

Guarantee as a Law Issue in Business

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Abstract

The issue of guarantee is so important in business for both purchaser and customer and this is considered in law system. In fact the guarantee is an obligation to accept the responsibility. There are different forms of guarantee in law system in regard to business such as responsibility. A guarantee can provide an obligation to someone as a responsible one to do certain activity. This study is descriptive-analytical and some hypotheses were considered. The subject of guarantee was investigated in this research due to the civil code of Iran law system. Finally this study concluded that the guarantee can impose one obligation to someone, so he is forced to withdrawal other cases because of his responsibility about the guarantee subject and this responsibility is important in law system. In business law, guarantee is not limited to the object of bargain and price, but it covers wide range of obligations and responsibilities.

Key words: guarantee, law system, obligation Statement of the problem

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Introduction

In article 684 civil law, in the definition of guarantee contract, it is said that guarantee contract means that one accepts the responsibility of a property that is responsibility of other individual. The thing we can infer from this article is that guarantee about debts are accepted i.e. those part of obligations indicating the payment of property to other individual which can be guaranteed and other obligations cannot be guaranteed (Katoozian, 1997, vol. 2, 269). But the legislator in article 697 in the responsibility guarantee states that subject to it responsibility of guarantee of customer or buyer about the object of the bargain or price for other party is permissible. According to article 362 civil code, one of the obligations for buyer and customer is the guarantee of the object of the sale. Buyer is obliged to return the price in the case that the object of sale be entitled for others (Katoozian, 1999, vol. 1: 221). This problem can be raised that whether there is a feature in responsibility of the object of the sale or price that legislator or Imamieh scholars has accepted the responsibility of guarantee and in other obligations, because of the lack of this feature, the guarantee is negative or this verdict can be generalized to other obligations and legislator, for example, has referred to responsibility guarantee, guarantee of the object of the sale and price. For this reason and because of the lack of research about legal society, guarantee in obligations was selected as the subject of the research in order to study the basics of responsibility guarantee for object of the sale and price and to provide answer to this basic question that whether guarantee in obligations as a general rule is acceptable or not?

Research questions

1. Is the responsibility guarantee of buyer and customer about the object of sale and price exceptional or not?
2. What is the nature of responsibility guarantee?

Research hypotheses

1. Regarding rational and quoted reasons, buyer and customer responsibility guarantee is not considered exceptional and it can be a basis for accepting guarantee in other obligations.
2. It seems that nature of responsibility guarantee is guarantee of obligation.

Research purposes

Purpose of the research is about the guarantee in obligations in law.

Research methodology

Methodology of this article is descriptive-analytical and includes three main topics:

1. Explaining the basics, descriptions and kinds of obligation
2. Rules relating to the objects of guarantee in obligation.

1. Concepts

-obligation

It is an Arabic word and its root is *ahd* meaning contract (Ibn Manzur, 1988, 448). *Ahd* in terminology of law is synonymous with contract and obligation. As it is shown in the civil law if the whole or part of the object of the sale belongs to other, buyer should return the price of the object of sale and in the case of ignorance of customer to corruption, buyer should pay the compensation.

Guarantee

According to article 684 civil law, guarantee means that an individual takes the responsibility of a property which is on the other individual and therefore, it has state one of the effects of guarantee instead of definitions of contract. So, in order to identify the nature of absolute guarantee, in its definition we should say that it is a contract that because of it, a person accepts the debt of other one before the creditor and with his consent and accepts transferring it to its responsibility (Katoozian, 2009: 107).

-return guarantee

Guarantee literally means taking the responsibility and acting for someone. Guarantee of the object of the sale means obligation of buyer to return the price of contract due to entitling for others and price guarantee means duty and obligation of customer for returning the object of the sale because of entitling for others (Bagheri, 2009: 25).

Responsibility of guarantee

Seller in the guarantee of the object of the sale i.e. if after the transaction it becomes clear that the object of the sale belongs to other individual or the transaction has been nullified, he should return the price to the buyer. Now, if someone guarantees buyer against the seller in case that if the object of the sale belongs to other people or the transaction was void, he will be responsible to return the price of buyer and this is responsibility guarantee (Allame Helli, 90).

2. Obligation basics

2.1 Law

If the one who takes the obligation with his will or after claiming of obligee, avoids to do his obligations, law will support rights and authorities by which obligee can achieve the object of obligation or its counterpart. These actions are one face of claiming right that are considered as a right which are supported by a supreme and higher power. These rights are:

1. The right of enforcing the object of obligation

It means that when the one who undertakes the responsibility did not fulfill his obligation, obligee can force him to fulfill it using public forces or using directive issued by registration or order of court.

2. Right of the termination

It means that obligee can use this lawful right to prevent misuse of the one who takes the responsibility and because of having this right, prevents him from fulfilling obligation. The right of cancellation, regardless of that it is considered as one of the option of conditions or it is a mean for compensating loss in the cases that imposing it was not desired from the obligator, it is acceptable as implementation guarantee.

2-2 governing of the will

As it is seen from the Descartes point of view, thinking and philosophy of thought was considered as a sign of existence and the belief was that "I thought, so I exist", in legal life of society, having will is the reason of human personality; based on this, providing freedom of will and equality of individuals is an innate and natural act that no law can violate or differentiate it (Katoozian, 1998: 166).

3. Elements of obligation

1) Parties of the obligation

First element of the obligation is presence of parties because for the imagination of obligation and debt, presence of two individuals is necessary: 1) right holder or creditor which is known as obligee; 2) one who has the obligation and he is called debtor or obligator. It is for this aspect and specifications of obligation that sometimes obligation is known as personal right (Katoozian, 1998: 231; Duroodian, 2009: 4).

2) Object of the obligation

Second element of obligation is the object of obligation and it means the thing that obligator accepts it before obligee.

3) Description of obligation

In legal analysis of obligation, lawyers gave described some features for it:

- a. obligation is a legal relation;
- b. it is binding;
- c. it is allocated to financial rights and debts;

Non-financial, objective and legal duties are not referred to as obligation. Obligations are debt rights and opposite of objective rights (Katoozian, 1997: 213).

4-orders related to the meanings of guarantee in obligation

4-1 guarantee of return

1. Guarantee of return relative to price

When the property belonging to other has been sold and then, the real owner did not confirm the transaction, whether customer can refer to seller for returning the price? Some Imamieh scholars have differentiated between the knowledge of customer to entitling the others for object of the sale and his ignorance and in the case of ignorance, they have differentiated between remaining the price and its waste (Hakim, 265).

In the case of ignorance of customer of the corruption of sale and entitling of others to object of the sale, consensus of the Shia' scholars is that the customer can refer to return the price to the seller, whether the object of the price existed or destroyed, because the sale will be null sale in the case of not confirming by owner; therefore, there is no legal reason for exiting price from the ownership of customer; therefore, according to the rule of "guarantee of handing" the buyer should guarantee the price and in the case of surviving the price, he will return it to the customer and in the case of wasting it, the customer is entitled to compensation (Hakim, 265).

But when customer is aware of entitling others to the object of the sale, in this case, some Shia' scholars believe that customer has not the right of referring to the seller for returning the price but other group of scholars have differentiated between survival of price and its waste and stated that in the case of surviving the object of price, customer has the right of referring to seller for returning the price because there is no legal reason for transferring ownership of price from customer to seller unless there was a corrupted sale between parties and because corrupted sale has no effect in ownership; therefore, customer can return the price. But if the object of price has been destroyed and the customer was aware of entitling others to object of the sale, in this case, he cannot refer to the seller because the act of customer is some kind of dominance by customer which causes ownership of seller to the price. The result is that along with a group of Imamieh scholars (Sheikh Ansari, Najafi), we can believe that the necessity of guarantee of handing is that the customer, in all assumptions and states, can refer to buyer for returning the price whether the customer becomes aware of not entitling for object of the sale or the object of the sale exits or wastes. Because this sale has no effect in ownership and according to hand rule, guarantee of buyer will be toward price (Alavi Qazvini, 1996: 201).

2) Guarantee of return toward the object of the sale

Civil law in article 390 states that if after delivery of the price, partial or total, there was another entitled individual, the buyer is guarantee, although there is no explicit refer to guarantee. In article 391 civil law, it is expressed that in the case that there is another entitled for the object of the sale, buyer should return the price of the object of the sale and in the case of ignorance of customer respecting the corruption, buyer should compensate the customer. These two articles show that return guarantee is specific to the certain object and if the total object of the sale was for obligation and seller, for fulfilling the obligation, delivers the property of other to buyer, regulations of return guarantee will not govern because selection and handing the object of the sale is not independent and separate ownership but it is sequence of obligation that seller has due to contract to meet the ownership of buyer through legitimate way; but if he takes the property of others and gives it to the buyer as guarantee, he has not fulfilled his obligation; therefore, buyer can ask court to enforce him the something which can be owned by him (Katoozian, 1998: 22).

The question here is that the responsibility of buyer in return guarantee is a default responsibility or coerced responsibility? Dr. Rahimzade believes that it should be speculated that because unauthorized transaction is not valid and it is null in the case of not confirming; therefore, return guarantee is the coerced responsibility of buyer. In response, we should say that we should take appearance into account. Of you consider the article 362 of civil law, this article did not consider the return guarantee as symptoms of correct sale. Lawyers criticizes this article because the return guarantee which relates to the null contract, is considered as right contract. In fact, this point should be considered that why return guarantee condition is an independent condition and it is inferred when it nullifies because it is unauthorized and not-endorsed. In other words, when there is sale contract, two obligation will be created which are independent and by inferring to one, inferring to other is not permissible. If the sale was correct, the guarantee is not considered but if the sale nullifies because it was unauthorized, first obligation i.e. transferring the ownership will not be enforced and it is the time to implement the second obligation. Therefore, return guarantee is accepted as a reasoned condition. If you consider the articles 220 and 225 civil law, this point becomes clear. Article 220 states that contracts not only binds the parties to provisions of contract but it is binding to custom for parties; therefore, this obligation is a contractual obligation. The responsibility of damage in the case of ignorance of the customer to the corruption of sale is that his responsibility is coerced because when an individual knows that the object of sale belongs to other and buys it, in this case, he has no right for it. Buyer is the guarantee of object of the sale; therefore, he is required to return the price because he has no legal ownership toward it. If by lack of responsibility we mean not having full responsibility, it is void and if it is for restricting the responsibility, it is accepted.

4-1-1 legal basis of return guarantee

In jurisprudence scholar view, when someone obtains a property in the corrupted contract that was thought right, he is usurper and his guarantee is the guarantee of usurper and it makes no difference whether he was aware of corrupted contract or not. In Islamic

jurisprudence, guarantee of returning the price has no contractual basis and it is considered as signs of corrupted contract. Therefore, an unauthorized seller who has received price from the buyer, in the case of rejecting the sale by owner, is usurper and involves the hand rule (Bagheri, 2009: 32).

4-1-2 scope of return guarantee

1) Return guarantee and right of profit

Sale contract will not eliminate the right of profit because the object of sale contract in owning the object of contract and in the case of profit right, the profit will be from the object of contract; therefore, there is conflict between sale contract and profit right and based on this, legislator in article 498 civil law states if the object of rent transfers to other person, the rent remains as same... Imamieh scholars has consensus or conflict to non-nullification of occupancy because of sale (Alavi Qazvini, 1996: 111). But it should be noted that if the buyer was unaware of profit right of other person to object of the sale, referring article 53 civil code, he will have the right of nullifying the sale. Basis of cancelling right of buyer in above assumption is the non-loss rule and option of defection with this excuse that benefits of object of the sale is disadvantage of the object of the sale and permits the cancellation of transaction (Najafi: 147, Shahid Thani: 89).

Also, according to a group of scholars, selling the property that other person has right in it as absolute ownership leads to cancellation of that right. This cancellation is applicable in any revocable contract. This can be inferred from article 44 civil code (Alavi qazvini, 1996: 111).

2) Guarantee of return and right derived from mortgage

Some Imamieh scholars consider the selling of pledged object by mortgagor invalid and considered it as unauthorized sale (Helli: 336, Shahid Thani: 184; Najafi: 199). This group of scholars which majority of them are Shia' scholars, has stated that besides consensus, the purpose and target of mortgage is security of debt which is not consistent with the dominance of owner in the sale and other actions that caused defect or waste of property (Ameli: 195) and some reasoned that mortgage is the security of mortgagee and it will fulfill when mortgagee prevents from any entering in it and his ownership will be cut from the property in order to fulfill his debt (Helli: 336, Shahid Thani: 184, Najafi: 199).

Some consider the reason of sale prohibition as its interference with the right of mortgagee which already exists (Sheikh Ansari: 181). Other group of scholars consider the mortgage sale invalid and consider no existence for it. In contrast of these two groups, some contemporary scholars give fatwas for accuracy of this sale (Mousavi Khoiee: 239). Anyway, according to majority of Shia scholars, mortgage sale is invalid and if mortgagee did not sign it, it will be null and void and in this case, regulations of return guarantee can be generalized to the right caused by mortgage. According to article 793 civil code mortgagor cannot enter in a mortgage which negates the right of mortgagee but in this law, senses of entering against the right of mortgagee are not determined. Therefore, in order to interpret the above article, we should refer to the Imamaieh jurisprudence (Alavi Qazvini, 1996: 115).

3) Return guarantee and rights caused by rent

Article 498 civil law has stated that if the object of rent transfers to other the rent will remain same unless lessor has predicted the right of cancellation for himself in the case of transfer. In above article, although there is no explicit reference to the accuracy of sale but because scholars have consensus about it (Helli: 413, Shahid Thani: 254, Najafi: 206), regarding analytical view, we can say that ownership of thing and ownership of benefits are two independent and separate issues, ownership of object and lease object is the ownership of benefits; therefore, there is no conflict between these two (Husseini Ameli: 7); therefore, sale and lease are correct and valid and the object of sale will transfer to the buyer. In the case of ignorance of customer about it, he is free to cancel the sale. Some quotation of Imams indicate the accuracy of this sale (Alavi Qazvini, 1996: 115-116).

4) Return guarantee in right of preemption

Paragraph one article 817 civil code is about the return guarantee about right of preemption. Before discussion about the return guarantee about the right of preemption, it should be mentioned that paragraph 2 article 820 civil law has full relation with paragraph one article 817 civil law. In fact, legislator has committed mistake and paragraph 2 article 820 is presented after it.

Paragraph one article 817: before the partner who owns the right of preemption, the customer is the return guarantee not buyer...

Paragraph two article 820: right of customer before buyer is about the returning the object of the sale which is mentioned in the sale contract.

For interpreting and explaining these two paragraph which are related to each other, we present an example; we and you (two persons) are partner in the piece of land, the broker (third person) sells your share to Hasan (fourth person) and receives the money. I assume

that I have the right of preemption (but I don't have because it is unauthorized contract), I pay the money to Hasan and receive the share but you reject this contract. Now I should take back my money from Hasan. Hasan has paid broker that should take back his money from broker (Mahmoudian, 2014: 22).

4-2 Guarantee of responsibility

If someone guarantees before buyer from for seller that if the object of sale belongs to other and the contract was invalid, he is responsible for returning the price to the buyer. This is the responsibility guarantee. By this guarantee, he will obliged to do the work which was the responsibility of seller. In other words, this person is guarantee of seller and buyer is the guarantee of price i.e. if after contract, there was defect in transaction or in the ownership of price, buyer is guarantee of price. It means that if after the contract there is problem in contract or ownership, it is the responsibility of buyer to return the object of sale to seller. If this one guarantees that in the case of corrupt transaction he is responsible to return back the object of sale to seller, he is guarantee of buyer (Mohaghegh Damad, 2000: 108).

4-2-1 legal basis of responsibility guarantee

Seller is guarantee of object of the sale. It means that if after the transaction the object of sale belongs to other or the transaction becomes null, it is his responsibility to return the price to buyer. Now, if one guarantees that he is buyer, this is responsibility guarantee that guarantee is obliged to do the act which was the responsibility of seller and in other words, he is guarantee of seller and in sale, the buyer is guarantee of price. If there is defect in contract or ownership of price, the buyer should return the object of sale to seller. Now if he guarantees that in the case of corrupt contract he is responsible to return the object of the sale to seller, he is guarantee of buyer (Shahid Thani: 256).

4-2-2 Scope of responsibility guarantee

If guarantee was for returning the price to customer after receiving the price, there is no conflict about accuracy of this among scholars. But there are problems because:

First: guarantee in this assumption is probable not certain because if the object has no owner and belongs to buyer, the sale is correct and there is no guarantee. Guarantee is meaningful when object has the other owner and the sale was null.

Second: in current assumption, if the object of sale has another owner, what is the guarantee of price for customer? It is not doubtful that until the survival of price, buyer is guarantee because the property does not belong to him; therefore, he is obliged to return the property. Based on this, if someone guarantee this for behalf of buyer, this means that he is responsible for buyer but it is clear that this guarantee is object guarantee not debt and therefore, according to scholars, this guarantee is guarantee of guaranteed sum not contract guarantee.

Responsibility guarantee before receiving price: responsibility price in this assumption i.e. the customer before paying the price fears that object of sale does not belong to buyer and if the price paid he cannot return it, he takes guarantee for price and then, he pays the price.

Most scholars consider the responsibility of buyer null for the problems mentioned before paying the price, there is no obligation for buyer for guarantee and the ownership of buyer has not belonged to the senses of content and therefore, this guarantee has not viewed by these scholars (Mohaghegh Damad, 1989: 109).

But a group of jurisprudence scholars consider the responsibility guarantee correct, although they did not consider it as contract guarantee and it is of exceptions for guaranteed some and in justifying their theory, they raised the general need that in these contracts buyer did not know the seller and he is not certain about his ownership and for the confidence, he is guarantee for price.

Civil law follows the second view and accepts the absolute responsibility guarantee.

It should be noted that problems in accepting the guarantee is caused by thinking of obligation and according to obligation view, guarantee of property is the responsibility of guarantee and most scholars have nullified it but they did not present any reason for it (Mohaghegh Damad, 1989: 110).

It is interesting that scholars committed to obligation about the responsibility of guarantee and guaranteed have problems about the guarantee of the object of the sale and presented excuses for it but finally, they gave it up.

Conclusion

1. about guarantee and obligation, there is little difference between lawyers which by analyzing them, we found that scholars in the case of responsibility guarantee have forced to give up their basis and accept the due obligation.
2. Now, it is clear that accepting the obligation in these cases and responsibility of a person brought no problem; therefore, it is not necessary to limit ourselves in the framework of object of the sale guarantee and price but we can consider it in all obligations.
3. about the scope of buyer guarantee, regarding returning the price and paying compensation, we can present following results:

A. if the object of the sale belongs to others and the owner did not accept it, the sale is void and buyer is guarantee of the object of the sale. As a result, seller is obliged to return the price and pay the compensation to ignorant customer.

B. in return guarantee of buyer, there is no difference between awareness and ignorance of buyer about the void sale because the fault is not a condition in it; second, the purpose of buyer is compensating not punishment.

C. if customer was aware of belonging the object of sale to others and has acted in loss of himself, the buyer is not responsible for compensation but buyer cannot own the unfair price and he will return the price to customer.

D. in the case of changing the price of goods and services and increase in inflation and reducing the value of money, buyer should be obliged to compensate the value and this price, in addition to price, is the nature of *riba* and has no compensation.

E. regarding nullification of sale, surviving the price in the hand of buyer is legal basis and buyer has received the received price; therefore, there is no condition for claiming customer and financial power of buyer.

H. obligation to return the money and compensation of money value is not specific to the buyer and in all obligations that the object of debtor obligation is paying cash, it holds. On the other hand, in the case that the price of price is the certain object, returning the certain object and in the case of waste, its compensation is on the buyer and above reasons are negative.

Suggestions

1. Limiting the compensation caused by nullification of sale to costs of ignorant customer in sale is against the law and unfair. In addition, custom of restricting customer from ownership of the object of the sale with added value, is loss and it necessitates the non-loss rule.

2. Unfair ownership theory which is consistent with the rule of prohibiting property in Quran and jurisprudence and in penal code is a solution for compensating the loss of customer ignorance and prevents cheaters from the void of legislation and conservatism.

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