritance, or by unearthing a hidden treasure, or by finding lost property, then all partners shall have a share therein; and if anyone is bound to pay a fine or make as compensation for some usurped property, then all partners shall discharge this liability together.

An agreement of this kind shall not be valid. This is also held by Imam Shafi'i رحمة الله عليه. *(Al Mughni 5/28)*

Imam Shafi'i رحمة الله عليه holds that out of all kinds of Shirkah only Shirkatul Inan is permissible. In Al Majmoo' Sharhul Muhazzib comes:

"There are four kinds of Shirkah: Shirkatul Inan, Shirkatul Abdan, Shirkatul Mufawadhah, Shirkatul Wujooh. We hold that out of those four only Shirkatul Inan is permissible. *(Al Majmoo' Sharhul Muhazzib 8/14)*

The rights of the partners in Shirkatul Mufawadhah

As a consequence of Shirkatul Mufawadhah, the partners shall have following rights:

1. In Shirkatul Mufawadhah all partners have got the to buy and sell, no matter whether on cash or deferred payment basis.
2. In Shirkatul Mufawadhah all partners have got the right to invest the capital of the Shirkah into a Mudharabah. In a Mudharabah one party contributes capital while the other party contributes labour. The thus accruing profit shall then be divided among both partners at an ageeed ratio. The objective of Shirkah is to earn profit, and Mudharabah happens to be an excellent means of earning profit, hence it is proper and in order to invest the capital of Shirkatul Mufawadhah into a Mudharabah.
3. In Shirkatul Mufawadhah all partners have got the right to deposit the capital with another person as Wadiy'ah.
4. In Shirkatul Mufawadhah none of the partners shall have the right to grant any other person a loan from the capital of the Shirkah. This is so because granting a loan is a gratitious act, and the partners are, as a consequence of the Shirkah, each other's representative with regard to the Shirkah in commercial transactions only. No one has got the right to give a person something on behalf of his partners without any kind of compensation.

In Mabsoot Surkhi comes:

"The partners do not have the right to grant any one a loan from the capital of the Shirkah, since granting a loan is a gratitious act. Each partner represents the others only as far as commercial transactions are concerned, and not with regard to gratitious acts." *(Mabsoot Surkhi 11/180)*

If one of two partners granted someone a loan from the capital of the Shirkah, them half of the amount thus given shall

be considered as his, and he will have to guarantee his partner for the other half. *(Mabsoot Surkhi 11/180)*

In An-Natf fil Fatawa comes:

ان لا يقرض منه احدًا

'It is not proper to give the capital of the Shirkah as a loan.'

(An-Natf fil Fatawa, 538)

However, the partners are permitted to take a loan, if there is need to do so. And in case a loan is taken, all partners are liable to pay back the loan.

5. If any of the partners married a woman and he has to pay the Mahr, or he has fixed the Mahr for any woman, or he has committed an offence for which he has to pay a fine, them only he alone shall be liable to pay the Mahr or the fine. The other partners are not liable to pay the Mahr or the fine. *(Sharul Mujallah, 753)*
6. If any partner became the proprietor of some asset either through inheritance, by ways of gift or as a reward, then he shall be sole proprietor of the asset. The other partners shall have no share therein. Faqeeh Ibn Abi Layla holds that all partners shall have a share therein.

(Mabsoot Surkhi 11/189)

Shirkatul Inan

Shirkatul Inan is the most well known kinds of Shirkah. This kind of Shirkah is commonly practised in the business world. It is an easy, practicable form of Shirkah. Neither do the partners have to invest an equal amount of capital, nor does the profit have to be distributed equally.

In the terminology of Fiqh, Shirkatul Inan refers to a contract where two or more individualls agree to invest some capital into a joint commercial venture and divide the accruing profit at a mutually agree percentage. And in case of loss, each partner shall bear the loss according to the ratio of investment. Hanafi, Shafi'i, Maliki, Hanbali, Zaidi, Zahiri and Ja'fri

scholars, all are agreed regarding the permissibility of Shirkatul Inan. *(Al Fiqhul Islam wa Adillah 4/796)*

Shirkatul Inan can be contracted for a particular kind of business, such as wheat, and it can also be contracted in a way to comprise all kinds of business.

Conditions

Shirkatul Inan is permissible if the following conditions are fulfilled:

1. Muslims as well as non-Muslims can participate in Shirkatul Inan. In the case of Shirkatul Mufawadhah each partner happens to be the other partners' agent as well as surety. In Shirkatul Inan however, the partners are each other's agent only. They do not stand surety for each other. If however at the time of entering the contract standing surety is being mentioned, then the contract would be valid and in order. Being each other's agent means that each partner has the right to buy, sell and make other expenditures from the capital of the Shirkah on behalf of the other partners, while standing surety means to be liable.
2. Capital contributions do not have to be equal in case of Shirkatul Inan. If one partner invests five thousand Rupees and the other four thousand Rupees, then yet the contract shall be valid and in order.
3. Unlike Shirkatul Mufawadhah, profit does not have to be distributed equally. One may fix a higher percentage of profit for one partner, and a lower percentage for the other. One may, for example fix two thirds of the total profit for one partner and one third for the other. Such a transaction would be valid and in order.
4. In Shirkatul Inan partners do not stand surety for one another. This is why even minors who have got understanding of business trasactions can-with their guardian's permission-participate in Shirkatul Inan. Similary a slave who has got his master's permission to engage in business, can participate in Shirkatul Inan, too.

5. In case of loss, all partners shall bear the loss equal to the ratio of their investment. If at the time entering the contract it is stipulated that only one partner shall bear the loss; or that one partner shall bear two thirds of the loss, and the other partner one third, then get such condition is not considered as reliable from the Shara'i point of view. The partners will still have to bear the loss according to the ratio of their investment.

   In Majma'ul Anhar Sharh Multaqal Abhar comes:

   "Loss in business will have to be borne according to the ratio of investment, even if the partners had stipulated a condition to the contrary." *(Majma'ul Anhar sharh Multaqal Abhar 1/722; Sharhul Mujallah 727)*

6. If for any reason whatsoever the Shirkah becomes invalid, the contract is cancelled, then the profit shall be distributed according to the ratio of investment, even if an the time of entering the contract it had been decided that one partner shall get a higher or lower rate of the profit. If, for example one partner had invested one thousand Rupees and the other had invested two thousand Rupees, and they both agreed to share the profit equally, then still the profit shall be distributed according to the ratio of the investment, that means the partner who had invested one thousand Rupees shall get one third of the profit, andd the partner who had invested two thousand Rupees shall get two thirds of the profit.

   In Sharhul Mujallah comes:

   "In case the Shirkah becomes invalid, the profit shall be distributed according to the ratio of investment. If it had been stipulated that one party shall receive more than that, then such stipulation shall be of no consequnce. *(Sharhul Mujallah 727, Majmaul Anhar Sharh Multaqal Abhar 1/722)*

7. All the partners shall have an equal right to work for the partnership and utilize the capital for this purpose. If, for example, some people have invested altogether ten thousand Rupees, then all of them have got the same right

to use the capital for buying and selling on credit. If any of the partners suffers a loss, then all partners shall be liable to bear that loss. If however one of the partners fell prey to an obvious fraud, them only he shall be liable to bear the loss. The other partners' capital shall be considered as safe.

(Sharhul Mujallah, 730)

8. If all the partners invested the same amount of capital, but agreed on different profit-ratios, and besides that they decided that only one or two of the partners shall work for the Shirkah, then it is proper to fix a higher rate of profit for the working partners. However, it is not permissible to fix a lower rate of profit for the working partner. In this case he shall get profit according to the ratio of his investment. The basis for above ruling is that in the first case, the working partner gets a higher rate of profit in return for his invesment and his labour. In the second case however the working partner is at loss; he has invested the same amount of capital and moreover he contribute labour, and yet he is supposed to get less profit than the others. This is gross injustice which which cannot be deemed permissible from the Islamic point of view. Similarly, if one partner has invested more capital than the others, and is fully in charge of the Shirkah, and yet his share of profit is lower than that of the others, then shuch a condition shall be considered as absurd. His share of the profit shall be according to the ratio of his investment.

9. If any of the partners purchased with his private capital any such item which does not qualify merchandise for this Shirkah, then item that shall be considered as his personal property. If however any partner does, during the tenure of the Shirkah which he had formed with one or more partners, business in the manner described above, then his private business, too, shall be treated as collective business, even if he furnishes proof that it is his own, private business. If for example some people formed a partnership, and opened a soap-factory from their combined capital, then none of the partners shall be

permitted to open his own soap factory from his own capital to set up a factory producing any other goods.

(Sharhul Mujallah Al Maadah 7287)

The rights of the partners

In Shirkatul Inan the partners shall have the following rights:

1. Each partner shall have the right to buy and sell on credit or for cash. They also may buy and sell for a comparatively higher price. In case of Ghaban Fahish. (i.e. a price which for exceeds or which is far below the rates in the market) however, the commodity shall be considered as a personal acquisition. The other partners shall have no share herein. *(Sharhul Mujallah Al Maadah 137/731)*
2. Each partner shall have the right to deposit the capital of the Shirkah with a third person, or to give it to a third person on basis of Mudharabah.
3. None of the partners has got the right to mix his own personal capital with the capital of the Shirkah, nor shall he have the right to use the capital of Shirkah to form another Shirkah with an outsider, or make a third person partner in this Shirkah. In case he wants another person to join the Shirkah, he will have to take permission from the other partner. If he lets another person join without the other partner's approval, and the capital of the Shirkah is lost, then he will be liable for his partner's share.

(Sharhul Mujallah Al Maadah, 734)

4. None of the partners is permitted to grant an outsider a loan from the capital of the Shirkah. unless the other partner/s agree to this. The same rule applies in case of gifts. Even if at the time of entering the contract the other partner/s had said: اعمل برايك, i.e. do whatever you deem proper, then still he shall not be permitted to grant a loan from the capital of the Shirkah. A loan can be granted only in case the other partner/s grant their explici permission. It is however permissible to take a loan from an outsider if there is need to do so. *(ibid, 734)*

5. If any of the partners has to undertake a journey for the Shirkah, then he is entitled to claim his travel expenses, such as conveyance expenses, costs for food, drink, accommodation, etc. In case of profit such expenses shall be covered from the profit, and in case of no profit, such expenses shall be covered from the capital. *(Sharhul Mujallah Al Maadah 137, 734)*

6. If at the time of entering the contract of Shirkah one partner stipulates that business shall not be conducted in any other city, and that selling and buying shall not be done on credit, then, if the other partner violates these conditions and incurred a loss, he shall be liable for the other partner's share.

7. In Shirkatul Inan each partner has got the right to appoint a third person as an agent to sell and purchase on his behalf.

8. Depending on the other partners' approval, each partner has got the right to deposit the capital of the Shirkah as a pledge with a third party, or to accept a pledge from a third party as security against a debt.

9. It is permissible to rent a building to keep the capital of Shirkah therein, or to hire a worker.

The Shafi'i scholars hold that in a Shirkah profit and loss have to be distributed according to the ratio of investment. If both partners have in vested an equal amount and fixed different ratios as far as the distribution of profit and loss is concerned; or both have invested different amounts and fixed equal ratios as far as the distribution of profit and loss is concerned, then in both cases the contract of Shirkah shall not be in order.

☆☆☆

THE CONTRACT OF SHIRKAH

The partners' right to make expenditures from the capital of Shirkah

The Hanbali scholars hold that a mere contract of Shirkatul Inan does not suffice to give each partner the right to make expenditures from the capital of Shirkah. Each partner has to take permission from the other partner as well. Only after taking permission he shall be entitled to buy, sell and manage other affairs Shall he have the right to buy and sell on credit?

The Hanbali scholars maintain that-in the light of a statement according to which verdicts are given-this may be considered as permissible.

Shall he have the right to deposit the capital on basis of Ibdha'a or Wadiy'ah?

The Hanbali scholars have got two statements regarding this issue-one according to which so is permissible, since traders occassionally have to do so; and according to the second statment it is not permissible to deposit the capital with a third person on basis of Wadiy'ah, since this might lead to fraud. Allamah Ibn Qudamah رحمة الله عليه declared that verdicts are to be given according to the first statement.

(Al Mughni 5/23)

Shirkatul A'maal or Shirkatul Sanai

Shirkatul A'maal, which is also know as Shirkah Abdan and Shirkah Taqbeel, is practised mostly by artisans and

workmen. In this kind of Shirkah two or more persons of the same profession of or of different professions, enter a contract to work together. In the terminology of Fiqh, Shirkatul A'maal refers to a kind of contract where some people-artisans, or other professionals-agree to do a certain kind of work together, and to share whatever profit accrues according to an agreed ratio. It should be noted that in Shirkatul A'maal there is no capital investment.

In Majma'ul Anhar Sharh Multaqal Abhar comes:

"Shirktus Sanai means that two people of the same profession or of different professions, e.g. a tailor and a dyer, or two tailors, decide to work together and divide their earnings amongst themselves. *(Majma'ul Anhar Sharh Multaqal Abhar 1/726, Sharh Mujallah 736, Fathul Qadeer 5/45)*

The Hanafi, Maliki, Hanbali and Zaidi scholars maintain that Shirkatus Sanai is permissible. It was comman during the days of the Noble Prophet صلى الله عليه وسلم, and a number of companions رضى الله عنهم اجمعين worked on this pattern. Abu Dawood, Nasai and Ibn Majah recorded from Abu Ubaidullah on the authority of Abdullah that Sayyidina Ibn Mas'ood رضى الله عنه said:

"On the day of Badr I made a deal with Ammar رضى الله عنه and Sa'ad bin Abi Waqqas رضى الله عنه that we shall share whatever we get from the booty. Sa'ad رضى الله عنه got prisoners while I and Ammar رضى الله عنه got nothing. When the Noble Prophet صلى الله عليه وسلم got to know about our agreement, he didn't say anything against it.

(Neelul Awtar 5/265)

Throughout the ages the Muslim Ummah acted on the permissibility of Shirkaus-Sanai.

The Shafi'i scholars hold that Shirkatus-Sanai is not permissible. In Al Majmoo' Sharhul Muhazzib comes:

"Shirkatul Abdan, two or people agree to enter a contract of Shirkat concerning the earnings of resulting from their labour, is null and void. Sayyidah Aisha رضى الله عنها related that the Noble Prophet صلى الله عليه وسلم said: 'Each such

condition which has not been mentioned in the Book of Allah, is void.' And since this condition is not found in the Book of Allah, it is considered as void, and another reason why this kinds of Shirkah is not in order, is that each partner is the owner of the earnings which he got as a result of his labour, hence it is not permisssible to ascribe a part thereof to another. So if both of them worked, then each of them shall be entitled to the earnings resulting from his labour, and nothing beyond that."

(Al Majmoo' Sharhul Muhazzib)

Imam Shafi'i رحمة الله عليه, is of the opinion that Shirkah relates to 'Amwal' (i.e. capital, assests) only. Hence, Shirkah with regard to labour and services is not in order. Except for Imam Shafi'i رحمة الله عليه the majority of scholars maintain that Shirkah can relate to Amwal as well as A'maal.

Types of Shirkatul A'maal

Shirkatul A'maal is of two types:

1. Shirkatul Mufawadhah.
2. Shirkatul Inan.

1. In case of Shirkatul Mufawadhah, it is necessary to mention the word Mufawadhah at the time of entering the contract. Both partners shall equally accept orders, and both shall get an equal share of the earnings. In case of loss, both partners shall equally bear the loss. Both partners shall represent each other and guarantee for each other.
2. In case of Shirkatul Inan, the partners agree to accept orders at different ratios, and to divide their earning at different ratios. One partner might, for example, stipulate that he shall accept two-thirds of the orders, and that he shall get two thirds of the profit. Both partners shall be liable to bear loss accordingly.

Conditions

1. In case of Shirkatul A'maal Inan it is not necessary that all partners accept the same volume of orders or that they

share their earnings equally. They can agree to accept orders and share the profit at different ratios. If, for example, some worker contracted the construction of a building, then it is not necessary for each worker to do as much work as the others, and to share the profit equally. This is so because each individual has different abilities. A young man can work more than an old man, hence he ought to earn more. In Al Fiqh ala Mazahibul Arba'a comes:

"In case of Shirkatul A'maal two persons agree to work together, without a condition that they shall share the workload and the profit equally. They can, for example, agree that one of them shall do two thirds of the work while the other shall do one third of the work. They shall share profit and loss according to the same ratio.

(Al Fiqh ala Mazahibul Arba'a 3/60)

2. Shirkatul A'maal can be formed only with regard to such services which would under the contract of Ijarah-make a worker entitled to receive wages. Since it is permissile to hire someone for teaching the Holy Qur'an, writing and teaching Fiqh, it is also permissible to form a Shirkatul A'maal with regard to these services. Ijarah cannt be contracted for sinful activities (i.e. it is not proper to hire someone for, sinful activities), and hence, forming a Shirkatul A'maal would not be proper, either.

(Sharhul Mujallah, 737)

3. Shirkatul A'maal can be formed only regarding such services in which one partner can act as an agent on behalf of the other. One cannot form a Shirkatul A'maal regarding services where the partners cannot act as each other's agent. There are some things which become property of anyone who takes them into his possession, e.g. grass growing on uncultivated land, wood in a jungle, wild birds and animals, etc. hence appointing another person to acquire such things on one's behalf would be futile and meaningless. From this one can conclude that Shirkatul A'maal cannot be formed regarding the acquisition of such things. *(Badai 6/3)*

4. Each of the partners has got the right to accept orders and to execute them. It is also in order if only one partner accepts orders and the other executes them. It is not necessary for that the person who accepts an order execute it as well. If, for example, two tailors agree to work together, then it is permissible if one of them takes the clothes (i.e.) accepts the orders) and the other sews the shirt. *(Sharhul Mujallah, 737)*

5. Each of the partners shall act as the other's agent as far as the accepting of orders is concerned. It is the responsibility of all partners to carry out the thus accepted workorders.

(reference as above)

6. The one who gives the order has got the right to require each of the partners to execute the order, and each of the partners shall be responsible to execute the order. It is not permissible for any of the partners to say:

"This order was received by such-and-such, hence it is h is responsibility to execute the order." *(reference as above)*

7. If any of the partners did not work, due to illness, for example, or because he had to travel, then he shall still get a share of the earnings and profit. His entitlement shall not cease on account of his not having worked. He sh all get his share as stated in the agreement.

In Mabsoot Surkhi comes:

والشريكان فى العمل اذا غاب احد هما او مرض او لم يعمل و عمل الأخر فالربح بينهما على ما اشترطا ـ

'If any of the partners is absent, or falls ill, or didn't work, and the other partner did the work, then the profit shall be divided among them according to the condions upon which they had agreed.'

(Mabsoot Surkhi 11/157)

8. It is not necessary that the partner who accepted the order executes it as well. He is at liberty to execute it in any manner he deems proper, he can have one of his partners to execute it, or he can hire someone else. If however the one who gave the order put a condition to the effect that

the one who accepted the order will have to execute it as well, them in this case the partner who accepted the order will have to execute. *(Sharhul Mujallah, 730)*

9. If one partner owns the shop and the other the tools, them it is permissible for them to work together and share the profit as per agreement. If however any such condition is stipulated according to which the partner who owns the tools shall not work, and that the work shall the responsibility of the other partner, then such a contract shall not be valid. The worker shall be entitled to wages, and the owner of tools shall get Ujrat-e-Mithl.

(Sharhul Mujallah, 730)

10. If the owners of two different species of animals (e.g. donkeys and camels) agree to render transportation services on equal basis, then they shall get equal shares of the profit. It will not be taken into consideration whether the a major part of the work is accomplished through the camel so that the owner of the camel gets more than the owner of the donkey. Both shall be entitled to an equal share of the earnings. *(Sharhul Mujallah, 44)*

11. If one's household members including women and children contribute some work too, then they shall not be considered as partners from the legal point of view. They shall rather considered as helpers and they are not entitled to any seperate share. *(Sharhyl Mujallah, 44)*

Shitkatul Wujooh

In the terminology of Fiqh, Shirkatul Wujooh refers to a contract between two or more people who neither invest capital in any kind of business, nor render any kind of services on partership-basis. Rather, on basis of their good will reputation, they agree to buy on credit and sell on spot, and share as profit whatever amount is left after setting their debts, according to an agreed rabio.

In Muajjam Lughatul Fuqahaa comes:

"In Shirkatul Wujooh two person agree to buy and sell on credit basis, without any capital investment, merely on

account of good will and their personal good reputation."
(Shirkatul Wujooh is also known as Shirkat uz-Zamam)

Types of Shirkatul Wujooh

Shirkatul Wujooh is of two types:

1. Shirkatul Mufawadhah.
2. Shirkatul Inan.

1. In case of Shirkatul Wujooh Mufawadhah it is essential that both partners are capable of standing surety for each other. They both have to participate equally in the purchase in the purchse of an items, and they shall both get an equal share of the profit. At the time of the agreement, the word Mufawadhah must be mentioned clearly.

   In Badai comes:

   "In case of Shirtktul Wujooh Mufawadhah, if one partner has beome liable to pay the price for an item, then the other partner shall be considered as (equally liable to pay. If one partner is asked to pay the price for soap (for example) which he had bought on credit, as well as the labourer's wages and rent for the shop etc. then if is permissible for one partner to acknowledge a debt on behalf of the other. In this case the creditor shall the right to demand from either partner the settlement of his dues. The reason for is that in case of Mufawadah each partner stands surety for the other."

2. In case of Shirkatul Wujooh Inan it is not necessary that the partners are capable of standing surety for one another, nor do they have to participate equally in the purchase. It is proper and in order if one partner purchases one the remaining goods.
3. The profit shall be divided keeping in view how many goods each partner acquired on account of his good will and reputation, i.e. profit shall be divided as per acquisition of goods. For example, if at the time of agreement it was decided that both partners shall equally

participate in the acquisition of goods, then they shall share the profit equally, too. And one of them stipulated that he shall acquire two thirds of the goods and the other partner one third, then the first partner shall get two thirds of the profit, and the other partner shall get one third only. If they put a condition to the effect that they shall equally participate in the purchase, or that one of then shall purchase more or less than the other, and that in any case they shall share the profit equally, them such a condition shall be considered as absurd. The profit shall divided amongst them in proportion to their acquisition of goods.

4. In case of loss, both partners will to bear the loss according to the ratio of profit. *(Sharhul Mujallah, 743)*

Imam Ahmad bin Hanbal رحمة الله عليه holds that both forms of Shirkatul Wujooh (i.e. Mafawadhah and Inan) are permissible. According to Allamah Ibn Qudamah's elucidation, the Hanbali scholars hold that profit shall be divided as per agreement. Each partner shall be entitled to receive the agreed upon share of profit, irrespective of the quantity of goods he had acquired. As per the Qazi's elucidation, the profit shall be divided in proportion to the acquisition of goods. Allamah Ibn Qudamah adopted the first statement. *(Al Mughni, 5/32)*

The Maliki scholars hold that Shirkatul Wujooh can be contracted for the acquisition of any specified goods, but not for the acquisition of goods in general. *(Mawahibul Jalcel)*

Imam Shafi'i رحمة الله عليه maintains that Shirkatul Wujoodh is null and void, for Shirkah is related to either capital or services, and neither capital nor services are found in Shirkatul Wujooh. Besides that there is apprehension of fraud in this kind of transaction.

Imam Abu Hanifah رحمة الله عليه holds that it falls in the category of labour and services, and that Shirktul Wujooh is hence permissible. *(Bidayatul Mujtahid, 2/308-9)*

Imam Shafi'i رحمة الله عليه holds Shirkatul Wujooh to be null and void, because whoever of the two participants purchases any item on credit due to good will and reputation, shall be

considered as the sole proprietor of that item. Hence, it is not appropriate to let another person share the accruing profit.

In Al Majmoo' comes:

"In our opinion Shirkatul Wujooh is not in order. Our argument is that the person who purchases an item is the sole proprietor of that item. Hence it is not correct to let another person have a share therein."

(Al Majmoo' Sharhul Muhazzib Takmalah Thaniyah 14/75)

Expenses

If any of the partner undertakes a journey for the sake of the Shirkah then his expenses shall be covered from the capital of the Shirkah. If the joint venture has yielded any profit, then his expenses shall be reimbursed from the profit, and in case the joint venture did not yield any profit, the expenses shall be reimbursed from the original capital.

All such expenses shall be reimbursed which are unavoidable during a journey e.g. food and drink, accomodation, laundry, public bath (i.e. basic personal hygiene), tickets for different kinds of transport, e.g. aeroplane, bus, taxi, railway, ship, etc. Beside that, all such expenses shall be reimbursed which traders usually incur during their journeys. If the travelling partner can easily spend the night at his own place, then costs for accommodation shall not covered.

In Sharhul Mujallah comes :

"If any partner needs to undertake a journey for the Shirkah, then he has right to cover his expenses from the capital of the Shirkah. Whatever expenses he had regarding food, drink, and transport, shall be covered from the capital of the Shirkah. In case the joint venture has yielded any profit, his expenses shall be covered from profit, and in case the joint venture yielded no profit his expenses shall be covered from the original capital. If it is impossible for him to spend the night at his home, then the costs for accommodation shall be covered from the capital of the Shirkah. *(Sharhul Mujalath, 5)*

The rights of the partners

Due to the contract of Shirkah the partners shall have the following rights and authorities:

1. **Bai' wa Sharaa:** As a consequence of Shirkah, the partners shall have the right to engage in all kinds of buying and selling-no matter whether on spot or on credit, for a higher or for a lower price.
2. **Rahn:** In the terminology of Fiqh, 'Rahn' means to pledge an item so as to secure the whole or partial settlement of an unsettled claim. The purpose of 'Rahn' or pledge is to gain another's trust and confidence. As a consequence of Shirkah, all partners have got the right to give something from the Shirkah-assets as a pledge, or to accept a pledge from others against an unsettlted debt.
3. **Istijar:** All partners have got the right to use the capital of Shirkah to rent a building or a shop, or to hire someone (as an employee), or to lease out the (fixed) assets of the Shirkah.
4. **Iqalah:** In the terminology of Fiqh, Iqalah refers to the mutually agreed upon revokation of a sales-deed, where the buyer returns the purchased goods and the seller returns the original amount for which the goods had been purchased. As a consequence of Shirkah, the partners have got the right to Iqalah.
5. **Eedaa' :** In the terminology of Fiqh, Eedaa' refers to depositing an item with someone as a trust, without paying any kind of recompensation. All partners have got the deposit the capital of Shirkah with a third peson as a trust.
6. **Ariyah:** All partners have got the right to lend the assets of Shirkah to a third party on basis of Ariyah, i.e. without demanding any kind of recompensation.
7. **Ibdha'a:** In the terminology of Fiqh, Ibdha'a means that a person uses another person's capital for trade, and then

gives the profit he thus earned to the actual owner the capital, without taking any recompensation for his services. Ibdaha'a is an excellent means of earning profit, hence every partner has got the right to adopt this means.

8. **Tawkeel:** Each partner has got the right to appoint a third person as his Wakeel, i.e. agent.

9. Each partner has got the right to invite others. He also got the right to give small, ordinary gifts. However, he does not have the right to pay Zakah on behalf of the other partner without his permission. But he may do so if he got his partner's permission. In case he wants to give someone a loan, he will have to take permission from his partner first.

The role of the partners

Usually people engage in partnership-based trade only for some personal or material gain. They do not share any values, since every partner considers only his own intersets, and in order to safeguard the same at his partner's expense, he resorts to all kinds of fraud, breach of trust, and other unethical behaviour. The Islamic Shariah laid down that in a partnerhip all partners shall got some material benefit, but along with that, they are trustees as well as agents of one another. As far as their role as trustee is concerned, they are to protect the assets of the partnership just like entrusted goods are to be protected. And if any of the partners causes the partnership some loss then, in his role as a trustee, he is not bound to compensate for that loss. And he is an agent in so far that he is to utilise assets for the benefit of all partners, and not just his own. No one should have reason to complain that so-and-so has taken all the profit while the others are at loss.

In Mabsoot Surkhi comes:

"In a Shirkah all partners are governed by the injunctions concerning trustees, and any condition to the effect that a trustee shall pay compensation is void.

In Hidayah has been mentioned:

"The assets of the Shirkah are like a trust in the hands of the partners."

The following has been stated in Al Majmoo' Al Muhazzib:

"All the participants in a contract of Shirkah are trustees with regard to the assets of the Shirkah. If the assets are damaged or destroyed for any other reason than negligence, then the partner is not obliged to pay compensation, since each partner represents the others as far as the protection and management of assets is concerned. If any assest happens to be destroyed in his hand, then it is as though it has been destroyed in the hands of his partners."

If however the assets is destroyed as a result of his own mistake or carelessness, then he shall be obliged to compensate, just like in case of any other trust.

Differences among the partners

There are several kinds of differences thay may arise among the partners:

1. One partner accuses the other of having committed an act of dishonesty regarding the assets of the Shirkah, and the other party denies that. In this case the denying party's statement shall be considered as reliable, for the original principle is that man does not commit acts of dishonesty. Committing an act of dishonesty is a temporary matter, which be proven only through evidence.
2. One partner has got some items in his possession regarding which the other partner claims that these items belong to the assets of the Shirkah. The first partner however states that these items are his personal belongings. In this case the first partner's statement under oath shall be considered as reliable, for obvious circum- stances demand that the person in whose possession these items are, is their owner as well.

3. If one partner accuses the other of having committed an act of disobedience, then this claims is worth of hearing only if the plaintiff states the amount involved. If even after the amount has been stated, the defendant denies the accusation, then, in case he has got no evidence, his statement under oach shall be considered as reliable.

4. *(a)* If one of the partners purchased any such asset which might yield profit, and the other partner claims that this asset had been purchased from the capital of Shirkah and that he hence also got a share therein, while the other partner claims that the had purchased the asset from his personal resources, then in this case the purchaser's statement under oath shall be considered as reliable.

   (b) And if he purchased any such asset which might result in loss, and the other partner claims that this asset had been purchased from the first partner's personal resources, while the first partner claims that he had purchased the asset from the assets of the Shirkah, then his statement (i.e. purchaser's statement) under oath shall be consideredd as reliable.

In case of Shirkah Mufawadhah, the following difference s might arise:

(a) The partners might have differences as to whether they contracted a Shirkatul Mufawadhah or not. One partner might claim that they did, while the other partner denies that; and the assets of the Shirkah are in the possession of the denying partner.

(b) Both partners admit having contracted a Shirkatul Mufawadhah but one partner claims regarding one particular item that it belongs to the assets of the Shirkah, while the other partner claims to have inherited it from his deceased father.

(c) Both partners admit having contracted Shirkatul Mufawadhah, but they differ regarding the division of profit. One partner claims that he is entitled to two thirds of the profit and the other partner to one third only, and the other partner claims the opposite.

(a) In the first case, where the partners differ as to whether contracted Shirkatul Mufawadhah or not, the denying partner's statement under oath shall be considered as reliable, and the other partner will have to furnish evidence to prove his claim. If he does so, then the assets of Shirkah which are in the latter party's possession shall be divided equally among both partners.

(b) In the second case, where the partners admit having contracted a Shirktul Mufawadhah, but they differ regarding any particular item, whether it belongs to the assets of Shirkah or whether it has been inherited by one of the partners; the partners will be required to substantiate their claim through evidence. If one then provides evidence, then his evidence shall be accepted.

(c) In the third case, where the difference evolves around the distribution of profit, while both parties admit having contracted a Shirkatul Mufawadhah, all the assets whether liquid or fixed-shall be equally distributed among both partners.

If one of the partners of Shirkatul Mufawadhah dies, and the assets of the Shirkah happen to be in the other partner's possession, and the deceased partner's heirs claim that the deceased partner had contracted a Shirkatul Mufawadhah, while the living pratner denies that, then the heirs will have to furnish evidence to substantiate their claim. If they can provide evidence that the deceased had contracted Shirkatul Mufawadhah, then still the case shall be not decided in their favour only because of that. They will further have to provide evidence that the assets which are currently in the defendant's possession already existed during the deceased partner's lifetime, or that the assets were owned by then jointly. In this case the assets shall be divided equally between the defendant and the deceased partner's heirs.

Invalid Shirkah

Shirkah shall be considered as invalid in the following cases:

1. A Shirkah cannot been contracted for such things the possession of which Allah Most High made permissible for everyone, as birds in the sky, wild animals, trees in the forest, fish in the sea, etc. Anyone who possession of these things shall be considered as their rightful owner. The Hanafi scholars hold that a Shirkah which has been contracted for such things is not valid.
2. One person happens to own a mule while another person happens to own a donkey. Both decided to work together, rent out their animals as mode of transport, and divide equ: 'ly the thus accruing profit. Such a contract of Shirkah shall not be valid since it comprises agency; and since agency is not in order in this case, the Shirkah is not valid, either. *(Tohfatul Fuqahaa, 3/19)*
3. One person gave his animal to another, so that he may rent it out, and both shall share the thus generated income. This constitutes an invalid Shirkah. The rentals shall belong solely to the owner of the animal, while his hireling shall be entitled to Ujrat-e-Mithl. In all cases of invalid Shirkah, the profit shall be divided according to the ratio of investment. A condition of paying more or less than that shall be void and unreliable.

(Fathul Qadeer, 5/33, Raddul Mukhtar, 3/383)

Cases in which the Shirkah is terminated

In the following cases the Shirkah becomes null and void:

1. **Termination of the contract of Shirka :** If any partner annuls the contract of Shirkah, then the Shirkah stands terminated.
2. **Death of a partner:** If one of the partners dies, then the Shirkah stands terminated, no matter whether the other partners were aware of his death or not, because each partner is an agent of the other, and if the person whom the agent represented dies, then the agent stands dismissed, no matter whether he know about the demise or not.

3. Apostacy: If any of the partners apostates and flees to a country which is governed by infidels, then he shall be considered like one who died. In this case, too, the Shirkah stands terminated.

4. Instances of lunacy: If one partner falls prey to lunacy (i.e.) such lunacy which exists at the beginning and end of the year, then the Shirkah stands terminated.

5. Destruction of assets: In case of Shirkatul Amwal the Shirkah shall become null and void if the assets of the Shirkah are destroyed prior to any sales transaction.

   Inequality regarding the assets: If the partners contracted Shirkatul Mufawadhah, and there was equality regarding the assets at the beginning of the contract, but then for any reason whatever this equality could not be maintained, then in this case the Shirkah stands terminated, because equality of the assets is a vital constitunet of Shirkatul Mufawadhah. *(Badai us-Sanai, 78)*

☆☆☆

THE CONTRACT OF IJARAH

The contract of Ijarah is one of the corner-stones of the Islamic economic system. Islam views Ijarah or 'lease' with favour, and it is considered as a source of blessing.

The contract of Ijarah belongs to those Shara'i transactions which promote social welfare as well as commercial and industrial development. Observation reveals that there are basically two kinds of people:

Those whom Allah Most High has blessed with wealth and financial resources, in order to circulate their wealth, promote their businesses, and to fulfil other needs, they depend on such people who are willing to render services in exchange for some kind of remuneration. On the other side there are countless people who are deprived of financial resources, because of which they take ups different prefessions and vocations in order to make ends meet. These people tend to be skilled and experienced, but since they lack financial resources, they are not in a position to set up their own factories. Rather they work for others, using all their skills and acumen, in order to make ends meet. Similarly there are people who do not own a house or any means of transport. They need to fulfil their requirements by a house or mode of transport on rent.

The Islamic Shariah tends to make let the capital circulate rather than leaving it frozen. Similary, individual skills and talents should not go waste. This why the Islamic Shariah has legalized the contract of Ijarah, in which the usufruct of an item of an item is exchanges for remuneration.

In Ijarah, one party contributes contributes the usufruct of a shop, house, animal, car, etc. (Zaid, for example, lets his house to Khalid, that means Zaid lets Khalid enjoy the usufruct of his house, and in turn, Khalid recompenses him by paying rentals. These rentals are known as Ujrat), while the other party pays some kind of recompensation or rentals. Likewise, when one peson hires some worker, then he enjoys the usufruct of the worker's labour, in exchange for wages. The person who hires is known as 'Mustajir', and hireling as 'Ajeer'.

The definition of Ijarah

Linguistically, Ijarah takes the meaning of recompensation, payment of wages and rentals, etc. In the terminology of the Holy Shariah it refers to a contract where usufruct is give in exchange of some kind of payment. In Hidayah comes:

الاجارة عقد على المنافع

'Ijarah is a contract where usufruct is give in exchange of payment.'
(Hidaya ma'a Nataajul Afkaar, 3/81)

In Muajjam Lughatul Fuqahaa is mentioned:

"Ijarah is a contract where the right to usufruct is acquired against some kind of payment."

(Muajjam Lughatul Fuqahaa, P. 43)

In Al Mujallah, Ijarah has been defined as follows:

"Exchanging a known usufruct for a specified remmueration is known as Ijarah." *(Al Mujallah, P. 60)*

Some jurists defined Ijarah as follows:

عقد معاوضة على تمليك منفعة بعوض

'Ijarah is a contract where ownership of usufruct is acquired through paying some recompensation.'

Some scholars defined Ijarah more concretely as follows:

الاجارة منفعة معلومة بعوض ..... معلوم ..... دين اوعين

'Ijarah is the sale of a known usufruct for a known price.'

(Kashful Haqaiq, 2/151; Al Mabsoot 15/74; Al Umm, 3/350; Al Mughni, 5/433)

That means Ijarah is a contract where a known usufruct is sold for a known price, and here it does not matter if this price, (i.e. the Ujrat) belongs to what is knows as Zawat-ul-Mithl or Zawatul Qeem.

From the above definitions is learnt that Ijarah must contain the following elements:

1. In Ijarah there must be some usufruct of sorts. It is not proper to contract any such thing in Ijarah from which anything of material substance can be derived. Hence it is not proper to acquire a fruit-bearing tree or a grape-vine on lease, because fruit and grapes are of material substance lik wise Ijarah of milk or wool-giving animals is not proper, either.
2. In Ijarah the usufruct is in exchange for some kind of recompensation. If anyone lets another person enjoy the usufruct of an item without charging him anything, then transaction is called 'Ariyah. For example, Zaid says to Khalid.' This is my house, you can live in it until you've found a suitable house for yourself. This is no Ijarah transaction; this kind of transaction is known as 'Ariyah (gratuitious loan or simple loan) in the terms of Fiqh. One party offers the other the right to enjoy the usufruct, without charging him anything.
3. Ijarah comprises ownership of the usufruct for which compensation is paid. If one has become entitled to the usufruct merely on account of legal permissibility, without actually becoming the owner of the usufruct, then this will not be considered as Ijarah. In a marriage contract, example, one becomes entitled to the usufruct in lieu of the payment of Mahr, however, one does not become the owner of the usufruct. Hence a marriage contract will not be considered as an Ijarah.

In Majma'ul Anhar Sharh Multaqal Abhar comes:

والنكاح فانه استباحة المنافع لا تمليكها

(Maja'ul Anhar Sharh Mullaql Abhar, 2/268)

The legitimacy of Ijarah

In the Holy Qur'an, Allah Most High commanded mankind to seek Divine bounties, and Divine bounty can be sought throught contracting Ijarah. Allah Most High said:

فاذا قضيت الصلوٰة فانتشروا فى الارض وابتغوا من فضل اللّٰه

'And when the prayer, is terminated, then disperse in the laud and seek of Allah's bounty.'

(Surah Juma'h, Ayat 10)

Allamah Kasani رحمة الله عليه mentioned that 'seeking Allah's bounty' includes Ijarah as well. *(Badaius-Sanai, 4/173)*

At another place Allah Most High said:

ليس عليكم جناح ان تبتغوا فضلاً من ربكم

'There is no sin on you if you seek the bounty of your Lord.'

(Surah Baqara, Ayat 198)

Is has been related that Ayat has been revealed regarding the Hajj of labourers. One person once approached Sayyidina Ibn Umar رضى الله عنهما and said: 'We are labourers, and we think that since we labour during Hajj, our Hajj is not acceptable.' Sayyidina Ibn Umar رضى الله عنهما asked: 'Don't you don Ihram? Don't you stay in Arafah? Don't you pelt the pillars with stones?' He said: 'Yes, we do.' Sayyidina Ibn Umar رضى الله عنهما said: 'Then you are pilgrims.' He further said: 'One-person put the same question to the Messenger of Allah صلى الله عليه وسلم. The Messenger of Allah صلى الله عليه وسلم answered this question only after the revelation of the Ayat:

ليس عليكم جناح ان تبتغوا فضلاً من ربكم

He صلى الله عليه وسلم said 'You are pilgrims.' In he Holy Qur'an has been stated the following regarding social stratification:

رافعنا بعضكم فوق بعض درجات ليتخذ بعضهم بعضا سخريا

'And We raised some them above others in rank that some of them may take labour from others.'
(Surah Zukhruf, Ayat 32)

That means Allah Most High has organised this world in such a way that some people are superordinates while others are subordinates; some people are affluent while others are indigent. Both stand in need of each other. If there were only rich people in this world, then who would be there to serve them, and if there were only poor people in this world, then who would be there to fulfil their financial needs? Allamah Shamsuddin Surkhi رحمة الله عليه, holds that this Ayat refers to taking services against wages. *(Al Mabsoot Surkhi 15/74)*

Similary, the Holy Qur'an has given husband and wife the right to hire a wetnurse to suckle their childern, if they both agree to do so. This is permissible from the Shara'i point view, and the wetnurse is to get the agreed upon wages. In the H oly Qur'an comes:

فان ارضعن لكم فاتوهن اجورهن

'And if they suckle for you, then give them their dues.'
(Surah Talaq, Ayat 6)

And it has been stated:

وان اردتم ان تسترضعوا اولادكم فلا جناح عليكم اذا سلمتم

ما اتيتم بالمعروف

'And if you wish to give your children out to nurse, it is no sin for you, provided that you pay what is due from you in kindness.'
(Surah Baqarah, Ayat 233)

This Ayat clearly demonstrates the permissibility and legitimacy of Ijarah. In addition to that, there are a number of Ahadith which prove the legitimacy of Ijarah.

In one Hadith has been stated:

اعطوا الاجير اجره قبل ان يجف عرقه

'Give the labourer his dues before his sweat dries.'
(Majmauz-zawid, P. 97; Subulus-Salam, 3/81)

This Hadith orders to pay a worker his wages , which is a proof for the legitimacy of Ijarah.

In another Hadith comes:

من استجار اجيرًا فليعلمه اجره

'If any of you hires a worker, he should let him know his wages.'
(Nasbur-Rayah, 4/131; Neelul Awtar 5/292)

One must be careful to pay a worker his wages, swiftly and without reduction, for the Messenger of Allah صلى الله عليه وسلم said that a person who had a worker work for him, making him complete his task, but failing to pay him his full wages, will belong to those three people who will have to defend themselves on the Day of Judgement.

It is further established that when the Noble Prophet صلى الله عليه وسلم and Sayyidina Abu Bakr Siddiq رضى الله عنه migrated to Al Madeenah, they had hired a person named Abdullah bin Al Uraiqil. Sayyidina Ibn Abbas رضى الله عنه related that once the Messenger of Allah صلى الله عليه وسلم had himself cupped and then gave the cupper his dues. *(Neelul Awtar, 5/285; Subulus-Salam, 3/80)*

Right from the days of the Noble Prophet صلى الله عليه وسلم till our era the whole Ummat agreed on the legitimacy of Ijarah. Only Abdur Rahman Al Asamm and Ibn Aliyah hold it to be unlawful. But since opinion stands in contradictron to the consensus of the Ummah, the Ummah never considered their objection as maintainable.

Allamah Kasani work:

The Ummah has got a consensus regarding the legitimacy of Ijarah, and this consensus existed long before Abdul Rahman Al Asamm came into existence. Right from the days of the companions, the Ummah practiced Ijarah, without anyone

ever raising a word against it. This is why an opinion which stands in contradiction to the conscensus of the Ummah, is not to be considered as reliable. *(Al Badai, 4/174)*

Imam Nawawi worte in Al Majmoo' Sharhul Muhazzib the following regarding this consensus:

> "Throughout the ages the scholars of different countries agreed on the permissibility of Ijarah. *(Al Majmoo' Sharul Muhazzib, 5/15)*

Allamah Ibn Qudamah رحمة الله عليه, recorded the comsensus of the Ummah regarding the permissibility of Ijarah. *(vide: Al Mughni, 5/433)*

Reason and analogy, too, demand the permissibility of Ijarah. Keeping in view man's various needs, selling and buying of goods and properties has been rendered lawful, similarly the sale of usufruct ought to be considered as lawful, too. The sale of goods and properties is known as Bai' while the sale of usufruct is known as Ijarah. Not every person is in a position to purchase a house for himself to live in, nor is every traveller in a position to purchase his own conveyance. Similary, not every owner of a house or conveyence is in a position to let others enjoy the usufruct od his property for free. Then there are people who work for wages. It is because of such people that factories run. Not every person is in a position to open his own factory, nor is every person in a position to work for free. Keeping in view these circumstance, the Islamic Shariah has rendered Ijarah lawful.

The Arkaan of Ijarah

According to the Hanafi scholars, the contract of Ijarah has got two Arkaan : Eejab offer and Qabool (acceptance). Offer and acceptance should be formulated in such a manner that the nature of the contract (i.e. Ijarah) becomes clear. While composing the contract, it suffices to mention the words 'Ijarah', 'Istijaar', 'Iktiraa', 'Ikraa', or their synonyms. In English one may say:

'I let ..... building to .....', against a monthly payment of ..... . If the second party accepts that offer, then the contract of Ijarah is valid and in order. The tense used in the contract should indicate past, e.g. one party might say:

> "I gave you such and such building on rent, against a monthly payment of hundred Dollars. The second party-inclined to accept should reply with a tense indicating the past. I may, for instance, say: 'I have accepted.' *(Fatawa Alamgiri, 4/404)*

The majority of scholars hold that the contract of Ijarah has got four Arkaan:

1. Aqideen (i.e. the parties of the contact), who comprise:
   (a) the Ajeer (employee, hireling, lessee).
   (b) the Mustajir (employer, lessor).
2. The words of offer and acceptance.
3. Ujrat (wages, rent).
4. Usufruct.

(Al Fiqhul Islami wa Adillah, 4/371)

The Hanafi scholars hold that there are five Arkaan:

1. The Ajeer.
2. The Mustajir.
3. Offer and acceptance.
4. Ujrat.
5. Usufruct.

(Al Fawakah Ad Dawani ala Risalah Ibn Asi Zaid Al Qabrani, 2/119)

The Shafi'i and Hanbali scholars maintain that the contract of Ijarah is not valid unless the word 'Ijarah' is used, for the purpose of this word is to convey the implied meaning.

One might ask whether the contract is valid in case the word Bai' (sale) is used, e.g. Zaid might say to Bakr. 'I sell you this house for one year, against a monthly payment of one thousand Dollars.

Shafi'i and Hanbali scholars have got two traditions regarding this issue. According to one tradition the contract of Ijarah will be in order, since Ijarah stands for the sale of usufruct. And according to the second tradition, the contract will not be in orders, since 'sale is a different transaction. *(Al Majmoo' Sharhul Muhazzib, 7/15; Al Mughni, 5/434)*

Conditions

In the contract of Ijarah, there are four types of conditions:

1. Conditions pertaining to the settlement of the contract.
2. Conditions pertaining to the implementation of the contract.
3. Concditions pertaining to the validity of the contract.
4. Conditions pertaining to the bindingness of the contract.

1. Conditions pertaining to the settlement of the contract

These conditions are of there types:

(a) Conditions pertaining to the parties of the contract.

(b) Conditions pertaining to the contract itself.

(c) Conditions pertaining to the place where the contract is executed.

A. Conditions pertaining to the parties of the contract

The parties of the contract have to be sane and of sound understanding. An Ijarah contracted by a madman, or a minor who lacks understanding, or such a person who is not in a position to distinguish between what harms him and what benefits him, will not be in order.

Maturity is not a condition. If any minor of understanding, an Ijarah regarding himself or his belongings, with due contracts permission from his guardian, then the Ijarah will be proper and in order. And if he contracted an Ijarah without his

guardian's permission, then the Ijarah shall depend on the guardian's permission. *(Badai, 4/176)*

The Shafi'i and Hanbali scholars hold that sanity and maturity are conditions, because Ijarah implies ownership of usufruct and neither a minor nor a madman is capable of ownership. *(Sharhul Kabeer, 4/3)*

The Maliki scholars maintain that sanity, maturity and freedom are conditions for Ijarah. If any minor, slave or madman contract an Ijarah regarding themselves or their belongings, then the Ijarah shall be in order, but it shall not be binding. The guardian shall have the right to either confirm or annul the contract. *(Al Fawakah Ad-Dawani, 2/119)*

Being Muslim is not a condition for Ijarah. An Ijarah can be contracted by Muslims as well as non-Muslims.

B. Conditions pertaining to the contract itself

There is only one condition that pertains to the contract itself, namely that the acceptance is in accordance with the offer. If one party, while expressing his acceptance does not do so in agreement with the subject matter of the offer, then the contract is not valid. If, for example, Khalid says to Bakr:

> "I let you ..... house for ..... monthly rent, and Bakr says: 'I agreed to take your shop on rent', then the Ijarah will not be in order, since the acceptance is not in accordance with the offer. Similarly, if Khalid mentions 1000 Dollars as monthly rent, and Bakr agrees to pay 500, then the Ijarah be considered as void. *(Badai, 4/136)*

C. Conditions pertaining to the place where the Ijarah is executed

There is only are conditon, namely that of 'Ittahad-e-Majlis', i.e. the offer and acceptance have to be done in one

sitting. If that is not the case, then the Ijarah shall be considered as void.

2. Conditions pertaining to the implementation of the contact

I. One condition is that the item the usufruct of which is contracted, is owned by the contracting party, and that he has got all rights pertaining to the item. If a person other than the rightful owner of the item contracts an Ijarah, then the Ijarah shall depend on the permission of the owner. If he grants his permission, then the Ijarah shall be in order, and if he does not grant his permission, then Ijarah shall not be in order. *(Badai, 4/137)*

II. Imam Abu Hanifa رحمة الله عليه mentioned another condition, as well namely that the contracting party is not an apostate. If an apostate has contracted an Ijarah, then the Ijarah shall not be implementable, because Imam Abu Hanifa رحمة الله عليه holds that any transaction contracted in the state of apostasy is to be considered as suspended. Imam Abu Yusuf and Imam Muhammad رحمة الله عليهما have not mentioned that condition. They hold that a transaction contracted in the state of apostasy is implementable. *(Badai, 4/137)*

III. The third condtion is that the item the usfruct of which is contracted in an Ijarah, is to be handed over to the lessee. If for example a house was given on lease , then house must be handed over to the lessee. If however a condition was stipulated that the rent shall be paid in advance, then the house shall be handed over only after payment of the rent.

IV. The contract of Ijarah has to be free of Khiyaar (i.e. options). If an option has been stipulated in a Ijarah, e.g. the lessee says:

"I am taking this house on rent, but I shall have an option of three days. During this duration I shall have the right to reject it."

After stipulating a condition of option, the contract shall not be implementable until the stated period has passed.

(Fatawa Hindiya, 9/11; Badai, 4/179)

3. Conditions pertaining to the validity of the contract

The conditions pertaining to the validity of the control are of five types:

A. Conditions pertaining to the parties of the contract.

B. Conditions pertaining to the usufruct.

C. Conditions pertaining to the subject-matter of the contract.

D. Conditions pertaining to the rentals/wages.

E. Conditions pertaining to the contract itself, i.e. the Arkaan of the contract.

A. Conditions pertaining to the parties of the contract

For the contract to the valid it is necessary that it came into existence with mutual consent of the parties. Allah Most High says:

> "And eat not up your property among yourselves in vanity, nor seek by it to gain the bearing of the judges that you may unknowingly devour a portion of others wrongfully." *(Surah Baqarah, Ayat 188)*

Elsewhere Allah Most High said:

> "O you who believe, squander not your wealth among yourselves in vanity, except it be a trade by mutual consent." *(Surah Nidaa, Ayat 29)*

The Ayat declares trade by mutual consent pure and lawful. Ijarah is a kind of trade, hence it requires mutual consent, too. Freedom and Islam are no conditions for the validity of contract. An Ijarah contracted by an infidel or by a slave is considered as valid. *(Badai-us-Sanai, 79)*

B. Conditions pertaining to the usufruct

I. The first condition is that the usufruct has to be known and specified, so as to avoid discord among the parties. If the usufruct is unknown, it shall be seen whether this lack of information would lead to discord or not. If yes, then the contract of Ijarah would not valid. And if not, then the contract of Ijarah would be valid, and the lack of information will not be considered.

There are several ways of determining the usufruct:

(a) Stating the location of the usufruct. That means one states where the item the usufruct of which is contracted in Ijarah is located. One may, for example say:

"I let such and house which is to situated in such and such locality; or: I let such and such animal for transportation services."

(b) In case of contracting Ijarah for a building, a shop, or a wet-nurse, it is further essential to state the duration of the contract, i.e. for how many days / months / years the contract shall last. In case of contracting these items or services, the rentals / wages can be determined only after determining the duration of the contract. Not determining the duration of the contract might lead to mutual discord, and mutual discored is a factor that invalidates the contract.

As far as the Ijarah of buildings and shops is concerned it is not a shara'i requirement that the lessee states what he is going to do in the building or shop. Once the lessee has taken the building / shop on lease, it is up too him whether he is going to use it himself on let it out to others, either free of cost (Ariyah) or against payment (Ijarah).

(Badai-us-Sanai, 4/179, 182)

It is not necessary to determine any particular period of duration for the Ijarah. An Ijarah can be contracted for short and long spans of time. There is no upper limit. Many scholars

hold that one can contract an Ijarah for as long as one expects the item to last.

(Majma'ul Anhar Sharh Mullaqal Abhar, 2/369; Al Mughni, 5/437)

According to a tradition by Imam Malik رحمۃ اللہ علیہ, an Ijarah can be contracted for five to six years, but not for longer. There are two traditions by Imam Shafi'i رحمۃ اللہ علیہ, in this regard:

One according to which it is not appropriate to contract an Ijarah for more than one year, and one according to which one can contract an Ijarah for up to three years.

(Al Majmoo' Sharhul Muhazzib, 15/18)

(c) If one has employed someone as a worker in a factory, then it is necessary to explain to him the nature of his work. In case land is contracted in Ijarah, the lessee has to tell the owner whether he intends to grow crops on the land, or plant trees, or construct buildings. In case he does not mention what he intends to do with the land, the Ijarah will be considered as invalid. *(Badai-us-Sanai, 4/183)*

In case of contracting animals in Ijarah, it is necessary to mention the location and the duration. If either of these two factors is not specified, the Ijarah will be considered as invalid. *(Badai-us-Sanai, 4/183)*

If slaves clothes or dishes have been contracted in Ijarah, then it is necessary to state the duration for which the Ijarah will last.

II. The second condition is that the usufruct be such that it is actually and legally possible to derive benefit from it. Hence it is not correct to contract any such thing in Ijarah the handing over of which is actually difficult, like in the case of run-away horses and camels. Likewise it is not correct to contract a subject-matter of which it is legally difficult to derive any benefit. e.g. hiring a menstructing woman for sweeping the mosque.

III. The usufruct has to be lawful of nature, e.g. books for reading, houses for residential purposes, nets for hunting.

The jurists of this Ummah are agreed that it is not proper to contract a Ijarah for acts of disobedience, e.g. hiring someone for unlawful games, or for teaching magic, or for mourning, because these all are acts of discobedience, and likewise it is not permissible to hire someone in order to kill a person without a just cause, or to imprison him. This is so because it is not proper to contract Ijarah for acts of disobedience. *(ibid)*

IV. The usufruct regarding which the Ijarah is contracted should have an objective that is reflected in common practicee, i.e. it should be something for which people usually contract Ijarah. If that is not the case, then Ijarah is shall not be in order, e.g. hiring someone merely for drying clothes, or leasing trees to obtain shadow. In either case the Ijarah shall not be in order. *(Badai-us-Sanai, 4/192)*

The Hanbali scholars hold that it is proper to hire someone for drying clothes, and to lease trees in order to obtain shadow. *(Al Mughni, 5/548)*

V. One more condition for the validity of the Ijarah is that the matter for which a person has been hired is not already absolutely obligatory (Fardh) or incumbent (Wajib) on him. Prayers, fast and Hajj are, for example, Fardh. If anyone hires, for instance, Zaid to offer prayers or to keep fasts, then that would not be permissible, because the services which are demanded from Zaid by virtue of the contract of Ijarah, are already Fardh on him. The regulations regarding teaching the Holy Qur'an, Sunnah, and Fiqh, leading prayer and giving Azan, fall in this category, too. The early scholars maintained that since these of services are actually acts of worship and of obligatory nature, it is not permissible to take any kind of remuneration for them. During those days, Imams, Qazis, Scholars, etc. were either financially independent, or they used to get a stipend from the public treasury. But times changed. During the days of the later jurists, when the people became less and less inclined towards religion, and when the Islamic government ceased to function, Imams

and scholars did not get any longer stipends from the public treasury.

Seeing such circumstances, the jurists decreed that it is permissible to take remuneration, for if that was not the case, everyone would engage in any mundane activity in order to make ends meet. No one would be willing to teach the Holy Qur'an, Sunnah, Fiqh and other Islamic sciences for free. The people would shy away from leading the prayes or giving Azan. This would cause religion a great loss. Verdicts are given in accordance with the view held by the later jurists. *(Badai-us-Sanai', 4/119,*

VI. One more condition for the validity of the Ijarah is that the hireling / employee does not himself benefit from his labour, for if he benefit from labour, then this would mean that he works for himself, and that in turn would mean that he is not entitled to receive any remuneration. If for example a person was hired to grind wheat into flour, and that he shall have a certain share of that flour as remuneration, then that would not be in order. The Hadith forbade this kind of deal.

C. Conditions pertaining to the subject matter of the contract

If the item the usufruct of which is contacted in Ijarah is some moveable asset, than it is necessary that it is in the owner's possession. One cannot contract an item in Ijarah which one does not possess. The Noble Prophet صلى الله عليه وسلم forbade the sale of things that one does not possess. Ijarah resembles sale transactions, hence the same condition is applicable.

D. Condition pertaining to the rentals / wages

The amount that is paid in a sales-transaction, in exchange for an item, known as 'price'. The amount that is paid in case of an Ijarah contract in exchange for the usufruct, is known as

'Ujrat' (i.e. rentals / wages. Any such thing that has the potential of becoming a price in a sales-transaction, has also got the potential of becoming 'Ujrat' in case of Ijarah. The following conditions need to be fulfilled in on Ijarah contract:

I. The Ujrat has to be something that is legally and customarily considered as property, and that is specified and known. The Noble Prophet صلى الله عليه وسلم said:

من استاجر اجيرًا فليعلمه اجره

'If any of you hires a worker, he should let him know his wages.
(Nisb-ur-Rayah, 4/131)

This kind of information is to be given through indication, specification and an explicit statement. If the Ujrat is of such kind that it requires labour and expenses to lift it, then according too Imam Abn Haneefa رحمة الله عليه, the location where the dues shall be settleed, has to be mentioned, too. Imam Abu Yusuf and Imam Muhammad رحمة الله عليهما, hold that Ujrat is to be paid at the same place where the Ijarah had been contracted.

(Al Mabsoot, 5/113); Badai, 4/93)

II. It is not proper to fix any such benefit as wages or rental which is related to the subject-matter of the contract, e.g. declaring a house as the rental for a house, or declaring an animal as the rental for an animal. However, one may fix any such benefit as wages or rental which is different from the subject-matter of the contract. For example, the rent for a house may be discharged through domestic services.

E. Conditions pertaining to the contract itself

One condition pertaining to the contract itself is that there should be no such condition in the contract which stands in contradiction to the objective of the contract, and which is not in line with the contract. For example, a house was given on lease. The lessor says to the lessee :

"You have to pay the rent right from this month, but the housee will be handed over to you only next month."

It is not proper to stipulate any condition of this not proper to stipulate any condition of this kind. *(Badai, 4/194)*

4. Conditions pertaining to the bindingness of the contract

The conditions pertaining to the bindingness of the contract are of two types:

"One type pertains to those matters because of which the contract of Ijarah shall be considered as binding and the other type pertains to those matters because of which the contract of Ijarah shall be considered as lasting."

I. Conditions of the first type

(a) The contract of Ijarah has to be implementable and valid. If the contract is invalid, it will not be considered as binding, rather it will be necessary to annul the contract.

(b) The item which has been contracted in Ijarah must, at the time of the contract or at the time of seisin, be free of any such fault or blemish which would make it difficult to benefit from the item. If the item has got any such fault or blemish, then the Ijarah will not be binding.

(c) The lessee must have seen the item he is taking on lease. If he has agreed to take a house that he has seen on lease, but when he sees the house, he does not like it, then, from the shara'i point of view, he has got the right to annul the contract. This is so because Ijarah is actually the sale of usufruct, and just like a buyer has got the option to reject goods when inspecting them (Khiyar-e-Ruyat), the lessee also got the option to reject the leased item when seeing it.

II. Conditions of the second type

There are two conditions which have to be fulfilled so that the contract of Ijarah remains binding :

(a) The leased item must remain free from any such fault or blemish which would make it difficult to derive benefit from the item. If any such fault appears which obstructs the derivation of benefit, then the contract of Ijarah remains no longer binding. If for example someone hired a servant or took an animal or a building on lease, and then the servant falls ill and becomes incapable of rendering any services, or the animal becomes lame and can no longer be used for riding or carrying burdens, or the building collapsed wholly or partially, then it in all these cases the lessee has got the right to annul the contract or keep it intact. *(Badai-us-Sanai, 4/195)*

(b) There should be no such excuse or claim regarding either party of the contract or the subject of the contract because of which it would be difficult to keep the contract intact. If any such occasion arises, then the Ijarah shall not be binding and either party shall have the right to annul the contract.

Types of Ijarah and the relevant injunctions

There are three types of usufuct which are usually contracted in Ijarah:

1. Houses, shops, land, animals, clothes, tents, furniture and other similar items are usually given or taken on lease. A mutually agreed amount is paid for the usufruct of these items.
2. Artisans and workers, like goldsmiths, carpenters, tailors, washermen, etc. make their services available through a contract of Ijarah. They are given remuneration in exchange for their services.
3. People are employed for different kinds of works and services. They are paid wages.

In the first instance the usufruct of items is contracted, and the usufruct is considered as the subject matter of contract. In the latter two instances, human labour is contracted, and labors is considered as the subject-matter of the contract.

Ijaratul Manafi'

Ijaratul Manafi', e.g. Ijarah of houses, shops, cars, transport, animals, clothes, jewelry and dishes, is proper and in order.

1. If a house, or shop is contracted in Ijarah, then it is necessary to mention the period for which the Ijarah shall last, at the time of entering the contract. However when a house is contracted in Ijarah, it is not necessary to mention for which purpose the house is taken on lease. In Fatawa Hindiya comes:

ومنها بيان المدة في الدور والمنازل والحوانيت واما بيان
مايستاجر له اجارة في المنازل فليس بشرط

(Fatawa Hindiya, 4/411)

In Al Mughni comes:

"There is no difference among the scholars as far the permissibility of contracting land in Ijarah is concerned. Ibnul Mundhir says that there is consensus among the scholars with regard to the permissibility of contracting real estate and animals in Iarah. The duration however will have ti be specified." *(Al Mughni, 5/449)*

2. In case land is contracted in Ijarah, one will have to specify what one intends to do with that land, whether one inlends to cultivale it, or plant trees on it, or construct buildings on it. If no such specification was made, then the contract will considered as invalid, unless the owner of the land has, at the time of entering the contract, clearly permitted to use the land in any manner he likes. In this case the Ijarah shall be in order. In Badai comes:

"In case land is contracted in Ijarah, it will have to be clearly mentioned what one intends to do with that land, whether one intends to cultivate it, or plant trees on it, or erect buildings on it. If one does not make any such elucidastion, then the Ijarah shall be considered as invalid,

unless the lessee has been given explicit permission to derive any kind of benefit from the land."

(Badai-us-Sanai, 4/183)

In Majmoo' Sharhul Muhazzîb has been mentioned:

"For the Ijarah of land to be in order, it is necessary to state whether one is going to cultivate that land, or plant trees on it, or erect buildings in it."

(Majmoo' Sharhul Muhazzib, 15/13)

Land can be contracted in Ijarah for cultivation purposes, or planting trees on it, or digging wells and canals on it, or for the production of bricks, or the construction of buildings. One will however have to state the duration of the contract, as well a what one intends to do with the land. *(Al Mughni, 5/63, 461)*

3. If animals are contracted in Ijarah, then it is essential to mention either the duration (of the contract or the location. That means the lessee will either have to mention for how long he intends to keep the animal, or to which place he intends to go with it. If neither of these two points is mentioned, then the contract will be considered as invalid.

In Badai comes:

If animals are contracted in Ijarah then one has to mention the duration or location. If neither of these two points is mentioned, then the transaction will be considered as invalid, for the lack of this kind of information might result in differences. *(Badai, 4/183)*

If animals are contracted in Ijarah one will further have to mention whether one intends to ride the animal or use it for carrying loads. In Fatawa Hindiya has been stated:

"In the Ijarah of animals one has to state the duration or location. One will further have to mention the purpose for

which one has taken the animal on lease-whether one intends to ride it or use it to carry loads.

(Fatawa Hindiya, 4/411)

One should only seat or mount as many people on a leased animal or motorvehicle as the animal or vehicle is meant to bear, or as is customary. It is not proper to mount more people than that. *(Hidaya, 2/283; Al Mujallah, P. 80)*

4. Ijarah of endowed land and buildings

For how long can one contract endowed land and buildings in Ijarah? Can one cantract endowed land and buildings for an unlimited period of time, just like any asset or commodity, or will one have to mention any limit? The author of Khulasatul Fatawa work the following in this regard:

"If an endowment has been contracted in Ijarah, then, if the In-charge of the endowment has contracted the endowment for more than one year, it needs to be seen whether the person who has made the endowment has put a condition that the endowment cannot be contracted for more than one year. In case he has kept any such condition, then the Ijarah will not be in order. And if he has not kept any such condition, then Ijarah can be contracted for a maximum period of three years. This has been adopted by Faqeeh Abul Laith. Imam Abu Hafs Al Kabeer holds that if there is apprehension of the endowment going waste, then it is appropriate to contract it for three years. And if there is no such apprehension, then it is not proper to contract the endowment for more than one year.

(Khulasatul Fatawa, 3/1127)

If at any place it is common practice to contract Ijarah for a long period of time, and if it is common to contract Ijarah for more than three years, then in this case the in-charge of the endowment can submit an application in the Qadhi's Court, to be allowed to contract the endowment in Ijarah for a longer period of time. If the Qadhi grants permission then the

endowment can be leased out for three years and longer. In Bahrur-Raiq comes:

> "If the one who made the endowment has not imposed any restrictions, then the endowment can be contracted in Ijarah for up to three years. And if the person who made the endowment has imposed any restrictive condition, then it is not proper to contract an Ijarah for more than one year. But if an Ijarah for more than one year would be of benefit to the poor, or if the people are not willing to contract an Ijarah for a short period only, then in this case the in-charge should request the Qadhi to permit him (to contract Ijarah for a longer period of time, for the Qadhi is the Wali (guardian) of the poor and the deceased.
>
> *(Bahrur-Raiq, 7/299)*

5. If anyone has taken a house or a shop on lease, and at the time of contract it has not been specified who is going to live in that house, or who the shop shall be utilized, then the lessee may live in that house himself, or he may let anyone else live in that house. And in case of a shop, he may sell there anything he likes. He must however, not do any such work which might damage the building or weaken the walls, nor must he have anyone else do such work. Activities of this kind require special permission from the owner of the building.

   For instance, if the lessee intends to set up an oven or a mill for grinding flour, then he ought to obtain permission first. Similarly, in case the lessee needs to accommodate animals in the building, I one will have to see what is common practice. If animals are commonly kept in buildings like in village-houses, then it is permissible to keep animals. And if it is not common practice to keep animals in buildings like in city-houses, then the owner's permission will have to be obtained first. If he permits it, then the lessee may keep animals in the building.

In Khulasatul Fatawa comes :

"If anyone has taken a building on lease, without specifying who is going to live in that building, then the lessee may either live himself therein, he may accommodate others, and he may store whatever items he likes in that building." *(Khulasatul Fatawa, 3/117)*

In Al Mujallah comes:

"The lessee is not permitted to engage in any such kind of activity that might damage the building or weaken its structure, unless the owner of the building has granted his permission. As far as the keeping of animals inside the building is concerned, one will have to consider the common practice of that town." *(Al Mujallah, P. 77)*

In Badai comes:

"As far as the keeping of animals in the building is concerned one will have to take into account which is commonly practiced." *(Badai, 4/184)*

6. If anyone has taken land on leasee in order to construct buildings or to plant trees, then, once the period of lease has expired, the lessee will have to cut down the trees and demolish the buildings, and return the empty land to its owner. However buildings and trees may if the owner of the land agrees be kept intract, provided Ujrat-e-Mithl is being paid.

In Bahur-Raiq comes:

"If anyone took endowed land on lease and planted trees or erected buildings on that land, then, once the period of lease expires, the lessee can maintain the trees and buildings, against payment of Ujrat-e-Mithl, provided his doing so does not have any negative impact on the endowment. And if those in whose favour the endowment was made are against the maintenance of the trees and buildings, then they will have to be removed."

(Bahrur-Raiq, 7/306)

7. In case of jointly owned property (such as a house or a shop) none of the owners may let out his share unless the same has been property defined. *(Badai, 4/180)*

8. It is not permissible to take items for decoration purposes on lease. But if one has out of necessity taken any item on lease, and this item by chance also serves decoration purposes, then there is nothing wrong with it.

   In Fatawa Hindiya comes:

   "If anyone has taken some dishes or vessels on lease, not for the sake of using them but decorating his house with them, then the Ijarah will not bevalid." *(Fatawa Hindiya, Vol.4)*

9. Is it permissible to contract religions books or copies of the Holy Qur'an in Ijarah? Imam Abu Haneefa رحمۃ اللہ علیہ holds this to be impermissible, since those are things of common benefit, and they should be given for free. The honourable. Imam however holds that the person taking the books can be made to guarantee that he will properly take care of them. This guarantee can be personal as well as financial. Imam Shafi'i. Imam Malik and Imam Ahmad bin Hanbal رحمہم اللہ تعالیٰ hold that it is permissible to contract religious books and copies of the Holy Qur'an in Ijarah (vide Al Mughni li Ibn Qudamah 5/550) Both options may be put into practice, depending on the circumstances.

10. If the lessee has on his own accord and with his own money, planted any trees or constructed anything on the leased land, then, at the time of vacating the leased land owner of the land has got the right to demand the removal of the trees or structures, or he may purchase them from the lessee. However, the owner of the land cannot be forced to purchase them. *(Mujallah, P. 77)*

Remunerating the hireling through the outcomes of his labour

As for as Ijarah is concerned, there is another issue that calls far discussion, namely whether it is permissible to pay the

hireling any such thing that is actually the result of his labour. Many other Shara'i injunctions depend on the permissibility or impermissibility of this issue, hence it seems appropriate to discuss the matter in detail. The honourable jurists hold two opinions is this regard.

According to one opinion it is not permissible to fix any such thing as remuneration that came into being as result of the hireling's or worker's labour, because this would mean that the worker himself would reap the benefits of his labour, and hence he would not be entitled to remmneration.

In Badai comes:

ومنها ان لا ينتفع الاجير بعمله فان كان ينتفع به لم يجز لانه حينئذٍ يكون عاملاً لنفسه فلا يستحق الاجر

(Surah Al Badai, Ayat 4/192)

Imam Abu Hanifah and according to the elucidation of many scholars, Imam Malik, Imam Shafi'i , Imam Abu Thawr, Ibn Al Munzir and a member of other scholars consider it as incorrect to remunerate the worker in this manner. Imam Hasan and Imam Nakha'i consider this as makrooh.

(Al Mughni Li Ibn Qudamah, 5/9, 11)

According to the second opinion one may remunerate the hireling through the outcomes of his labour, provided one states the quantity. Athram related that this is held by Imam Ahmd bin Hanbal رحمة الله عليه , Imam Muhammad bin Abi Harb, Imam Ahmad bin Saeed and Imam Awzai'. (ibid) Dr. Wahba Zuhaili stated that Imam Malik, Imam Yahya (who is an Imam of the Zaidiyah school of thought) and Imam Mazni Ash-Shafi'i, too, hold this opinion.

(Al Fiqh Isalmi wa Adillah)

The scholars who consider the matter as impermissible have derived their argument from the Hadith regarding Qafeez Tahan. On authority of Sayyidina Abu Saeed Khundri رضي الله عنه :

عن ابي سعيد الخدرى قال نهى عن عسب الفحل وعن

قفيز الطحان

'The Messenger of Allah صلى الله عليه وسلم forbade taking ermuneration for letting one's camel stallion (to another for impregnating a she-camel) and Qafeez Tahan.'

(Dr. Darqutni, Neel-ul-Awthaar)

Qafeez Tahan means to pay a person one had hired to grind flour from the flour he had ground.

This Hadith consists of two parts, the first is concerned with letting one's stallion. This matter has been mentioned in many other Ahadith too. The second part is concerned with the prohibition of Qafeez Tahan. Hafiz Ibn Hajr Asqalani stated that this has been recorded by Darqurni, abu Ya'la and Baihaqi, and that the chain of transmission of this Hadith is weak.

(Al Mughni, li Ibn Qudamah, 5/12)

Allamah Ibn Qudamah رحمة الله عليه, work about this Hadith:

وهذا الحديث لا نعرفه ولا يثبت عندنا صحته

(Al Mughni li Ibn Qudamah, 5/12)

The Hanafi scholars as well as other like-minded scholars who act in the light of this Hadith give it more weight and consider it as legal proof.

Those scholars who consider this kind of remuneration as permissible derive their arguments from the following considerations:

1. Muzara'ah has been declared as permissible in the sacred Ahadith, and the permissibility of this arrangement has been highlighted by the Hanafi jurists as well as by the jurists belonging to other scholars of though. Right from the days of the Noble Prophet صلى الله عليه وسلم up to this modern age, the people of this Ummah acted on basis of this permissibility. In a Muzara'ah contract, the Muzari' (i.e. the one who cultivates the land) is given one third or one half of the produce in return for his labour. This is to

can be compared to remunerating a hireling through the out comes of his labour.

2. The honourable jurists have also permitted an arrangement known as Musaqah, where the worker tends fruit-bearing trees and is remunerated through a part of the produce. This too, can be compared to remunerating a hireling through the outcomes of his labour.
3. The Islamic laws concerning Mudharabah are comparable too. In Mudhabah the worker is remunearated through a certain share of the profit that resulted form his efforts. This can be definitely compared to remunerating a hireling through the outcomes of his labour. Yet the jurists are agreed regarding the permissibility of Mudharabah.

Some important related issues

Various important issues are related to this matter, some of which are mentioned below:

1. One person has bought some animals like cows, buffaloes, goats, camels, etc. and then handed them over to another person to look after them. The milk and offspring shall then divided between both of them according to a mutually agreed ratio. The jurists who consider Qafeez Tahan as impermissible hold this arrangement to be impermissible, too. They hold that the actual owner of the animal is the owner of the baby and the milk as well, and that the person who looks after animals is entitled to a decent remuneration as per common practice.

(Badai-us-Sanai, 4/192)

Those jurists who consider Qafeez Tahan as permissible consider the above-mentioned arrangement as permissible, too. Keeping in view that this arrangement is commonly put in practice throughout India, it ought to be permissible.

Maulana Ashraf Ali Thanvi wrote :

"Some of Imam Ahmad's رحمۃ اللہ علیہ disciples deem this arrangement to be permissible. However not adopting it is

closer to precaution, but if there is pressing need to adopt it, then one may do so." *(Imdadul Fatawa, 3/343)*

2. One bought wheat and then had it ground to flour in a flour-mill and gave some of the ground flour as remuneration.
3. One had a butcher slaughter some animals and then gave him some of the meat and the hide as remuneration.
4. One had some people to harvest fruit and crops and then gave some of the harvested fruit and crop as remuneration.
5. One had a weaver weave yard into cloth and them gave him some of the ready cloth as remuneration.

Those scholars who consider Qafeez Tahan as permissible consider the above arrangements as permissible, too. And those scholars who hold that Qafeez Tahan is impermissible hold that these arrangement are impermissible, too.

Giving rented estate on lease

When a person rents some estate then he becomes the owner of the usufruct (e.g. the right to live on that estate). Such a person has got the right to either live himself on that estate or to benefit from it by giving it on lease to any other party. The jurists hold different opinion regarding the amount of rent, whether the lessee must contend himself with the same amount of rent that he is paying or whether he may charge more than that.

Imam Ata رحمة الله عليه holds that he may charge more. Imam Shafi'i رحمة الله عليه is of the same opinion. Imam Ibrahim deems it to be repugnant, and the same stance is maintained by the Hanafi scholars. But if the lessee has added any value to the estate, then it is permissible for him to charge a higher rent, and this increase in the rent will be considered as payment for the value he added. *(Mabsoot Surkhi, 15/78)*

The author of Majama'ul Anhar Multaqiul Abhar cited Imam Tahawi's statement as recorded in Sharhul Majma'.

"If the first lessee of the estate let the estate to someone else for a higher amount than paid by himself, then it needs to be seen if the second rental is of the same kind as the first rental. If both rentals are of the same kind then such an increase is not permissible. And if the agreed second rental is of different kind, then such an increase is permissible. According to Mulla Khusro's elucidations, the lessee can let the estate only to a party other than the owner.

(Majma'ul Anhar Sharh Multaqiul Abhar, 2/404)

The permissibility of 'Pagri'

The issue of 'Pagri' had been subject during the first and second seminar hold by the Islamic Fiqh Academy of India in Delhi, Many renowned Indian economists, jurists and experts in the Islamic sciences presented their papers during these seminars. These papers were subseqently published in the journal of the Islamic Fiqh Academy. After the presentation of the papers, ensuing discussions and exchange of opinions the participant of the seminar unanimously agreed on the following:

1. It is better if the owner of the state preserves the advance payment which he has taken from the lessee as a security as it is. If the owner spends the amount, then he will be liable to reimburse it to the lessee as soon as the period of the lease expires

2. If a house or a shop is given and rent and the owner of the house or shop has the lessee pay an additional amount as 'Pagri', apart from the monthly rentals, then the owner's charging this amount shall be considered as return for his giving up his right to having the house or shop vacated. It is permissible for him to charge this amount as it is in exchange of his right. Afterwards, if the owner intends to take his house or shop back, then the lessee shall have the right to demand the thus paid amount back, in return for his right to live in that house.

3. The owner of the house has given his property on rent without charging any 'Pagri', and the duration of the lease has not been mentioned in the contract. In this case the owner of the house may ask the lessee any time to vacate the property. However the owner should allow the lessee a suitable notice-period, keeping in view local practices, so as not to put the lessee or his own person into undue trouble.

4. If the owner has given his house or shop to someone on rent without charging 'Pagri' then it is not permissible for the lessee to ask for the 'Pagri' at the time of vacating the property. *(Ahm Fiqhi Faslay, P. 13)*

Types of hirelings and relevant injunctions

Ijarah can be divided into two kinds:

One can be referred to as Ijaratul Manafa's, which is concerned with the usufruct of house, shop, etc. while the other kind can be referred to as Ijaratul A'maal. In this kind of Ijarah human labour becomes the subject-matter of the contract. We have already discussed the injunctions pertaining to the first kind of Ijarah. In the following pages we shall focus on the injuctions pertaining to the second kind. Hirelings are of the two kinds:

1. Those people who approach others to hire them. Such people do whatever work they are given by the person who hired them. (i.e. the Mustajir) and they are paid for their labour. Workers, clerks, department in-charges, domestic servants, etc. in terminology of the Holy Shari'ah such hirelings are known as 'Ajeer-e-Khas'.

2. Then there are such people who know any art or craft. They usually do not approach others to hire them, nor do they tend to be anyone's employee. Rather they are approached by people who need their services

Goldsmiths, welders, carpenters, tailors, copplers, watch-makers, barbers, dyers, washermen, sweepers, etc. fall into this category. In the terminology of the Holy Shari'ah such hirelings are known as 'Ajeer-e-Mushtarik'. In Multaqiul Abhar comes:

"'Ajeer-e-Mushtarik' is a person who works for different people. He is not bound to any individual. On the other hand, Ajeer-e-Khas is someone who works for only one person and is bound to him." *(Majma'ul Anhar, P. 93, 391)*

Ajeer-e-Khas

Someone who works for one person only is referred to as 'Ajeer-e-Khas' or 'Employee'. He does not do the work of several others at the same time. An 'Ajeer-e-Khas' is in the role of an 'Ameen' or trustee, and the things handed over to him have status of entrusted goods.

Hence, if any of those things which have been handed over to him are lost or destroyed without any fault or neglect on his part, then he is not under obligation to make up for the loss. If, for example any such thing has been stolen, or disappeared, or anyone has usurped it, then the Ajeer-e-Khas is not obliged to make up for the loss, since it is agreed that things given to the Ajeer-e-Khas are actually entrusted goods, and since he is working for only one person rather than for several persons it is not difficult for him to take care of those things.

In Majma'ul Anhar Sharh Multaqiul Abhar comes:

"The Ajeer-e-Khas is not obliged to make up for anything that has been given to him and then happened to be destroyed. This is so because anything that has been given him is actually a trust as per consensus."

(Majma'ul Anhar Sharh Multaqiul Abhar, 2/394)

In Mabsoot Surkhi comes:

There is no difference among the scholars regarding the following:

"If the Ajeer-e-Khas unintentionally causes the destruction of a thing that has been given to him, them he is not obliged to make up for it." *(Mabsoot Surkhi, 15/103)*

In Al Mughni comes:

"Ajeer-e-Khas is a person who works for against wages for a particular period of time. If anything happens to be destroyed through him without any fault or neglect on his part then he is not obliged to make up for the loss. This view is held by Imam Malik, Imam Abu Hanifa and his disciples and by Imam Shafi'i.

(Al Mughni li Ibn Qudamah, 5/527)

In Takmalah Thaniyah Al Majmoo' Sharhul Muhazzib have been mentioned two statements given by the Shafi'i scholars. According to one statement an Ajeer-e-Khas is to be treacted like an Ajeer-e-Mushtarik that means he has been recorded that Imam Shafi'i said:

الاجراء كلهم سواء

'i.e. all kinds of hirelings are equal regarding injunctions.'

And according to the second statement, the Ajeer-e-Khas will not be obliged to make up for the damage. *(vide 15/96)*

A hireling's remunration should be known and defined. That means right at the time of finalizing the contract it has to be decided how much the hireling is to earn per day or per month. It would not be right to merely say that he shall get a reasonable payment for his work. Apart from the pay, the kind of work and working hours ought to be mentioned, too.

(Al Mujallah P. 60-66)

If the hireling makes himself available to his employer during the decided working hours, then he is entitled to payment, no matter whether his employer took any work from him or not. *(Majma'ul Anhar Sharh Multaqiul Abhar, 3/373)*

In the case of Ajeer-e-Khas one has to specify for how long, i.e. how many days / months / years he is to work. It is incumbent on the Ajeer-e-Khas to complete the work in the specified period.

Ajeer-e-Mushtarik

Ajeer-e-Mushtarik or Ajeer-e-Aam, (workmen free lancer) is person who works for different people. An Ajeer-e-Mushtarik is in the role of a trustee. That means anything that is given to him for repair or dyeing, etc. is a trust deposited with him. However this trust is to be rated as what is known as 'Amanat bid-Daman', that means an Ajeer-e- Mushtarik is like such a trustee or agent who is remunerated in return for his taking proper care of the entrusted goods. This responsibility of his is important even so as he is in charge of the goods or things of several people. Hence, if one was not to hold him responsible, then he might well be tempted to usurp the goods of many people. If goods entrusted to him are damaged or destroyed, then there are two possibilities:

1. Damage or destruction resulted from an act by the Ajeer.
2. Damage or destruction did not result from an act by the Ajeer.

Then there are again two possibilities as far as point I is concerned:

1. There was a fault or reglect on part of the Ajeer.

In the second case, where the damage or destruction was not the result of an act by the Ajeer, there are two possibilities:

1. The cause of destruction could not have been averted, like the goods' catching fire or an animal's (natural) death.
2. The cause of destruction could have been averted, like the goods' being stolen or usurped.

In the first case where the goods were damaged or destroyed as a result of the Ajeer's act, due to a fault or neglect on his part, the scholars are agreed that the Ajeer will have to make up for the loss. In the second case where the damage or destruction of the goods did not result from an act by the Ajeer, Imam Abu Hanifa, Imam Zafar bin Al Huzail and Hasan hold with regard to both possibilities that the Ajeer is not obliged to make up for the loss.

Imam Abu Yusuf and Imam Muhammad hold that the Ajeer is under obligation to make up for the destruction of the goods if their destruction could have been averted. Faqeeh Abul Laith issued a decree according to the view held by Imam Abu Hanifa.

However keeping in view the ever-changeing conditions, the epidemic spread of dishonesty unfaithfulness, falsehood, the public's decreasing ability to distinguish the lawful from the unlawful, and the need to protect the belongings of the common man, it seems more appropriate to issue verdicts according to the view held by Imam Abu Yusuf and Imam Muhammad. Otherwise, if one would not hold the Ajeer-e-Mushtarik responsible, he might usurp the people's belongings on one pretext or the other. *(Mabsoot Surkhi, 15/103; Majma'ul Anhar Sharh Multaqiul Abhar, 2/391; Fatawa Hindiya, 4/500)*

In Fatawa Hindiyah comes:

وبقولهما يفتى اليوم لتغير احوال الناس وبه يحصل صيانة اموالهم

Hence, If anything is lost, destroyed, stolen or usurped due to neglect on part of the Ajeer, then recompensation is to be taken from him. If, for example, a washerman looses a piece of laundry or tears it, if a goldsmith looses the jewelry then they will have to pay recompensation.

The Ajeer-e-Mushtarik is entitled to remuneration once he has completed his work. He is not entitled to remuneration before completing his work. *(Majma'tul Anhar Sharh Multaquil Abhar, 2/391)*

The lessee's rights and duties

1. The lessee must return the subject of the lease (whether it be a house, shop or anything else) to the owner as soon as the period of the lease expires; or he should renew the contract. *(Al Mujallah, P. 85)*

2. It is the lessee's responsibility to keep the leased property clean. This refes to all such chores like sweeping, dusting. clearing webs, etc.

In Al Mujallah comes:

"Throughout the duration of the lease it shall be the lessee's responsibility to remove dust, dirt, etc. *(Al Mujallah, P. 85)*

3. It is the lessee's duty to leave the house or shop in its original condition and not to make any changes that might damage the building. If he has damaged the building or if he has made it very dirty, the owner shall have the right to make him leave. *(Al Mujallah, P. 85)*
4. If an animal constitutes the subject of the lease, then owner of the animal and not the lessee shall responsible for the animal's fodder. If the lessee has arranged for the animal's fodder without the owner's permission, then this will be considered as an act of kindness by the lessee. He cannot claim his expense from the owner of the animal. *(Fatawa Hindiyah, 4/455)*
5. The lessee is not permitted to do anything that might damage the house or building.
6. If the lessee had keeping in view his comfort, done some construction work on the building, then, if he had done so with the owner's permission, he shall be entitled to reimbursement of his expenses. And if he had done so without the owner's permission he shall not be entitled to reimbursement. *(Al Mujallah, P. 77)*

The owner's rights and duties

1. Once a house or shop has been given on rent, the owner must vacate it immediately so that the lessee may utilise it.
2. Major repairs renovation, etc. are the owner's responsibility. The owner will have to bear such expenses by himself. *(Fatawa Hindiyah, 4/555; Al Mujallah, P. 77)*

3. If at the time of the contract the owner of the shop or house merely said that he will charge two hundred dollar as rent, without stating the duration of the contract, and if local customs do not give any clue either as to how long such an arrangement usually lasts, then the contract shall be valid for one month only. In the second months they shall have to renew the contract. In this case the owner shall have the right to make the lessee vacate the house.

(Hindiyah, 3/280)

4. It is the owner's duty to give the lessee all such things which are essential to derive benefit from the subject of lease, e.g. the keys to a house, the reins of a horse, etc. *(Takmalah Thaniyah Al Majmoo' Sharhul Muhazzib, 15/44)*

Differences between the owner and the lessee

Initially there are two issues regarding which the owner and the lessee might differ:

1. There might be differences regarding the amount to be paid as rental. The owner might claim a higher amount where as the lessee might claim a lower amount.

2. There might be differences regarding the subject of the lease.

Then there are two possibilities as far as each of these two issues is concerned:

(a) The differences regarding the rental arose before the lessee benefitted from the subject of the lease.

(b) The differences regarding the rental arose offer the lessee had begun to benefit from the subject of the lease.

(c) The differences regarding the subject of the lease arose before the lessee enjoyed the benefit of the same.

(d) The differences regarding the subject of the lease arose after the lessee had begun to benefit from the same.

In case a and *c*, where the differences regarding the rental or the subject of the lease arose before the lessee benefitted from the subject of the lease, both parties are to take an oath regarding the veracity of their claim after which the contract shall be dissolved. The Noble Prophet صلى الله عليه وسلم said:

اذا اختلف المتبايعان تحالفا و ترادّا

(Neelul Awtaar, 5/223; Nasbur-Rayah, 4/5)

The party who refuses to take the oath shall be considered as having made false claim and the case shall be decided against him. If any party has provided evidence to prove the claim then such evidence shall be accepted. If both parties produce evidence and the difference is with regard to the rental then the owner's evidence shall be accepted. And if the difference is with regard to the subject of the lease then the lessee's evidence shall be accepted.

In case *b*, and *d*, where the differences regarding the rental or the subject matter of the lease arose after the lessee had begun to derive benefit from the subject matter of the lease, e.g. he stayed for a couple of days in the rented house or he rode the animal for a while, then the lessee's statement under oath concerning the past period of the lease shall be considered as reliable. And as far the still remaining period is concerned, both parties shall be required to take an oath regarding the veracity of their claim, after which the lease shall be cancelled.

If the difference between the two parties arose after the expiry of the lease or after reaching the destination up to which one had taken animals on lease, then in this case there is no need to administrate an oath to both parties. The lessees's statement under oath with regard to the rental shall be considered as reliable, and the owner will not be required to take an oath.

2. If the two parties differ with regard to the nature of the rentals'e.g. one party claims that ten Dirhams were decided as rental while the other party claims that one

Dinar was decided as rental then both parties are to take an oath after which the contract shall be dissolved.

If any of the parties refuses to take an oath, then this will be considered as a confirmation of the other party's claim. If only one party produced evidence to substantiate his claim, then his evidence shall be accepted. If both parties produce evidence, then the owner's evidence shall be accepted.

3. If there arise differences between the hireling and the owner, e.g. one person gave some cloth to a tailor, telling him to make a coat but the tailor made a shirt, saying that he was told to make a shirt, or a person gave some cloth for dyeing, telling the dyer to dye it red but he dyes it green, saying that he was told to dye it green, then the person who owns the cloth shall be required to take an oath and his statement shall be considered as reliable. The tailor or dyer shall be responsible for the price of the owner of the cloth may also take the cloth and pay the tailor or the dyer the customary wages. This is held by the Hanafi scholars. *(Badai-us-Sanai, 4/219)*

Ibn Abi Lail holds that the hireling's statement under oath shall be considered as reliable. Imam Shafi'i رحمۃ اللہ علیہ has reportedly made different statements in this regard. However, according to the Zahir-ur-Riwayah of the Shafi'ite school of thought, the owner's statement under oath shall be considered as reliable. Verdicts are passed accordingly.

4. If the difference concerns the wages or rental, e.g. the owner of the cloth claims that the tailor agreed to stitch a shirt for free of cost where as the tailor claims to have charged ten Dollars, or the owner of a house claims to have charged one hundred Dollars as rent whereas the lessee claims that the rental has not been decided, then, according to Imam Hanifa رحمۃ اللہ علیہ, in the first case the statement made by the owner of the cloth and in the second case the statement by the lessee shall be considered

as reliable, and in neither case the payment of the wages or rental are due.

Imam Abu Yusuf رحمۃ اللہ علیہ opines that if the person is free and reliable then he will have to pay the wages or rentals. Imam Muhammad رحمۃ اللہ علیہ holds that if the person who was ordered to stitch the clothes is a professional who does this kind of work against payment, then his statement is to be considered as reliable.

(Badai-us-Sanai, 4/122)

Cases in which the contract of Ijarah stands as dissolved

The contract of Ijarah shall stand as dissolved in the following cases:

1. Death of either party. If either the lessee or the owner dies, then the contract of Ijarah shall stand as dissolved. This is maintained by the Hanafi scholars. The Shafi'i scholars hold that death of either party does not lead to the dissolution of the contract-Rather the heirs of the deceased person will be considered as his representives and the contract of Ijarah will continue as before.

(Badai-us-Sanai, 4/222)

Dr. Wahba Zuhaili stated this to be the view of held by the majority of scholars. *(Al Fiqh Islami wa Adillah 4/781)*

2. Iqalah. In the terms of Fiqh 'Iqalah' or 'Reversal of sale' means that the buyer and the seller decide to reverse a sale that they had concluded before. The buyer returns the goods and the seller returns the price he had received, and they do so with mutual consent. Iqalah is possible in Ijarah, too. The contract of Ijarah is considered as dissolved if the owner and the lessee are mutually agreed to do Iqalah when the first rental becomes due.

(Badai-us-Sanai, 4/222)

3. Destruction of the subject of Ijarah. If the thing the usufruct of which had been contracted in Ijarah is destroyed, then the contract of Ijarah shall stand as dissolved. For example, a house / shop had been contracted in Ijarah and then it was demolished. Or an animal had been contracted in Ijarah and then it died. In these cases the Ijarah shall stand as dissolved because the subject of the Ijarah-contract no longer exists. *(Badai-us-Sanai, 4/222)*

4. Expiry of the lease-period. Once the period for which an Ijarah had been contracted expires the contract of Ijarah shall stand as dissolved. However if there exists any reason due to which the contract of Ijarah needs to be kept intact even after the period has expired then it is possible to extend the period as per requirement. For example, some land had been contracted in Ijarah. The lessee cultivated the land and planted crops on it. However, the period of the Ijarah expired before the lessee could harvest the crop. In this case one may extend the period until the crop is harvested. *(Badai-us-Sanai, 4/222)*

☆☆☆

SALAM CONTRACT

The Islamic economic system is free from excesses and distortions. It stands in perfect accordance with human nature. It provide a solution for all kinds of financial problems and difficulties. It guards the rights of the rich, and it also has got full consideration for the needs of the poor.

Islam's objective is to circulate wealth, to ensure that it does not stay in the satchels of the rich alone, so that the affluent and less affluent may equally benefit there from.

Islam has permitted different kinds of commercial transactions, one of them is known as 'Salam'. In this kind of transaction, the price is paid before hand, while the goods are delivered at a specified future date. In today's language this is known as 'Forward Buying'. Experts in the field of Islamic banking are agreed that 'Bai Salam' can be of great benefit in an interest free banking system.

The legitimacy and necessity of Bai Salam

It is basically a requirement of people belonging to the agricultural sector, who need money to cover the expenses of cultivation. In case they do not have money, they are not in a position to cultivate their land, thus the land would loose its fertility, and produce would come to a stillstand Human society would suffer tremendously. This is why the Islamic Shari'ah has permitted that people who have got sufficient resources, extend a specified amount for a specified period of time to farmers who, once the period expires, i.e. when the crop is ready to be harvested-give them in turn an agreed upon

quantity of crop. This way the land stays under cultivation, capital keeps circulating, and the owner of the capital is able to acquire crops at a suitable price. Research scholar Ibn Hamam wrote the following regarding the legitimacy and necessity of Bai Salam:

> "Both the buyer as well as the seller of the goods stand in need of Bai Salam. The buyer needs maximum profit in order to cover the expenses of his family-members and dependents. Bai Salam is ideal to achieve this objective, because in this transaction the buyer can purchase food-stuff at a price much lower than the actual cost. On the other hand, the seller stands in need of capital so as to be able to engage in agricultural and industrial activities. In order to acquire the much needed capital, he enters a Salam transaction, in which the goods/crops are delivered at a later time. Thus his need is fulfilled. Due to these benefits, the Islamic Shariah has sanctioned the transaction of Salam, and the whole Ummah is agreed regarding its permissibility."
>
> *(Fatwahul Qadeer, 6/206)*

The Holy Qur'an has generally declared commerce and all kinds of buying and selling-including Bai Salam-to be permissible. Allah Most High said:

> "Allah permits trade and forbids usury."
>
> *(Surah Baqarah, 2751)*

and:

> "And when the prayer is concluded, then and seek of Allah's bounty." *(Surah Jumu'ah, Ayat 10)*

These Ayat, due to their general nature, cover Bai Salam, as well. Bai Salam is an excellent means of acquiring lawful sustenance and promoting economic welfare. The Holy Qur'an has given explicit permission for Bai Salam, as well. Allah Most High said:

يا ايهاالذين امنوا اذا تداينتم بدين الىٰ اجلٍ مسمى فاكتبوه

'O ye who believe, when you contract a debt for a fixed term, contract it in writing. *(Surah Baqarah, Ayat 282)*

Sayyidina Abdullah bin Abbas رضی اللہ عنہما said regarding this Ayat:

"I bear witness that Allah has pemitted Bai Salam-in which, duly fulfilling certain conditions, the goods are delivered after a specified period of time-in His Books and He has openly declared its permissibility. Sayyidina Ibn Abbas رضی اللہ عنہما then recited the above Ayat. *(Nisbur-Raya 4/44; Takhlees-ul-Khair, 242; this Hadith has also been recording by Shafi'i, Tabarani, Al Hakim and Baihaqi)*

From the sacred Ahadith is learnt that at the time the Messenger of Allah صلی اللہ علیہ وسلم migrated to Madinah, the people there were accustomed to contracting Salam for two years. When the Messenger of Allah صلی اللہ علیہ وسلم got to know about this, he did not stop them from doing so, rather he permitted this kind of transaction, provided some conditions are duly fulfilled. The following has been related from Sayyidina Ibn Abbas رضی اللہ عنہما :

"When the Messenger of Allah صلی اللہ علیہ وسلم arrived in Madinah; the people there used to contract their crops in Salam. The Noble Prophet صلی اللہ علیہ وسلم said: 'Anyone who in tends to do Salam, ought to specify the weight, measure and time (of delivery)."

(Nisbur-Raya, 4/42; Jamiul Usool, 2/17)

The juristic definition of Salam

In the terminoloy of jurisprudents, Bai Salam (Forward Buying) refers to such a contract in which the price for the subject-matter of the sale (Mub'ee) is paid in advance, where as the sold goods are delivered at a later time. In Mujjam Lughatul Fuqahaa comes:

بيع السلعة الأجلة الموصوفة فى الذمة بثمن مقبوض فى مجلس العقد

'Bai Salam is a contract in which goods, the characteristics of which are clearly described, are sold in the sitting during which the transaction is contracted, against a payment (in advance), while the goods are to be delivered (at a later time).'

(Muajjam lughatul Fuqahaa, 249)

This is why research scholar Ibn Hamam wrote:

"Salam (Bai Aajil bil 'Ajil; vide Fathul Qadeer, 6/204) means to sell something against on-the-spot payment, while the sold goods are to be delivered at a later time.' Other jurist have, though with a slighty different wording, defined Salam in the same manner, namely that in Bai' Salam payment is done on the spot, while the goods are delivered later." *(Ghayiatul Muntahaa, 2/17; Mughni Al Muhtaj, 2/102; Kashshaful Qinaa, 3/273; Sharhul Kabeer, 3/195)*

Arkaan

Each sale transaction must necessarily comprise of offer and acceptance, that means one party is to make an offer of either selling or purchasing an item, while the other party is to accept that. This is known as 'Eejab-o-Qabool', i.e. offer and acceptance. Offer and acceptance is the back-bone of this kind of transaction. Now comes the question which words should be used to formulate the offer and acceptance? The Shafi'i and Hanbali scholars hold that it is essential to mention the word 'Salam' or 'Salf' (another name for Salam). Imam Zafar رحمة الله عليه, is of the same opinion. *(Badai-us-Sanai, 7/3147)*

The Hanafi and Maliki scholars maintain that any such words or phrases may be used from which the nature of the transaction can be understood. *(Al Fiqhul Islami wa Adillah, 4/1599)*

Some Hanbali scholars hold that the word Bai' suffices to validate the Salam transaction. *(Kitabul Furoo', 4/173)*

Do the Shafi'i scholars subscribe to this view, too? There are two statements in this regard:

1. Some hold that a transaction which has been contracted merely through the word Bai' shall not be considered as Bai' Salam.
2. Some hold that since Salam is a kind of Bai' (i.e. sale), in which the seisin of the payment has to occur in the meeting in which the transaction is contracted, the word Bai' shall suffice to validate this kind of transaction.

(Al Muhazzib, 1/297)

The Hanafi scholars hold that Bai Salam got two Arkaan, offer and acceptance. The words used during offer and acceptance should be such that the nature of the transaction (i.e. Salam) is clearly understood. The majority of scholars hold that Bai Salam has, just like any other sale, three Arkaan:

1. Parties of the contract: The paying party is called 'Rabbus-Salam', and the seller is known as 'Muslam ilaih.'
2. Ma'qood alaih: The price which is paid for the goods; and Muslam fihi, the goods for which the price was paid.
3. The offer and acceptance.

This way there are according to the majority of scholars a total of five Arkaan:

1. The buyer 2. The seller 3. The goods
4. The offer 5. The acceptance

Conditions

Besides the Arkaan, there are two kinds of conditions on which the validity of the Salam contract depends:

1. Some conditions which pertain to the contract itself.
2. Some conditions which pertain to the things to be exchanged.

The latter is again of two kinds:

(a) Conditions which pertain to the capital and the price.

(b) Conditions which pertain to the Muslam fihi; i.e. the goods.

There is only one condition which pertains to the contract itself, namely that no party should stipulate a condition of option* in the contract of Salam (vide Al Muhazzib, 1/297). The contract should be perfect and complete.

Allamah Kasani elucidated this condition as follows:

"There is only one condition attached to the contract itself, and that is that neither party should stipulate a condition of option, for in case of a condition of option, the permissibility of sale would be proven against analogy; since in this kind of a condition of option would defeat the very purpose of the transaction. It is an obstacle to the object of the contract.

Condition pertaining to the 'Price'

The are six conditions which pertain to the 'Price':

1. The nature of the 'Price'. It has to be detemined whether the 'Price' which is paid far the goods is of monetary nature (i.e. Dinar, Dirham or other currency) or if it consists of a commodity which can be measured or weighed, like wheat, barley, cotton, iron, etc.
2. The kind of the 'Price'. If a country uses different kinds of Dirham, Dinar or currency, or if there are different kinds of wheat, then one will have to specify which kind shall be given as a price.

   Here it should be pointed out that if a country uses only one kind of currency, or if only one kind of wheat is

*Note : Khiyar-e-Shart or condition of option is a term of Fiqh. It means that at the time of transaction, either party says: 'Give me three days to consider the matter. If I do not feel comfortable, then I shall have the right to cancel it.'

planted, then there is no need to make any such specification. In this case it is sufficient to mention merely the nature.

3. One will have to state the quality, if for example, wheat is the price, then one will have to mention whether the wheat is of superior, medium or of inferior quality.

   The purpose of stipulating these three conditions is to avoid lack of information, which, in turn, might lead to differences and dispute. Beside, such lack of information would render the contract of Salam invalid.

   (Badai-us-Sanai, 7/3149; Fathul Qadeer, 6/221)

4. It is essential to determine the amount or quantity of the price. Imam Abu Hanifa and Imam Thawri رحمة الله عليهما hold that in a Salam transaction one has to state the amount of the price, as well. If, for example, one gestures toward a bundle of currency-notes, saying, 'I'll pay you this much without saying how much it is, then the transaction will not be in order. Similarly, if one gives wheat as price, then one will have to mention the weight. *(Badai-us-Sanai, 7/3139)*

5. Imam Abu Hanifa رحمة الله عليه stipulated one more condition, if Dirham or Dinar are paid as a price, then they have to be kept in such a way that no defect or blemish remains concealed. Imam Abu Yusuf and Imam Muhammad رحمة الله عليهما however hold that this is not a condition.

   (Al Fiqhul Islami wa Adillah, 4/601)

6. The price has to be paid on spot, i.e. right at the time of the contract. It is very important for the validity of the transaction that the buyer hands over the price to the seller, and that the seller takes possession of the price. If the payment of the price is deferred, then the contract of Salam shall not be in order. This kind of transaction would fall in the category of بيع الكالي بالكالي , i.e. deferred payment for goods to be delivered at a take time, and this kind of transaction is unlawful. It has been prohibited in the sacred Ahadith. If someone owes a person a certain sum of money, then one cannot convert this debt into the price to be paid in a Salam transaction.

If, for example, Zaid and Bakr enter a Salam transaction, and Zaid says: 'Khalid owes me that much money, and I convert this debt into the price to be paid', then this would not be in order. The price has to be handed ocer to the seller in the same sitting in which the transaction is contracted, and the seller has to accept and take physical possession of the price.

If the seller wants to waive the amount which is due to him then he cannot do so unless the buyer agrees to that. If the buyer does not agree, then the Salam transaction will not be in order.

(Badai-us-Sanai, 7/3151-2; Fathul Qadeer, 6/227)

The Hanafi, Shafi'i and Hanbali scholars agree regarding this condition. *(Al Muhghni Al Muhtaj, 2/102); Al Muhazzib, 1/300); Al Mughni, 4/295)*

It has been recorded from Imam Malik رحمۃ اللہ علیہ, that he considers it permissible to delay the payment for a maximum of three days, no matter whether any such condition had been stipulated or not. But it is not permissible to delay the payment for more than three days.

(Hashiya Ad-Dasowqy, 3/95; Al Mutaqqa ala Muwatta, 4/300)

Conditions pertaining to the goods

The Hanafi scholars hold that there are ten conditions pertaining to the goods (the goods to the sold in a Salam transaction). The transaction will not be in order unless these ten conditions are fulfilled.

1. The nature of the goods must be known. It has to be made clear whether one is going to sell wheat, lentils, barley, etc.
2. The kind of the goods must be specified. For example, one will have to state clearly what kind of wheat one is going to sell.
3. The quality of the goods must be mentioned, e.g. one will have to make clear whether one is going to sell wheat of superior, medium or inferior quality.

4. One has to state the quantity. If one sells any thing that can be weighed or measured, then one will have to state the weight, or measure. Similary, if one sells any thing that can be counted, one will have to state the amount.

5. The price and the goods must be void of two elements that lead to Riba Al Fadhl (excess usury) that means they must differ in quantity and nature. If only one of these elements is found then this would be a case of Riba An-Nasiya (Delay usury), and a transaction which contains Riba is considered as invalid.

6. The sold goods are to be delivered at a future date which must be specified. The Hanafi, Maliki and Hanbali scholars hold that the transaction will only be in order if the goods are delivered at a specified future date. If the goods are delivered immediately, then it will not be a Salam transaction, it will be an ordinary sale. They derive their argument from the following Hadith:

من اسلف في شئ فليسلف في كيل معلوم ووزن معلوم
الىٰ اجل معلوم

From this Hadith becomes clear that the delivery has to take place at a later, clearly specified point of time. *(Mabsoot, 12/125; Fathul Qadeer,2/228; Bidayatul Mujtahid, 2/201; Hashiyatul Aswaqi, 3/205; Ghayatul Muntaha, 2/78)*

In Fathul Azeez comes:

ولا فرق على القولين بين السلم الحال والمؤجل

What should be the minimum period of defermen for the delivery of the sold goods? The Hanafi and Hanbali scholars hold that the minimum period should be one month.

In Fatawa Hindiya and Bahrur Raiq comes:

عن محمد رحمة الله عليه انه قدر ادناه بشهر وعليه الفتوىٰ

It has been recorded from Imam Muhammad رحمة الله عليه that minimum period is one month and verdicts are given to this effect. *(Fatawa Hindiya, 3/180; Bahrur Raiq, 6/160)*

In Ibnul Muflih Hanbali's work Kitabul Furoo' has been stated the same, that the minimum period of deferment is one month. *(Kitbul Furoo', 4/181)*

The Maliki scholars hold that the minimum period of deferment is fifteen days.

7. Another condition for the validity of the Salam transaction if that the sold goods must be determined through specification. A Salam transaction cannot be contracted for goods which are not determined through specification such as Dirham, Dinar, and currency notes. *(Fatawa Al Hindiya, 3/180; Badai-us-Sanai, 7/3164)*

8. The Muslam fihi; i.e. the like of the goods which are to be sold must be available in the market, right from the time of the contract until the delivery of the goods, and the availability of such goods should not merely be presumed. If the like of the contracted goods becomes unavailable in the market in the interval between the conclustion of the contract and the delivery of the goods, then it is not proper to contracts such goods in a Salam transac- tion. If the goods are not available in the market, but in people's homes then this shall not be taken into considration.The transaction would still not be in order.

(Fatawa Al Hindiya, 3/180; Fathul Qadeer, 6/229)

One contracted grain or any other commodity in a Salam transaction. At the time of concluding the contract, the commodity was available in the market, but by the time the delivery became due, the commodity was no longer available, or very difficult to acquire. What shall be the Shariah ruling in this case?

The author of Durr-e-Mukhtar, Allamah Ibn Abideen Shami wrote:

"The buyer shall have the opinion. Either he may wait until the commodity becomes vailable in the market; or he may take back his money and annul the contract."

(Durr-e-Mukhtar, 5/212)

9. If the goods are difficult to transport then one will have to determine the place where the goods shall be delivered. Imam Abu Yusuf and Imam Muhammad رحمہما اللہ hold that this is not a condition.

   They maintain that the goods have to be delivered to the same place where the contract had been concluded. If the goods are easily to transport, and there is no need to hire any labourer to carry them, then there is no need to specify the place of delivery. *(Fathul Qadeer, 6/226; Bahrur Raiq, 6/161; Fatawa Al Hindiya, 3/180)*

   Such goods can be delivered to him anywhere. *(Badai-us-Sanai, 7/3164)*

10. Salam can be effected only in such commodities the quality and quantity of which can be exactly specified; e.g. things that are weighed, measured or counted, provided the difference that is likely to occur in the last category is negligible only. *(Badai-us-Sanai, 7/3164)*

Commodities which can be sold through Salam

1. Things that are weighed and measured. The Holy Shariah has permitted to contract all such things in Salam which are weighed and measured, and which are always availabe in the market, and the types and qualities of which can be clearly specified, e.g. wheat, barley, lentils, olives, raisins, clarified butter, honey, saffron, musk, etc. However it is essential to determine the weight, measure, quality and date of delivery when contracting these in a Salam transaction Likewise it is permissible to sell Henna, roses, jasemine and all kinds of dried flowers through Salam. *(Khulasatul Fatawa, 3/7)*

2. Adadiyat-e-Mutaqarabah. Countable items are of two kinds, such where there is a considerable difference between the single specimens, and this difference leads to difference prices. Commodities of this kind are called

Adadiyat-e-ghair Mutaqarabah, or Adadiyat-e- Mutafawiyahi the terms of Fiqh. Animals, precious stones pearls, melons, cucumber, etc. belong to this group. Melons can differ considerably in price melon is available for as little as five Rupees, while another might cost ten Rupees or more. Similary in case of precious stones, pearls and animals. Commodities of this kind cannot be sold in a Salam transaction.

The second kind is all such commodities which are either completely identical, or where there is only a very minor difference between the specimen which does not affect the price. Eggs, nuts, etc. belong to this group whether a nut is big or small, it does not affect the price. Like wise in the case of eggs. Commodities of this kind are called Adadiyat-e-Mutaqarabah in the terms of Fiqh. This kind of commodity can be contracted in a Salam transaction.

(Badai-us-Sanai, 7/3164-5)

Bricks also fall in the category of Adadiyat-e-Mutaqarabah. Hence bricks backed or unbacked can be sold thorugh Salam, provided their size, shape, quality, etc. is properly determined.

3. Zar'eeyat: ..... Zar'eeyat are all such commodities which are sold per measure, such as cloth, mats, etc. Is it permissible to sell this commodity through a Salam transaction? Allamah Khasani writes the following in this regard:

"Analogy demands that contracting such items in a Salam transaction should not be permissible, for this kind of items does not belong to the Zawatul Amthal, besides, there can be a considerable difference in the quality and price of cloth, but yet, on the basis of Istahsan, this kind of deal has been rendered permissible. Besides, at times arises the need to contract cloth in a Salam transaction, just as there arises the need to contract other items. People have also acted accordingly, hence, keeping in view need and necessity of people, the analogy was abandoned, and this kind of transaction has been declared permissible. In fact, if

the length and breadth, the material and the quality of the cloth are described properly the difference becomes negligible. *(Badai-us-Sanai, 7/3164-5)*

The author of An-Nutf fil Fatawa categorised the commodities that can be contracted in a Salam transaction as follows:

For kinds of commodities can be sold through Salam:

1. Makeelat - I such items that are measured by any hollow measure.
2. Mawzoonat - such items that are sold by weight.
3. Mazroo'at - such items that are sold by measure.
4. Adadiyat-e-Mutaqarabah - such items the single specimen of which show a very minor difference only, like eggs and nuts. *(An-Nutf fil Fatawa, 1/456)*

Salam in case of precious stones and pearls

Precious stones and pearls fall in the catgory of Adadiyat-e-Mutafawah. There can be considerable difference between two samples of them, and this difference is reflected in the price. One diamond might cost thousand Rupees while another might cost hundred thousand Repees. Hence it is not permissible to sell precious stones. gems, pearls, etc. though Salam. Allamah Kasani work:

ولا يجوز السلم فى العدديات المتفاوتة من الحيوان

والجواهر والألئى

Salam is not permissible in case of Adadiyat-e-Mutafawah, like animals, precious stones and pearls. *(Badai-us-Sanai, 3/3166)*

Salam in case of animals

It is agreed that the sale of animal fat through a Salam transaction is permissible. The question that arises is whether it is permissible to contract animals as such in Salam. The

scholars hold different opinions in this regard. Imam Abu Hanifa رحمة الله عليه holds that this kinds of transaction is not permissible. He derived his argument from a tradition narrated by Sayyidina Ibn Abbas رضي الله عنه according to which the Noble Prophet صلى الله عليه وسلم forbade the Salam-sale of animals.

(Nisbur-Rayah, 4/46; Takhleesul Jair, 245)

Imam Abu Hanifa رحمة الله عليه further says that there can be considerable difference between individual animals of one species, and that this difference is also reflected in the price of the animals. Some animals are fat and stout. They are rather expensive. On the other hand, thin and emanciated animals are very cheap. Even clear mention of species, breed and quality do not describe an animals sufficiently. Hence it is not permissible to sell an animal through a Salam transaction. Imam Sufyian Thawri and Imam Awzai رحمهما الله are of the same opinion.

(Farhul Qadeer, 6/209; Bahrur Raiq, 6/158)

Imam Shafi'i, Imam Malik and Imam Ahmad bin Hanbal رحمة الله عليهم hold that if the species, breed, age, attributes, gender, colour, height and size are clearly defined, then it is permissible to sell animals through Salam. *(Bahrur Raiq, 6/158; Bidayatul Mujtahid, 2/200; Hashiyatul Aswadi, 3/208-9; Al Mughni, 4/28; Ghayatul Muntaha, 2/72)*

Salam in case of meat

Due to the different physical constitutions of animals there are differences in the quality of meat, as well. This is why Imam Abu Hanifa رحمة الله عليه holds it is not permissible to sell meat through Salam, no matter if the meat is with or without bones. On the other hand, Imam Abu Yusuf, Imam Muhammad, Imam Shafi'i, Imam Malik and Imam Ahmad bin Hanbal رحمة الله عليهم hold that if the kind of meat, its quality, the age of the animal, the parts from which the meat is taken, as well as the quantity are clearly defined, then it is permissible to sell meat through Salam. For instance, one will have to state whether one is going to sell beef or mutton, whether the animal is fat or lean, young or old, whether one is going to sell

forequarter, hindquarter, entrecoite, etc. whether one is going to sell five kilo or ten kilo. If all these details are provided, then a Salam transaction of meat shall be considered as permissible.

(Bidayatul Mujtahid, 2/200; Hashiyatul Aswadi, 3/271; Mughni Al Muhtaj)

In Bahrur-Raiq comes:

"Imam Abu Hanifa رحمة الله عليه holds that it is not permissible to sell meat through Salam. However Imam Abu Yusuf and Imam Muhammad رحمة الله عليهما hold that if the kind of meat, its quality, the age of the animals, the parts from which the meat is taken as well as the quality are clearly defined, then Salam shall be permissible.

Salam in case of fish

The majority of scholars hold that just like in case of meat, Salam is permissible in case of fish, too. Different narrations have been recorded from Imam Abu Hanifa رحمة الله عليه in this regard. According to an authentic tradition, small fish can be sold through Salam no matter whether they are sold by weight or measure; or whether they are fresh or dried. The reason for this is that there is hardly any difference in small fish, and that it does not matter much if it is fat or lean. And according to the Zahirur Riwayah, large fish can be sold through Salam, too. *(Al Mabsoot, 12/138; Fathul Qadeer, 6/205)*

Salam in case of fruit

There are four possibilities as far as Salam in case of fruit is concerned:

1. The transaction is contracted in the season in which the fruit is available in the market, and the date of delivery is fixed at a time when the fruit is no longer in the market.
2. The transaction is contracted before the season, and the date of delivery is for fixed after the season.
3. The transaction is contracted before the season, and the agreed date of delivery falls in the season.

All these three possibilities would render the transaction invalid, since the condition of availability in the market from contract till delivery is not met.

4. The fourth possibility is that the transaction and delivery, both fall in the same season. In this case the transaction shall be valid since the condition of availability in the market from contract till delivery has been met.

(An-Nutfil Fatawa, 1/458)

Injunctions pertaining to the price and seisin of goods

1. In a Salam contract, the price must be paid in the same sitting in which the transaction is contracted, and the seller must take possession of the price. If one or both parties get up before the seller takes possession of the price, then the contract shall not be in order.

2. In a Salam contract the seller is not allowed to forego the price. If he foregoes the price, and the buyer agrees, then the Salam contract shall not be valid. And if the seller rejects that offer, then the Salam contract shall be valid.

   On the other hand, if the buyer foregoes the delivery of goods, then the contract shall be valid, regardless of whether the seller accepts or not. The reason for this is that sceisin of goods is not a condition in Salam (whereas sceisin of price is a condition).

   (Badai-us-Sanai, 7/3152; Fatawa Al Hindiya, 3/186)

3. In case of a Salam contract it is not proper to accept as price anything other than what had been agreed. If, for example, it has been agreed that the price shall be paid in cash, then it is not permissible to pay in kind, instead. But if the seller agrees to accept as price something of better or lower quality than what had been agreed-provided the nature of the price does not change-then this shall be considered as permissible. However this is up to the seller, he cannot be compelled to do so. *(Fatawa Al Hindya, 3/186)*

4. If anyone contracted forty kilograms wheat in Salam, and the buyer told the seller to pack the wheat in the sack he brought, then, if at the time of packing the wheat, the buyer was not present, then this shall not be considered as sceisin, and if for any reason wheatsoever the wheat is destroyed, then the seller shall be at loss. And if the buyer was present at the time of packing, then it shall be considered as sceisin. *(Fatawa Al Hindiya, 3/186)*

Difference between the buyer and seller

The following differences might arise between the buyer (Rabbul Maal) and the seller (Muslam ilaih):

1. Both parties might agree regarding the price (Ra'sul Masl) and differ regarding the goods (Muslam fihi). For instance, both parties might say that hundred Rupees were agreed as a price, but they differ regarding the goods. One party might say they agreed on forty kilograms of wheat, while the other might say that they agreed on eighty kilograms of wheat.
2. Both parties might agree regarding the goods (Muslam fihi) but differ regarding the price. For instance, both parties agree that forty kilograms of wheat had been sold, but one party claims that they were sold for hundred Rupees, while the other party claims that they were sold for two hundred Rupees.
3. There might be difference regarding the price as well as the goods. One party might say that hundred Rupees were agreed as price while the other party might say that two hundred Rupees were agreed as a price; and as far as the goods are concerned, one party might claim that forty kilograms were sold, while the other party might claim that eighty kilograms were sold.

   Then in the above-mentioned cases the price might be payable either in cash or in kind. This leads to six possibilities.

1. *(a)* If the price is paid in kind (e.g. cloth or wheat), and both parties disagree only regarding the goods, e.g. the buyer claims to have purchased forty kilograms of wheat for this much cloth, while the other party claims that he had bought only twenty kilograms of wheat; and both give evidence of to substantiate their claim, then there is agreement that the buyer's proof shall be accepted, and the matter shall be decided in his favour. The same goes for other in-kind payments like barley, low quality wheat, etc.

   (b&c) If there is a difference regarding the price, e.g. one party claims that cloth has been agreed as price while the other party claims that it was agreed that a slave shall be given as price, but both parties agree regarding the goods, e.g. wheat, or if both parties disagree regarding the goods as well, and both parties produce evidence to substantiate their claims, then, according to Imam Muhammad bin Al Hassan Ash-Shaybani, the buyer's evidence shall be accepted. Imam Abu Yusuf رحمة الله عليه says that since both parties have got a claim against each other, the evidence of neither party shall be accepted, and transaction shall be cancelled.

2. *(d)* In case the price is paid in cash, if there is agreement regarding the price and disagreement regarding the goods, and both parties give evidence to substantiate their claim, then, according to Imam Abu Yusuf رحمة الله عليه the evidene of the Rabbul Maal shall be accepted and the Salam transaction shall declared as proper and in order. Imam Muhammad hold that the evidence of the Rabbul Maal shall not be accepted.

   (e) And if there is difference regarding the price, while there is agreement regarding the goods, then, according to Imam Abu Yusuf رحمة الله عليه, in this case, too, the evidence of the Rabbul Maal shall be accepted.

   (f) And if there is difference regarding the price as well as the goods, e.g. one party claims that the the price

amounted to ten Dirham and the goods to forty kilograms of wheat, while the other party claims that the price amounted to fifteen Dirhams and the goods to eighty kilograms of wheat, and both parties provide evidence to substantiate their claims, then, according to Imam Abu Yusuf رحمۃ اللہ علیہ, the claim that states the larger amount and quantity shall be considered, in the above case the price shall be fixed at fifteen Dirham, and the goods at eighty kilograms of wheat. According to him this shall be like a single Salam transaction.

Imam Muhammad رحمۃ اللہ علیہ hold that the above case shall be considered as two Salam transactions. In one transaction the price shall be fixed at ten Dirhams and the goods at forty kilograms, and in the second transaction the price shall be fixed at fifteen Dirhams and the goods at eighty kilograms. And if one party claims that the price consisted of Dirhams and the other claims that it consisted of Dinar, then in this case no definite ruling has been recorded from Imam Abu Yusuf and Imam Muhammad رحمۃ اللہ علیہما. The auther of Khulasatul Fatawa however seems to be inclined to consider this case as two Salam transactions, too. *(Khulasatul Fatawa, 3/12)*

3. If one of the party claims that at the time of contracting the transaction it was agreed that the goods to be delivered shall be of low quality or that the goods shall be delivered after such and such period of time, while the other party denies that, e.g. one party says:

'I have stipulated this period' and the other party denies that, claim, or party says: 'I have contracted low-quality wheat' and the other party denies that, then, according to Imam Abu Hanifa رحمۃ اللہ علیہ, the statement of the one who made the claim shall be considered as reliable.

Imam Abu Yusuf and Imam Muhammad رحمۃ اللہ علیہما hold that if the buyer denies the stipulation of a certain period of time, then his statement shall be considered as reliable; and if in the second case, if the seller denies the condition

of low-quality wheat, then his statement shall be considered as reliable.

(Majma'ul Anhar Sharh Multaqal Abhar, 2/205)

Making expenditures regarding the price and the goods prior to scisin.

In a Salam transaction it is not permissible to make any kinds of expenditures regarding the price or the goods, prior to sceisin.

As far as the price is concerned, making expenditures prior to sceisin is not permissibe since sceisin of the price has to take place in the same sitting in which the transaction has been contracted. If expenditures are made prior to sceisin, then the sceisin cannot be properly established, which results in the loss of a shara'i right.

And making expenditures regarding the goods prior to sceisin is not permissible since the goods are actually the subject-matter of a sale, and it is not permissible to make expenditures in the subject-matter of sale prior to sceisin.

In Al Ikhtiyar li ta'leel ul Mukhtar comes:

It is not permissible to make expenditures regarding the price and the goods prior to sceisin.

(Al Ikhtiyar li ta'leelul Mukhtar, 2/38)

In Bahrur Raiq comes:

It is not permissible to make expenditures regarding the goods prior to sceisin because the goods constitute the subject-matter of a sale. And if the subject matter of the sale consititutes moveable property then it is not permissible to make any expenditures regarding the capital because the sceisin thereof has to take place in the some seiting in which the transaction has been contracted, and if any expenditures are made, then the legal right to sceisin is lost.

(Bahrur Raiq, 6/1647)

In Raddul Mukhtar and Majma'ul Anhar, too, has been stated that it is not permissible to make any expenditures regarding the goods prior to sceisin.

Such expenditures which are permissible in a Salam transaction

Basically there are five kinds of expenditures which are permissible in a Salam transaction:

1. Wakalah (i.e. power of attorney, agency)
2. Hawalah (i.e. Bill of exchange, transfer of debt)
3. Kafalah (Bail, Surety)
4. Iqalah (Reversal of sale)
5. Rahn (Mortgage)

1. **Wakalah** : Just like a person can contract a Salam transaction by himself, similary he can appoint another person as his agent to contract the Salam transaction. If he was appointed someone as his agent, and his agent contracts a Salam transaction on behalf of his principal, duly regarding all the conditions, then this transaction shall be permissible, and all relevant responsibilities are established in the agent. The agent will have to pay the price on behalf of his principal, and when the delivery of the goods becomes due, he will be asked for the same.

   (Raddul Mukhtar, 5/218)

2. **Hawalah** : In the terms of Fiqh, Hawalah (Bill of Exchange) implies the transfer of debt from one person to another. The second person, i.e. the one to whom the debt is transferred, thus has to pay the debt on behalf of the first person. This kind of transaction is permissible, provided both parties consent. *(Majma'ul Anhar, 2/103)*

   This transaction is permissible in Salam, too. In this case, the seller obliges another persons to provide the goods on his behalf, and the other accepts the responsibility.

3. **Kafalah** : In the terms of Fiqh, Kafalah (standing surety) means that one person guarantees for another that will settle his dues, and that he will give bail for him. This is not restricted to the repayment of loans also, but can extend to other transactions, too. Kafalah is permissible in case of Salam.

4. **Iqalah** : In the Islamic Shariah, Iqalah stands for the reversal of a sale. At times it happens that a person sells a commodity for below value, due to lack of business acumen. Once he realises his mistake, he wishes to returns the price and finish the whole affair. The Islamic Shariah enjoins such person to resort to Iqalah. Iqalah can be carried out a Salam transaction, too.

5. **Rahn** : In the terms of Fiqh, Rahn (mortgage) means to keep, in exchange for a certain entitlement, any such thing through which it is possible to acquire that entitlement either totally or partially. The purpose of Rahn is to get another person's trust. Rahn is permissible in Salam.

☆☆☆

MURABAHAH

The Islamic Shariah has defined lawful and permissible methods of trade and business. One fundamental method is known as Murabahah. Murabahah plays a vital role in Islamic trade. Through it man can acquire his livelihood in a lawful manner.

Murabaha is an excellent means of promoting commerce. It protects simple-minded people who lack business-acumen from financial loss. If one wants to estabish an interest-free banking system, duly regarding the Islamic economic principles, then Murabahah would be of fundamental importance. An Islamic bank can earn considerable profits by contracting different business transaction on basis of Murabahah, and similarly the share-holders can earn an agreed ratio of the profit on their deposits in a lawful manner. Murabaha means to sell a commodity by disclosing the price for which the commodity was acquired, and the profit one intends to keep.

The definition of Murabaha

Etymologically spoken, Murabaha is derived from Rabh, which implies increase, and in the terms of Shariah, it means to sell something at a higher price than its actual price. With refrence to 'Sihah', a famous encyclopedia, Allamah Ibn Nujaim Misri رحمة الله عليه has defined Murabaha as follows:

والمرابحة فى اللغة كما فى الصحاح يقال اذا بعته المتاع
واشتريته منه مرابحة اذا سميت لكل قدر من الثمن ربحا

'To sell with a (margin of) profit over and above the actual cost.'

(Bahrur-Raiq, 6/107)

In Fatawa Al Hindiya Murabaha has been defined as follows:

والمرابحة مصدر رابح وشرعاً بيع ما ملكه بما قام عليه

وبفضل مؤنة

(Raddul Mukhtar ala Hamish ar-Radd, 4/171)

"Murabaha has been derived from Raabaha; and in the Holy Shariat Murabaha refers to a sale where one sells an item for a certain profit over and above the costs for which one had acquired it."

Allamah Ibn Rushd Maliki defined Murabaha thus:

"Murabaha means that the owner of a commodity sells the commodity for a profit (which is paid) in Dirham or Dinar." *(Bidayatul Mujtahid)*

While defining Murabaha, Allamah Saifud-deen Qaffal wrote in Heeliyatul Ulama:

"Murabaha has been derived from Raabaha. The word Murabaha is constructed on the pattern of Mufa'ala. Technically spoken it means to sell some-thing for a profit over and above the original price. (Heeliyatul Ulama fi Ma'arifatu Mazahibul Fuqaha)

The legitimacy of Murabaha

Murabaha has been in practice since ancient times. In every era people acted on basis of its permissibility. Rationally spoken, the contract of Murabaha ought to be permissible, too. In the Holy Qur'an, Allah Most High has indicated the permissibility of Murabaha as follows:

احل اللّٰه البيع وحرم الربا

'Allah has permitted trade and forbidden usury.

In this blessed Ayat, Allah Most High has declared all kinds of commerce and trade as permissible, and He has forbidden all kinds of usury and interest. Murabaha is an

important transaction which helps promote commerce and trade and which spurns economy.

Similarly in Surah Muzzammil, Allah has encouraged His believing bondmen to seek lawful sustenance. He says:

"And other travel in the land in search of Allah's bounty." *(Surah Muzzammil, Ayat 20)*

In Surah Jum'ah comes:

"And when the prayer is ended, then disperse in the land and seek of Allah's bounty." *(Surah Jum'ah, Ayat 10)*

The general meaning of these Ayaat includes the contract of Murabaha, which is an excellent tool for the acquisition of lawful livelihood and economic welfare, as well. The author of Al Majmoo' Sharhul Muhazzib Takmalah Thaniyah concluded the permissibility of Murabaha from the following statement of Allah's Messenger صلى الله عليه وسلم .

اذا اختلف الجنسان فبيعوا كيف شئتم

(Al Majmoo' Sharh Muhazzib Takmalah Thaniyah 3/813)

The need for Murabaha is further established by the fact that simple-minded people who lack business acumen often become victims of fraud when purchasing a commodity. In such a case they need to rely on a trustworthy, experienced person. Such people can purchase their requirements through Murabaha. Thus they will be protected against deception and fraud. The author of Hidayah wrote the following regarding the permissibility of Murabaha:

والبيعان جائزان لا ستجماع شرائط الجواز ـ والحاجة ماسة الىٰ هذا النوع من البيع لان الغبى الذى لا يهتدى فى التجارة يحتاج الىٰ ان يعتمد فعل الذكى المهتدى

And the two sales (Murabaha and Tawliya) are permissible since the conditions of permissibility are found. Another reason of which Murabaha is necessary is that a simple-minded person who lacks business acumen needs to depend on a reliable, experienced person.

In each era, the Ummat considered Murabaha as permissible and acted accordingly. Allamah Ibn Qudamah Hanbali رحمۃ اللہ علیہ wrote:

"Murabaha-sale is permissible, and there is no disagreement regarding its permissibility."

(Al Mughni li Ibn Qudamah, 4/199)

Allamah Kasani recorded a consensus regarding the peimissibility of Murabahah. He wrote:

"There is no denying the fact that throughout the ages the Ummah considered Murabahah and similar sales as permissible and acted accordingly, which proves that there is consensus regarding its permissibility." *(Al Badai, 5/220)*

Arkaan

The Hanafi scholars hold that there are two Arkaan in a Murabaha contract:

1. Offer 2. Acceptance

Both should be phrased in such a way that the nature of the transaction can be clearly understood. As far as the offer is concerned, it suffices to use the word Murabahah or similar expressions, e.g. the seller might say to the buyer:

"I purchased these goods 100 Rupees. I will sell them to you for on Murabaha basis 110 Rupees; ten Rupees I'll keep as profit for myself." The buyer might say: 'Fine, I accept.'

The majority of scholars hold that Murabahah, just like other kinds of sale, got three Arkaan:

1. The parties of the contract, i.c. seller and buyer.
2. The subject-matter of the contract, i.c. the goods.
3. The offer and acceptance.

This amounts to a total of fine Arkaan:

1. The seller.
2. The buyer.
3. The goods.
4. The offer.
5. The acceptance.

Conditions

The following conditions will have to be fulfilled for the Mura- baha to be valid and in order:

1. The cost-price must be known. The first condition for the validity and permissibility of Murabaha is that the seller discloses the price for which he had acquired the goods to the buyer because Murabaha is based on this very price as well as some profit, and this is not possible unless the cost-price is known. If the cost-price is not known at the time of contract, then the transaction will be null and void. *(Badai-us-Sanai, 22/220)*

2. The profit must be known and defined: The second condition is that the seller discloses the profit he intends to earn, because in case of Murabaha the profit will be considered as a part of the price, and knowledge ragarding the price is conditional for the validity of a sale.

   (Badai-us-Sanai, 22/220)

3. The goods must fall in the category of Zawat-ul-Amthaal. The third condition is that the subject-matter of a Murabaha-sale must be of that kind which is known as Zawat-ul-Amthaal. This condition applies only in case of a Murabaha or a Tawliyah contract.

The Islamic Shariah has divided commodities and property into two kinds

1. All those things which either differ not all, or which show only a very minor, negligible difference, e.g. wheat, barley, gold (coins), silver (coins). etc. One grain of wheat resembles another grain of wheat so much that it is difficult to distinguish one from the other. Things like these are known as 'Mithl' or Zawat-ul-Amthaal in the terminology of the Holy Law.

2. The second kind of commodities includes all those things which differ considerably from each other. Animals, for example even though they belong to the same species,

differ considerably. One cow might be worth one thousand Rupees, and another cow might be worth five thousand Rupees. Similary in case of cloth. Cloth, in spite of being made of the same material, can differ considerable in price. Goods of this kind are known as Zawatul Qeem in the terminology of the Holy Law.

The goods can either of the kind which is known as:

"Zawatul Amthaal which are sold by measure (goods of this kind are known as Makeelat) or by weight (goods of this kind are knows as Mawzoonat) or by count (Adadiyat-e-Mutaqariba) where one specimen hardly differs from the other. or:

"It can be of the kind which is known as Zawatul Qeem, where one specimen differs considerably from the others and which are sold by measure (Zar'eeyat), or it can belong to goods which are sold by count, and where one specimen differs considerably from the other (Adadiyat-e-Mutafawiya). Hence if the goods fall in the category of Zawatul Amthal, and if the goods fall in the category of Zawatul Qeem, then they may be sold keeping in view their price.

4. At the time of the first contract, the price of the goods must not have been paid in potentially interest-yielding commodities or means of exchange (Amwaal-e-Ribwiyah) of the same kind. If any one acquired Makeelat Mawzoonat for an equal quantity of goods of the same kind, then it will not be in order to sell these goods on Murabaha basis, because in Murabaha goods are sold for an amount over and above the cost price, and this is not permissible in case of Amwaal-e-Ribwiyah. However if they differ in kind, then there is no harm in selling them through Murabaha. If, for example, one person bought one Dinar of for ten Dirham and then sold if for eleven Dirham; or if he sold it with profit for some specified length of cloth, then this shall be permissible.

5. The first transaction must have been valid and in order. One more condition for the validity of Murabaha is that

the first transaction must have been in order. If the first transaction was not valid, then Murabaha would not be permissible.

The original cost of Murabaha

The original cost of a Murabaha transaction is that thing that has become due on the seller and not the amount that the buyer has paid at the time of entering the contract. This is so because Murabaha means to sell something with profit over and above the price one has paid at the first instance and the price that became payable at the first instance is what has become due from the now seller. This can be illustrated through the following example:

"A person has purchased cloth for ten Dirhams, but instead of the ten Dirhams he paid one Dinar, or he gave some other cloth worth ten Dirhams. Now the price that was actually agreed upon for the cloth is ten Dirhams, but buyer chose to pay one Dinar or to give some other piece of cloth in return. Now if the cloth is sold in a Murabaha transaction, then the original cost involved will be the ten Dirhams, upon which both parties agreed at the time of the contract. The one Dinar or the other cloth that were afterwards paid instead of the ten Dirhams will be considered as original cost, because the original price is the amount that became due as a result of the sale, and thee one Dinar or the other cloth are mere alternates for the price. Similarly, if a person bought cloth for ten good Dirhams, but paid Dirhams of a lesser quality, then yet the original cost involved in the Murabaha will be ten good Dirhams, and not the Dirhams of a lesser quality."

What can be included in the original cost?

In case of Murabaha every such expense can be included in the original cost that the first buyer incurred regarding the subject matter of the contract, that somehow added value to the subject matter of the contract, or that is usually included by

traders in the original cost, such as transport costs, costs for dying, washing, stitching, the broker's commission, costs involved in driving and feeding animals, etc. All such expenses can included in the original cost, as per common practice. However, in this case the seller will not say that he has purchased the goods for such and such amount, he will rather have to say that the goods cost him such and such amount. In Fatawa Hindiyah comes:

> "In case of Murabaha it is permissible to add the cost of washing, dying, tailoring, transporting to the original cost. As a matter of fact, in the case of Murabaha this practice is quite well established among the traders. It is proper to add anything to the original cost the adage of which is considered as common practice. But it is not proper to add anything to the original cost the adage of which is not considered as common practic. *(Fatawa Hindiyah, 3/162)*

In Multaqiul Abhar comes:

> "One may a include any such expense in the original cost which was incurred to add value to the commodity, like washing, dyeing independent of the colour one is using-cutting, spinning, transportation, broker's commission, etc."

Allamah Aini and other scholars rely in this case on the common practices of traders. However, if the seller adds thus something to the original cost he is not to say:

> "I bought this commodity for such and such amount."
>
> *(Annotation to Multaqiul Abhar)*

Rather he should say that this commodity cost me such and such amount.

The Maliki scholars have mentioned the following details in this regard. They hold that there are two possibilities in case of a Murabaha contract.

1. The first possibility is that the seller had acquired the commodity for a specified price, and that he did not incur any additional cost. This case is easy as here he only has to

sell the commodity for a price over and above the original cost.

2. The second possibility is that the seller has incurred further cost after purchasing the commodity. In this case there are three possibilities:

(a) The expense that was incurred regarding the goods is such that the thus ensuing characteristic is existent and firmly established in the goods e.g. a person bought white cloth and got it dyed, or he bought wool and then got it spun it into yarn, or he bought unstitched cloth and then got it stitched. Now colouring, spinning and stitching are all characterstics that are firmly established in the cloth. The injunction pertaining to this kind of expense is that it shall be added in the original cost, and that the profit shall be determined in proportion to these expenses as well as the original cost. Beside that, the seller will have to disclose that apart from the actual price of the goods he spent such and such amount. That means, for example, that the seller fellls the buyer:

"I bought this cloth for ten Dirhams, and I spent another 3 Dirhams on dyeing, cutting and stitching it."

But if the seller himself happens to be a dyer, washerman or tailor, then the wages for his labour will not be added to the original cost, nor will the profit be specified in proportion to it.

(b) Such costs which were incurred neither regarding to something that is firmly established in the goods, nor are they peculiar to the goods, like storing the goods against payment, or costs for transportation. The injunction in this case is that such costs shall not be included in the original cost, nor shall the profit be determined in proportion to such costs.

(c) Such costs which were incurred regarding to something that is not firmly established in the goods but that is specific to the goods. If these costs are incurred

regarding anything that traders usually do themselves, but that particular trader has hired someone for doing that task-like for example folding and stacking cloth, then such cost will neither be included in the original cost, nor will it be considered when determining the profit. And if these costs are incurred regarding anything that traders usually do not do themsleves hire someone for that task-like feeding animals-then such cost can he added to the original cost, but it shall not be take into consideration when determining the profit. Besides that, the seller will clearly have to state that he incurred that cost. *(Sharh-us-Saghir ala Aqrabul Masalik ila Mazhab Imam Malik, 3/217-8)*

The Hanbali scholars hold that if the owner of the goods has made any addition to the goods like dyeing washing or stitching then he will have to state clearly how much he spent on the goods, and how much he spend on the addition e.g. he bought some cloth for ten Dirhams and then spent another five Dirham on washing, dyeing, stitching the cloth. *(Al Fiqh ala Mazahibul Arba'a, 2/250)*

According to the Hanafi scholars the following expenses cannot be included in the original cost:

In the case of animals : Cost for fodder and veterinarian services.

In the case of slaves: Cost for medical treatment, cupping, circumcising, teaching the Holy Qur'an and Islamic incantations.

In the case of goods: The rental that was paid for a building in which one stored the goods. *(Hidayah, Annotation to Fathul Qadeer, 6/561; Badai, 5/223)*

What one needs to state clearly in a Murabahah transaction

Murabaha sales are based on trust and honesty. The buyer accepts the original price stated by the seller without any proof

or oath an part of the latter, and then purchases the goods after both parties have agreed on a profit over and above the origial price. Hence the Murabaha transaction must be free from all kinds of dishonesty and betrayal. Allah Most High states in the Holy Qur'an:

"O ye who believe! Do not betray Allah and His Messenger صلى الله عليه وسلم . *(Surah Anfaal, Ayat 27)*

And the Noble Prophet صلى الله عليه وسلم said:

"One who betrays does not belong to us."

The Noble Prophet صلى الله عليه وسلم also said to Sayyidina Wabisah bin Ma'bad رضى الله عنه :

"The lawful things are clear, and the unlawful things are clear, and in between the twain are doubtful matters, so leave whatever seems doubtful to you and take whatever does not seem doubtful to you."

The Noble Prophet صلى الله عليه وسلم said:

"One who believes in Allah and in the last day must not stand at the station calumny."

In Murabaha one has to clarify the following matters:

1. If after buying and possessing a commodity the same became defective, and one intends to sell the commodity on Murabahah basis, then it needs to be seen whether:

   (a) The defect is the result of any natural disaster. If that is the case, then, according to the Hanafi scholars it is permissible to sell the commodity in a Murabahah transaction even without stating the defect, because no part of the price stands against the defective part. Hence it makes no difference if one mentions the defect or not.

   Imam Zafar رحمة الله عليه, Imam Shafi'i رحمة الله عليه and most of the scholars however hold that one has to mention the defect when seelling the commodity.

   (b) If the defect has resulted from an act of by the person who acquired the commodity, or if any stranger rendered it defective, then the defect must be pointed out to the

buyer. The scholars are agreed regarding this matter. After the defect has been pointed out, it is up to the buyer to either purchase the commodity or leave it.

2. If the commodity has undergone any addition, e.g. a slave-girl has given birth to a child, or a tree started to bear fruit, or a lamb has grown enough wool to be shorne, then, this needs to be pointed out according to the Hanafi scholars. This is so becames any such increase or addition to the subject-matter of the sale is treated like the subject-matter of the sale, hence such matters need to be clarified. *(Badai-us-Sanai, 5/223)*

   According to a tradition by Ibn Mundhir, Imam Ahmad bin Hanbal رحمة الله عليه, too, is of the opinion that such matters need to be clarified. *(Al Majmoo' Sharhul Mazhab, 6/137)*

   The Shafi'i scholars have mentioned the following details in this regard:

   "If the first purchaser had benefitted from the subject-matter of the sale, someone purchased a slave-girl who then gave birth to a child, or an animal that gave birth to a young one, or he purchased a tree from which he obtained fruit, then this shall not result in a reduction of the price as the contract was not made regarding these things. But if anyone harvested the fruits of a tree, and the fruit is there at the time of entering the Murabahah contract; or he milked an animal and the milk is there at the time of the contract, then there shall be a reduction in the former price, as in this case the fruit and milk shall be included in the contract, and a part of the price shall against the fruit and the milk. *(Al Badai-us-Sanai, 5/224)*

   However, if he had purchased land and grown grain on it, and then sells the same land in a Murabahah transaction, then he needs not state that he had grown grain on that land, as the grain has not really issued from the subject-matter of the sale, hence it will not be considered as a part of the subjec t regarding this.

   (Al Mughni li Qudamah, 4/201)

3. If a person has bought some goods on credit and then intends to sell them on Murabahah basis, thehe needs to tell the buyer that he acquired the goods for such and such amount, and that he done so an credit, and that he is going to sell goods for this much profit. The reason for this is that in case of credit sales, the seller keeps the price higher than case of spot payment. If, after this clarification the buyer feels inclined to purchase, then he may do so at the suggested price, otherwise he may leave it.

Shamsul Aimma Surkhi elucidated the matter as follows:

"If anyone purchased goods on credit, then it is not proper for him to sell these goods on Murabahah basis unless he makes clear that the bought these goods on credit. This is so because a Murabahah sale is a kind of trust, that means it ought to be free from all kinds of dishonesty. Apart from that, goods sold on credit usually cost more than goods sold against immediate payment." *(Mabsoot Surkhi, 16/13)*

In the Fatawa Hindiyah comes:

"If someone has purchased goods on credit, then it is not proper for him to sell these goods by means of Murabahah unless he clearly states that he had acquired them on credit." *(Fatawa Hindiyah, 3/163; Durr-e-Mukhtar, 4/174)*

The author of Hidayah elucidates the matter even further. He writes:

"If anyone purchased a slave for 1000 Dirhams, and then sold him against a profit of 100 Dirhams without disclossing to the buyer that he had purchased the slave on credit, and the buyer got to know from other sources about the nature of the first transaction, then he shall have the option of either dissolving the sale or keeping it intact. The reason for this is that the time up to which the payment is delayed has got a slight resemblance with the subject-matter of the sale, hence, due to this delay in payment, the price is increased. *(Hindiyah Ma'al Fath, 6/467)*

In Al Majmoo' Sharhul Muhazzib Takmalah Thaniyah comes:

"The jurists are agreed that if one has purchased goods on credit and then sells them onward through Murabahah, it is not sufficient to merely tell the customer the original price. Rather one will have to state clearly that one acquired those goods on credit."

(Al Majmoo' Sharhul Muahzzib Takmalah Thamiyah, 14/13)

In Al Mughni li Ibn Qudamah comes:

"If any has purchased goods on credit and intends to sell them through Murabahah, then he will have to disclose that he had acquired the goods on credit."

(Al Mughni li Ibn Qudamah, 4/204)

Apart from thar, if one had got some commission or discount on the purchase of the goods, then he will have to disclose that, too, as the seller fixes his profit apart from that. Hence, not mentioning commission or discounts will be considered as dishonesty.

Regulations regarding dishonesty in Murabahah

Murabahah and Tawliyah are based on honesty and trustworthiness. The buyer accepts the original price stated by seller without any proof or oath on part of the latter and purchases the goods. Remains the question as to what shall happen if the seller has committed a breach of trust or told a lie, and then himself admitted his transgression or it was proven by his refusal to take an oath, shall the contract of Murabahah continue to be valid or not? The statements made by the honourable jurists in this regard can be summed up as follows:

Dishonesty in Murabahah can be of two kinds:

1. Regarding the nature of the price. For example a person had purchased goods against low quality Dirhams but told the buyer that he had acquired the goods against good Dirhams. This will be an act of dishonesty regarding the nature of the price. Or: He has purchased goods on

credit and told the buyer that he had purchased the goods against cash. This too, will be an act of dishonesty regarding the nature of the price.

2. Regarding the amount given as price. For example, a person had purchased goods for hundred Dirhams, but when he sold the goods through Murabahah, he told the buyer that he had acquired the goods for two hundred Dirhams.

In the first case (dishonesty regarding the nature of the price) the jurists are agreed that the buyer shall have the option of either paying the price and keeping the goods or returning the goods taking back his down payment (if any) and finishing the contract.

As far as the second case (dishonesty regarding the amount given as price) is concerned, the Hanafi scholars hold different opinions.

Imam Abu Hanifah رحمۃ اللہ علیہ stated:

"The buyer shall have the option of either paying the full price and keeping the goods, or annulling the Murabahah and taking back his down-payment. However in a Tawliyah contract, the price shall be redued in proportion to the dishonesty committed, but the contract shall remain binding and intact regarding the reduced price."

The Hanafi scholars prefer this statement and verdicts are passed accordingly.

Imam Muhammad رحمۃ اللہ علیہ holds that in both cases the buyer shall have the option of either paying the full price and keeping the goods or annulling the contract.

Imam Abu Yusuf رحمۃ اللہ علیہ holds that the buyer shall not have any such option in either case, rather the price of the goods shall reduced in proportion to the dishonesty committed. The contract shall remain valid and binding regarding the reduced amount. *(Badai-us-Sanai, 5/226)*

It needs to be pointed out that these details apply only in case the subject-matter of the sale exists at the time of discovering the dishonesty, and there still exists a possibility of

reversing the Murabahah contract. And if there is no possibility of reversing the contract, e.g. the goods have been destroyed or they have developed any such defect because of which the contract cannot be reversed, then the buyer shall have lost his right to option and the contract will be binding regarding the full price. *(ibid)*

Allamah Ibn Qudamah Hanbali رحمة الله عليه wrote:

"If anyone purchased goods on credit and then sold them onward through Murabahah without telling the buyer, (that he had bought the goods on credit) then, according to Imam Ahmad bin Hanbal رحمة الله عليه the buyer shall have the option to pay the full price on which the Murabahah had been contracted and to keep the goods, or to finish the transaction. This is also the Mazhab of Imam Abu Hanifah and Imam Shafi'i رحمة الله عليه. *(Al Mughni li Qudamah, 4/206)*

In Al Majmoo' Sharhul Muhazzib comes:

"If at the time of entering a Murabahah contract the seller says that the original cost of the goods was one hundred Dirhams, and fixes one Dirham profit for each ten Dirhams of the original cost, thus selling the goods through Murabahah for one hundred ten Dirhams, and afterwards admits that he has made a wrong statement, or is it proven through evidence that the goods did not cost more than 90 Dirhams, then yet the sale shall be valid. Qazi Abu Hamid رحمة الله عليه holds that the sale shall be null and void According to a later statement by Imam Shafi'i رحمة الله عليه the sale shall be in order, and the buyer shall take whatever from the seller whatever amount he had paid over and above the original price, and the profit shall be decreased in the same proportion. Sufyan Thawri رحمة الله عليه and Ibn Abi Laila رحمة الله عليه are of the same opinion." *(Al Majmoo' Sharul Muhazzib Takmalah Thamiyah, 3/9-11)*

THE END

INDEX

Worldwide, the economy is on a downward slope. The capitalistic system begins to bare its flaws. Experiments with socialism had been a disaster. More and more people come to realize the perils of an interest based economy. More and more people turn away from unethical business practices which are the ugly by-product of capitalism. More and more people come to realize that the world needs an alternative.

But is there really one? What would this alternative look like? Would it be practical?

Islam and the Prophet of Islam ﷺ have provided the answer already more than 1400 years ago.

This book is an attempt to explain the basic methods of a non interest based economy, an economy based solely on the fundamentals of Islam.

It shortly introduces the conditions and functioning of Islamic contracts like Musharakah, Mudharabah, Ijarah, etc.

Included is also the transcript of an enlightening talk given by Justice (R) Mufti Muhammad Taqi Usmani on the Islamic concept of economy, as well as a detailed Fatwa regarding various transactions at the stock exchange.

In short, this book is a treasure trove of information not only for social scientists, industrialists and business men, but also for the interested layman and everyone who has got a concern to promote ethically correct dealings.

E-mail: ishaat@pk.netsolir.com
ishaat@cyber.net.pk

ECONOMY (THE ISLAMIC APPROACH)
ISBN 978-969-428-426-2
DIE-8106