

Investigating the Condition of Object of Sale

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ABSTRACT

When quantity of the object of transaction between parties to the contract is not defined precisely, the parties may include it as a condition during the contract. In this case, the quantity plays either the role of object sold or its description; if the condition is transgressed in the former, the contract is free from all encumbrances, but in the latter it is considered as a transgression, hence it is revocable.

KEYWORDS: object of sale, price, quantity, option

INTRODUCTION

In Iran's statutes, the legislator has drawn up several Articles on the condition of quantity, and has identified their bases and executive warranty in the case of transgression. Since Iran's Civil Law is predicated on religious jurisprudence and Islamic canon, therefore at the present paper we also make use of jurisconsults' opinions. Moreover, we study the related Articles and their conflict of proofs or opinions.

a) Quantifying contracts

Quantifying is the process of describing the quantity of object sold or its price. In common law the value of transaction is specified in accordance with its quantity and any unclear words may cause uncertainty in the contract. According to Article 342 specifying the quantity is done through weight, bushel, number, zar, area or observation of the object of sale. Hence, in addition to specifying the kind and its description, we must also identify the quantity of the object of sale before anything else. Because, by specifying the quantity, we will specify the degree of parties' commitment too. As it is said, for specifying the property under contract, we must also specify its quantity (or size), which is done through common law (but sometimes the quantity of the object of sale is not clear for parties to the contract, therefore they transact with the condition of its specified quantity (Katuzian, 1995, P 110)); and the legislator has accepted and prescribed the condition of quantity according to Article 342 of Civil Law (if the object of sale is sold on the condition of having a given quantity the sale is held even though the object of sale is not counted, bushel or measured by Zar).

It is noteworthy that quantifying the object of sale is a general rule, and when we can remove the uncertainty through ways other than its measurement it will be suffice; because sometimes parties are unaware of the quantity of the object of sale or due to some reasons understanding its quantity is difficult. For example when the area of a land is not clear for parties or for one of them, then the land is transacted on the condition of having a certain area. Therefore, when clarifying any uncertainty can be done through ways other than its measurement, it will suffice and common law allows this degree of leniency; in this case, establishment of mutual consent between contracting parties is not in contradiction with the arbitration of common law in measuring object sold. But we must be aware that clarifying personal uncertainty must not replace with common law arbitration. In this regard, mutual consent will be illegal; and for preventing future hostilities, the content of Article 342 is related to preserving public order. Therefore, if it is not possible to sell a stack on the basis of negligence and estimation, the two parties cannot transact by claiming that they have enough knowledge about the matter (Katuzian, 2001, P 182) and if the object of sale be in conditioned quantity, the vendor will perform his commitment with its delivery to the vendee. Just like the object of sale, which is defined according to its quantity and size, the price must also be identified. It is not necessary for the object of transaction to meet the condition of quantity; therefore, if the price is unknown the transaction will be annulled due to the uncertainty.

As it is stipulated in Article 343 of civil law, the quantity, kind, and description of the object of sale must be identified; and since it is clarified in Article 350 that the object of sale can be of different types, which its quantity, kind and description must be stated in different types of things (definite property, property deemed to definite, and property, which can be sold according to sample for delivery after a period), in definite and deemed to definite properties, observation or anything that shows quantity, kind or description

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will be sufficient; this is the case even though the parties to the contract did not count it or clarify its kind and description clearly. For example in definite property when one purchases a property through observation, in fact he has become aware from its quantity, kind and descriptions. But in property, which can be sold according to sample for delivery after a period, it is necessary to cite its kind, quantity and descriptions, because based on the parties' agreement in the contract they select the proof of the object shortly thereafter and add it to their contract; any unclear words in the contract about one of them shall annul the contract. While in definite and deemed to definite properties mere observation of the object of sale clarify all ambiguities, in property, which can be sold according to sample for delivery after a period, it is also necessary to cite its description, quantity and kind; instead of citing its descriptions, the parties can even choose a sample of the object, which in the case of its contradiction with the object of sale, they have the right to annul the contract.

In other words the condition of quantity exists for all types of the property (definite and deemed to definite properties, or property, which can be sold according to sample for delivery after a period) and when the conditioned quantity at the time of the contract becomes less or more, with an explanation for the future, its executive warranty in definite and deemed to definite things will be Articles 355, 384, 385 and etc. If the object of sale is property, which must be sold according to sample for delivery after a period, we can condition its quantity at the time of the contract, and if the quantity becomes less or more than what is conditioned at the time of delivery and specifying the proof, in this case we cannot annul the contract but according to Article 279 of CL, we must persuade the obligor to identify another proof (Katuzian, 2001, P 209).

b) The Role of quantity in the contract of sale

Generally, quantity in the contract of sale is of following two roles:

1. The role of quantity as the object of sale or price:

Quantity is generally the determinant factor of the degree of vendor's commitment and the price is identified according to the scales for the measurement of the quantity. In other words, there is a portion of object for every portion of price, and the degree of vendor's commitment and price is identified by quantity. Consider, for example, a condition in which one purchases a land with the condition of having 100 meters in area, and pays 50,000 Tomans per meter; in this case, quantity is the object of sale itself, which directly affects consideration of the contract. It seems that stipulation like "quantity is the object of sale itself" is only applicable to equi-parts (dividable) properties. Because in dividable properties, every part equals to other parts and we can simply divide the price by every part of the property and fix the pricing.

It is noteworthy that we can also condition the object of sale as the quantity in goods with various parts. Because based on the common law we can divide the price by every part of these kinds of goods.

If the object of sale becomes more than the conditioned quantity, knowledge or ignorance of the vendor will not affect the contract; because there is no agreement about the extra quantity of it.

If the object of sale becomes less than the conditioned quantity, and the vendee accepts the condition, while he is aware of this fact, according to the rule of action, he cannot use his right of annulment. However, he can deduct the price. In other words, for every portion of deduction in the object of sale the vendee can deduct the price; and if the vendor does not accept this condition and takes the whole price, he will be considered as a usurper and owns it illegally. The vendee can only use his right of annulment when he had not aware of the deduction in the object of sale. In support of the abovementioned materials, Article 443 of CL stipulates that: "partly unfulfilled sale is optional only when the vendee was not aware of it at the time of contract, but the price will reduce, anyway."

All of the aforementioned materials are also true about the price, which its quantity must be identified in the contract.

2. The role of quantity as a description of price/object of sale

Although the quantity of object sold is generally shows the degree of vendor's commitment and the price is identified subject to it, but sometimes parties to the contract focus on other qualities in a way that they do not regard the quantity of price as a main subject. They don't identify price according to every measuring unit of the object, and consider price quantity as one of the descriptions (Najafi, 2008, P 278; Almotahhar, 2008, P 516; Ameli, 1414 Hegira, PP 278, 279). For example, if one purchases his neighbor's land or house and adds it to his own property without considering its area as a determinant scale of price, and specify a quantity in the contract of sale, in this case specifying the quantity is related to description of sale; if the contract is concluded on the condition of having a given area, although the condition under mutual consent is related to quantity and area, and displays the quantity and size of the commitment, it has the effect of conditions of description.

Moreover, we must also accept the role of quantity in the properties, which are not considered divisible by common law.

In religious jurisprudence, consideration is only equaled to what that must be given in return, and it is not compared with other things. It is also supported by Sharia (divine law), and most of jurisconsults consider the role of conditioned quantity in sale as a descriptive one, transgression from which does not entail the division of price by the quantity (Najafi, 2008, P 229, Almotahhar, 2008, P 516, Ameli 1994, P 278 and Helli, 1994, P 377). In other words, there is not a portion of price for every portion of property, but the object of sale is a private thing which is totally stands for the respective price. But it seems that the abovementioned theory is applicable in the objects of sale with different parts (undividable properties). Thus, in property with different parts, every part is not equal to other parts and we cannot price every part of it unless with some leniency.

Therefore, in property with different parts (we will say undividable property, hereafter) the conditioned quantity is mainly considered as the description of the object of sale; and description is of perfect kind transgression from which will result in waiver of the price.

One of the jurisconsults (Mosavi-Khoei 1992, P 347) accepts that the conditioned quantity in sale is of descriptive aspect, but he does not accept it as a principle.

If the conditioned quantity be of descriptive aspect, the vendee shall have the right to cancel the contract.

According to the rule of action, if the parties to the contract be aware of the excess or shortage of the object sold the parties cannot use their right of annulment stipulated in Articles 355 and 358. Because they act to their detriment, and anybody who acts to his detriment must pay for it. The parties shall only have the right to cancel the contract when they are not aware of the excess or shortage of the object of sale.

It is noteworthy that assigning the role of quantity in sale is related to the common volition of parties to the contract; it is the parties themselves who decide to give the quantity either the role of description or object of sale.

Therefore, if the parties' common volition is to define every portion of object of sale with a portion of price, in fact they assign the role of object of sale for the quantity; if their common volition is to define the whole object with the whole price, in this case they assign the role of description for the quantity.

It is only in undividable property that the common volition of parties cannot affect the quantity. Because, in undividable property, even with some leniency, one cannot assign a portion price for a portion of property; in undividable property, despite parties' intention, it is not acceptable to give the role of object sold to quantity; it is obliged to have the role of description.

In the case of taking the excess or shortage of the property as a mistake, (i.e. at the time of specifying object's quantity the parties may measure it less or more than its true quantity), the jurists indicate that mistake is a misconception about an object or property and is of two kinds: material mistake and immaterial mistake. If the mistake be material the contract will be annulled, but if it is immaterial the right of annulment shall only be given to the opposite party. It may be said that when the object of sale is less or more than the conditioned quantity, it can be regarded as a mistake, but the mistake cannot cover all dimensions of the quantity condition. Because according to Article 200 of CL, in material mistake the object of transaction is actually the object other than real one, while in condition of quantity not the object but the quantity becomes less or more than what is conditioned. If the condition of quantity is considered as the description of property, in this case mistake means that the parties made an immaterial mistake about the description of transaction and for this reason the opposite party shall have the right to cancel the contract. But if the mistake be material it will not justify the shortage of object sold and common volition of the parties, because in material mistake it is the object of sale itself that is replaced by other object, but in condition of quantity the quantity becomes less or more than the real one; and if the quantity has the role of object of sale, according to Article 348 its shortage can be interpreted as its non-existence, which will annul the contract. But if the quantity plays the role of object of sale, there would be no agreement about its excess.

It is worthy to note that the condition of quantity stipulated in the statute has its origin in religious jurisprudence and is taken after the tradition of Ebne-Hanzala, which is quoted from Imam Sadegh (PBUH) who was asked about a 10-acres land with specified borders, which was purchased by the vendee. After the vendee paid the price, they (parties to the contract) separate from each other. When the vendee measured the land it was only 5 acres. Imam Sadegh said: "the vendee have the right to take back the price of other 5 acres and purchase the land or he can annul the contract and take back the whole money; unless there are other lands for the vendor adjacent to that land. Therefore, he (the vendee) can take his other 5 acres from those lands and the sale becomes necessary; and it is necessary for the vendee to fulfill the sale. But if there is no land for the vendor in that location, the vendee shall have the right to purchase the land and take back the price of other 5 acres or he can annul the contract and take back the whole money" (Ameli, 1992, P 361).

c) Study of Articles about the condition of quantity

In this section, we investigate the condition of quantity stipulated in Articles 355, 384 and 385 of Civil Law and Article 149 of Registration Code.

1. Study of Article 355 about the condition of quantity

The legislator states in Article 355 that “If a property is sold with the condition of having a definite area and after the transaction it is proved less than that quantity, the vendee shall have the right to annul the transaction; and if it is proved more than the conditioned quantity, the vendor can annul the transaction, unless in both cases the parties compensate the excess or shortage of the object of sale by mutual consent.” In the abovementioned Article the word “area” refers to the conditioned quantity and in this Article, quantity is not effective in Pricing. That is, quantity is not a fundamental base and plays the role of description for the object of sale and the whole of property (object sold) is transacted against the whole of price; there is not a portion of price for every portion of property. It seems from the converse of the abovementioned Article that if the object of sale be less or more than the conditioned quantity, the parties shall have the right to endorse a contract in which the excess of the object sold or price does not belong to the vendor or vendee, because in this case the quantity is considered as a description.

The word “property” in Article 355, not only involves the land but also it involves properties other than the land; because the subject related to the right of ownership in land or other assets is called property. In addition, all of the objects sold in area, some kinds of cloth for example, are not of different parts (Abdullah, 1997, P 3). That is, the abovementioned Article covers both dividable and undividable properties (Jafari-Langroudi, 2002, P 99).

It is also indicated that the abovementioned Article is about undividable properties and it is not impossible with regard to its historical background, because its juridical background is about the land, which is an undividable property. Moreover, transacting with the condition of a specified area is a reason for the lapse of the abovementioned Article from the case in which the object of sale is sold in area; the proof of this object is generally land (Abdullah, 1997, P 4). Although the juridical background of the Hanzala’s tradition is about an undividable property, i.e. land, but all the more and by the presented reasons we can say that his tradition involves dividable properties too. As it is mentioned the area is not employed just for undividable properties like land, but it is also utilized in dividable properties like cloth.

But according to the latter section of Article 355, the parties can compromise for the excess or shortage of the property by mutual consent. It seems that calculation is usually easier in dividable properties, because all of their parts are equal. In this way, it is accepted in common law that undividable properties are calculated and divided according to the price; also in some cases like rules of dividing common property, the legislator has accepted the abovementioned case.

Moreover, with a little leniency or compromise the parties to the contract can also calculate undividable property.

Article 355 is one of the proofs of Article 235, because it is prescribed in Article 235 that if there is a transgression from the condition of description the parties can annul the contract, and in Article 355 the right for annulment is about the mistake in the quantitative description of the object of transaction (Jafari-Langroudi, 2000, P 214). That is, in this case the parties to the contract make a mistake about the conditioned quantity: the object of sale is less or more than the conditioned quantity.

If at the time of delivery, the object of sale becomes less than its conditioned quantity and the vendee does not use his right of annulment, he cannot ask for compensation of the object’s shortage; because for compensation of loss, the legislator gives the right of annulment for the vendee. Conversely, for the excess of object, the legislator gives the right of annulment to the vendor; and it seems from the Article 355 that if he do not use his right of annulment and accepts the contract he will not have the right to ask for compensation. In the case of properties’ excess if the vendor does not use his right of annulment, the vendee cannot annul the contract and the legislator does not give any right for the vendee to cancel the contract; but this is in contradict with some of jurisconsults opinion who have said that if the object of sale be more than what is conditioned and the vendor does not use his right of annulment the vendee who has something in common with the vendor with regard to the excess of object shall have the right to annul the contract (Ansari, 2000, P 34).

It is said that Article 355 is about the case in which the object of sale is entirely undividable (Katuzian, 2001, P 212).

With regard to the aforementioned materials, when the parties to the contract are able to calculate the shortage or excess of the object by mutual consent, in this case the above Article is about dividable properties. Because it is only in dividable property that parties can compromise the excess or shortage of the contract by mutual consent.

2. Study of Article 384 about the condition of quantity

Article 384 indicates that “if during the contract the quantity of the object of sale had been definite but at the time of delivery it became less than that quantity, the vendee has the right to cancel the contract or accept it with the price of existing property; but if the object of the sale be more than what was specified, the excess of the object is for the vendor.”

It seems that Article 384 in, its special concept, is not one of the proofs related to condition of quantity. Because in the context of this Article, there is nothing about the condition and we cannot infer any concept related to it; in this case quantity is considered as the context of contract not the condition at the time of contract. But since the prescribed writ in the above Article is also in conformity with the condition of quantity and controls it, we explain it in the following section.

In the aforementioned Article the quantity is of fundamental role and plays the role of object of sale. That is, there is a portion of price for every portion of the object of sale. In fact, quantity is considered as a standard for value and a determinant factor in identifying the degree of commitment. In this Article the object of sale is a dividable property, every part of which stands for a definite price (Katuzian, 2001, P 212).

The thing that reveals whether the condition of quantity is considered as the object of sale or its description is mutual consent and real intention of the parties. If the parties' mutual consent or their real intention is not indicated precisely in the contract, one can understand the role of quantity in sale by means of evidences and the manner the manner in which the condition is made (for example, if every unit of object of sale stands for every unit of price, the quantity is the object of sale itself and vice versa). If the object of sale had been definite at the time of ratifying the contract but it became less than the conditioned quantity at the time of delivery, the vendee shall have the right to cancel the contract or he can pay the price according to the existing property (object of the sale). That is, he pays only for the delivered portion of the property and in the case of prepayment he takes back the extra price. If the vendee does not use his right of annulment, he only pays with regard to the existing object of sale; and if the object of sale be more than what is conditioned in the contract the excess of the object is for the vendor, because the quantity is the object of sale every unit of which stands for every unit of price; therefore, there is no agreement about the excess of the property (Katuzian, 2001, P 123). If the object of sale be less than its conditioned quantity the contract will be divided into two contracts, and according to Article 361 “if in the contract with definite property it becomes clear that there was no contract, it will be annulled.” In other words, the contract is authentic with regard to the existing part of the property and there will be no contract about its part, which does not exist. When the object of sale is less than what is conditioned, the amount paid in excess will be evicted; and when the object of sale is more than its conditioned quantity, since there had been no contract about the excess of the object, it will be evicted.

Some of jurists believe that the writ of Article 384 is specific to dividable properties, especially when the object of sale is more than its conditioned quantity (Katuzian, 1995, P 123). But it seems that it is about both dividable and undividable properties. Apparently this Article is about dividable properties because statement like “... if the object of sale is less than its conditioned quantity, the vendee has the right to annul the contract or to pay the price in proportion to the existing property, but if it is more than its conditioned quantity, the excess of the property will belong to the vendor” implies that when the object of sale is dividable property in which quantity plays the role of the object of sale, in the case of shortage of the quantity, the payment of a portion of price will be done easily; and if the object of sale is more than its conditioned quantity, the excess of the property belongs to the vendor only when it is dividable and can be easily separated into equal parts. But in answering to whether the above Article involve undividable property or not, the jurists believe in the inclusion of undividable properties in the Article 384 (Katuzian, 2001, P 212 and Ali, 1997, PP 373, 374). It is also confirmed by juridical procedures, which are discussed in the following section.

In fact Article 384 states an assumption in which the object of sale is dividable, because this Article, which is stated immediately after Article 384, is about undividable object of sale. Therefore, Article 385 takes the inclusion of undividable property out from the Article 384 and this Article is only about dividable object of sale. Moreover, Article 384 is about dividable properties, and this indicates that the writ of this Article is about dividable properties.

If the object of sale is sold with a conditioned quantity, transgression from this condition will give the right of annulment for the loser of the contract, even though the quantity indicate the degree of commitment and be the subject for contract. Conversely, if the object of sale be less than what is conditioned, the vendee can reduce the price or annul the contract (Katuzian, 1995, P 125).

It is obvious that in both cases i.e. whether the quantity is identified in the contract or be conditioned, the vendee cannot ask other assets of the vendor for compensation. For example, if the quantity of a sold land

be less than what is conditioned, the vendee cannot ask for compensation from the vendor's land adjacent to that land.

3. Study of Article 385 about the condition of quantity

Article 385 prescribes that "if the object of sale be properties such as carpet or house, which cannot be divided without detriment, and which is sold with a conditioned quantity but at the time delivery be less or more than what is conditioned the vendee and vendor shall have the right to cancel the contract, respectively."

Although in the abovementioned Article the condition is about quantity but it is of descriptive aspect; and if the object of sale is less or more than what is conditioned, the condition will not fulfilled and Article 235 comes to action: every unit of price will stand for every unit of object of sale. Therefore, the vendee will not be of right to reduce the price and cannot sign the contract unless for total price; and when there is not clear that whether the vendee has the right to reduce the price or not, it will be referred to nonentity principle (Abdullah, 1997, P 4).

It is noteworthy that in the case of transgression from the condition of quantity in Article 385, legislator set the right of annulment as an executive guaranty, which means that the whole price stands for the whole object of sale. That is, either the parties annul the contract or accept it without asking for compensation. In addition, since the condition of quantity is adopted from jurisprudence, which refers to the reduction of price in especial cases (it is applicable when the quantity is the object of sale) and in which the nonentity of reduction is described as a principle, therefore, in the case of uncertainty we refer to the principle of nonentity in which the quantity plays the role of object of the sale. With regard to the words carpet and house in Article 385, the writ of this Article is about undividable properties; also it is clear that the Article itself is about undividable properties. But some undividable properties can be divided with some negligence, for example land is an undividable property, but it can be divided in common law.

In this Article the quantity is in the role of description of property. For preventing from loss and its compensation, the legislator set the option of annulment for transgression from the condition. For example, if a carpet is sold with the condition of having 10 meters in area, but at the time of selling it becomes 11 meters, the vendor have the right to claim that extra meter. Because it is a piece of carpet and not 10 meters of it which is sold; moreover, if it becomes less than the conditioned quantity, the vendee has not the right to reduce the price (because he has bought a carpet one of the descriptions of which is to have 10 meters area) unless the shortage or excess of the object detriment one of the parties to the contract. For example, consider a vendee, who owns a 12-meters room, and has bought a carpet with the condition of having 12 meters area, but after bringing it to his house he has noticed that the carpet is 12.5 meters in area: in this case he has the right to cancel the contract, because the extra 0.5 m is the cause of detriment. Although in Article 385 every unit of object of sale stands for every unit of price, but the quantity is the description of the object of sale. Because object of sale is undividable and we cannot consider the quantity as a fundamental base in which every portion of price stands for every portion of the property.

The right of annulment in Article 385, which is given to the party who incur a loss is only about transgression from the quantity and does not contain any transgression with regard to other descriptions (such as color).

4. Study of Article 149 of Registration Code about the condition of quantity

Article 149 of Registration Code prescribes that "If a property is sold with a specified quantity and then the parties understand that its area is more than what is conditioned, the beneficiary must pay the extra price and other legal costs of transaction, in accordance with the value written in the first deed, to registry fund and ask for correction in the deed. If the excess of area be in the limit of vendor's ownership and there is no trespass to the neighboring properties, and if there is no contract between the parties about the aforementioned excess, the registry will correct the deed and inform beneficiary to receive the paid amount from registry fund. If reference of the vendor takes more than 10 years from the correction of the deed, it will be considered as waiver and the amount will be liquidated to the registry fund.

Provision: In the case when it is impossible to specify the value of abovementioned extra area, it will be specified by the registry evaluator according to its value at the time of first transaction."

It seems that Article 149 of Registration Code in its especial context is not from the proofs of the condition of quantity; because quantity in the abovementioned Article is considered as the context of contract and not as a condition at the time contract. But, since the prescribed writ is also in conformity with the condition of quantity, we assign the following section to explain it.

In Article 149 of Registration Code an especial case has been predicted. In this Article instead of vendee it is referred to beneficiary, because it is possible that the property is sold by the first vendor and then it has been transacted among different vendees. In this Article the beneficiary is the possessor of the property; moreover, in this Article the legislator regulate that the beneficiary must pay the extra price and other legal costs of transaction to registry fund, in this case the legislator deviates from the generality. According to generality if the object of sale be in the role of description, the vendor has the right of annulment and if the object be in the role of object of sale itself, the excess of the property belongs to vendor; but in this Article it is regulated that the excess of the property can belong to the possessor on the condition that there was no contract or agreement between the parties about the said extra area. But in Article 149 the quantity is in the role of both description of property and the property (object of sale) itself: statement like "...the beneficiary must pay the extra price and other legal costs of transaction ... to registry fund ..." in the first part of this Article indicates that the quantity is the object of sale itself in which every unit of price stands for every unit of quantity. On the other hand, statement like "If it is impossible to specify the value of the extra area" indicates that this part of Article accepts quantity as the description of the object of sale in which the whole price stands for the whole object of the sale. Therefore, in the abovementioned Article the quantity plays the role of both description of the object of sale and the object of sale itself. Moreover, this Article indicates that the beneficiary can ask for the correction of the deed, which is not in conformity with the generalities, but for observing public benefits in metropolitans like Tehran it is inevitable. Also in this Article from terms like "... be in the limit of vendor's ownership..." we notice that this is about a situation in which the deed has been issued and registered in the registry. Therefore, this excess of area is only about the properties, which their deeds have been issued; the writ of this Article is about undividable properties.

In addition, it seems from the sentence "he can" at the beginning of the Article 149 that it is not obligatory for the beneficiary to accept the excess of area and pay back the extra money, but if he wishes he can reject the excess of area and give back it to the vendor; because the content of this Article is about dominant cases in which due to ever-increasing value of the property people will not tend to give back the extra area of the property. In the case when the area is in the role of the object of sale, every unit of area stands for every unit of price and the extra quantity of the area is obvious; and in the case when every unit of area does not stand for every unit of price the extra quantity of the area is calculated. The important thing in this Article is that if the beneficiary asks compensation for the excess of area, this amount will be calculated according to its first transaction. Since the property may be transacted several times, therefore it is of benefit to the beneficiary or possessor of the property to pay the extra price according to the first transaction.

In Article 149 the legislator considers the principle of maintaining contracts; moreover, the beneficiary must not own the extra area free of charge; if he owns the property free of charge it will be void, because for the fulfillment of the principle of maintaining contracts the agent's (registry's) help is important. That is, legislator regulates some rules for the registry in a way that if the beneficiary tends, takes the possession of that extra property with giving consideration (Jafari-Langroudi, 2002, PP 88, 89). In other words, the legislator promotes the contract toward maintenance and not division; he manages the contract in a way that leads to maintenance.

In Article 149, the legislator never talks about the retraction of extra quantity between the vendor and beneficiary, and he has not given any right of annulment to the beneficiary, but has maintained the contract; this is in the case that there is no contract between the parties and the excess of the area be in the limit of owner's property and there is no trespass to the neighboring properties, but the excess of area must be in the quantity that is of use for the vendor (Jafari-Langroudi, 2002, PP 89, 90).

d) Executive warranty of transgression from condition of quantity

In this section we describe the executive warranty of transgression from the condition of quantity.

1. Option of transgression from the condition of description

In this case, quantity is in the role of description of the object of sale, in which the whole price stands for the whole object of sale, and quantity is not effective in the contract. The legislator states its executive warranty in Article 235: "when the condition at the time of contract is description and it becomes clear that this description does not exist, the party who benefits from the condition shall have the option of annulment.

Although legislator stipulates the executive warranty of transgression from the conditioned quantity in Article 235, it is also mentioned in the writ of Article 355, which is the repetition of content of Article 235.

Article 385 of Civil Law is about undividable properties, in which quantity is the description of object of sale, and like Article 355 if the object of sale is less or more than what is conditioned, it will be considered as the transgression from the condition of description and with reference to Article 235 it can be annulled.

2. The option of sale unfulfilled in part

When quantity is the object of sale itself and quantity is effective in specifying the price, we will have two assumptions. One of them is related to the situation in which the object of sale is dividable, which is stated in Article 384. Since every unit of price stands for every unit of object of sale, when the object be less than what is conditioned the excess of price will be evicted and if the object be more than its conditioned quantity its excess will be given back to the vendor. In the case of Article 384 the contract is divided into two correct and void contracts, in which parties have the right of annulment and the option is called option of sale unfulfilled in part (Katuzian, 2001, P 383).

It seems that in Article 384 if the object of sale be less than its conditioned quantity, the warranty of transgression from the condition of quantity is the option of sale unfulfilled in part. Because according to Article 348, when the vendor is not of power to submit an object, the contract is void and in the proof of Article 384 the vendor is unable to submit the shortage of quantity. According to Article 384 the vendee is of the right to have the option of sale unfulfilled in part. But in Article 384, the option of sale unfulfilled in part will not be of proof if the object of sale be more than what is conditioned, because this option is drawn up for situations in which a part of contract is void. While, in Article 384, there is no contract about excess of the object to be annulled in the case its excess. Because in this Article, quantity is the object of sale itself, in which every part of price stands for every part of the object of sale. Therefore, in the case of excess of the object, the extra quantity will be given back to the vendor, otherwise the vendee will be considered as a usurper of the property.

In relation to dividable property, which its quantity is more than what is conditioned (and one of the proofs of which can be Article 384), one of Iranian jurists believes in the option of commonalty, although later in his discussion he has not accept this option (Haeri-Shahbagh, 1997, P 374).

In other words, with regard to the assumption in which the object sold is more than its conditioned quantity he accepts the right of annulment for the vendee; because if the object sold is more than what is conditioned and parties have accepted the condition in which the object sold is not more or less than the conditioned quantity, in this case the excess of the object will belong to the vendor; but the vendee will say: It is not clear which part of the object sold belongs to the vendor and the object is undividable; therefore the parties will have that extra party in common, and for preventing from detriment the vendee shall have the right to annul the contract, which is called option of commonalty. But the legislator does not accept this kind of option. The things that are mentioned in Article 149 of Registration Code are in contradiction with the generalities; because if the object of sale is more than what is conditioned, the right of annulment must be given to the vendor or the extra quantity must return back to him, but in the case of beneficiary's tendency, the legislature only allows him to return the extra price. If the beneficiary does not tend to pay the price, he evicts the extra area and the contract will be fixed; it is obvious that there is no right of annulment in Article 149 and this is because of preserving public order and transactions.

Conclusion

It is noteworthy that specifying the role of quantity in sale is done through common volition of parties to the contract who decide to give the quantity either the role of description or object of sale.

Therefore, if parties' common volition is to put every part of object sold against every part of price, they accept the role of object sold for quantity; but if they put the whole object of sale against the whole price, they accept the role of description of object sold for quantity.

It is only in undividable properties that the parties' common volition is not of effect. Because in undividable properties one cannot place every part of object sold against every part of price even with negligence. In undividable properties, despite the common volition of the parties to accept quantity as the object of sale, it is not allowable, and they are obliged to accept its role as the description of object sold.

In Article 355 the quantity is in the role of description of the object sold, and the entire object of sale stands for the entire price. It is implied from the word "area" in the abovementioned Article that this Article is about both dividable and undividable properties. The inclusion of undividable properties in the abovementioned Article is clear, because its juridical background dates back to Ebne-Hanzala tradition, which is stated about land; moreover there are juridical procedures about the excess or shortage of the land, which is an undividable property. But the inclusion of dividable property is also implied by the word "area" which is also used for measuring some dividable properties and all the more the reasons for the tradition of Ebne-Hanzala are related to dividable properties. Also as it is mentioned in the last part of Article 355, calculation is more comfortable in dividable properties; but in undividable property the calculation is also possible through some negligence or compromise. Article 384 is about properties in which quantity is in the

role of object sold; that is, every portion of price stands for every portion of object sold. Although at first it seems that the abovementioned Article is about dividable properties, but in fact, it includes both dividable and undividable properties; because it is possible to condition the quantity as the object of sale in undividable properties too. The above Article is about dividable properties, because when every portion of price stands for every portion of object sold, we must accept that the object of sale is dividable. Likewise Article 385 which comes immediately after Article 384 is about dividable properties, hence Article 385 excludes undividable properties from the inclusion in Article 384.

In Article 385, the quantity is considered as a description of object sold, because this Article is obviously about undividable properties in which quantity can only be in the role of description of object sold; and in the addendum of this Article it is stated that in the case of transgression from the condition of quantity the loser shall have the right to annul the contract, and this indicates that quantity is in the role of object sold. Article 385 is about undividable properties because undividability is the general characteristics of these properties; moreover, at the first part of this Article some undividable properties (carpet and house) are stated.

In Article 149 of Registration Code, quantity is of both roles: description of object sold and the object of sale itself. This Article is only about immovable properties, which are registered in the notary. Likewise, it is about dividable properties, because the calculation of extra area is correct only when we are able to evaluate and separate the property and in undividable property it is impossible.

Although Article 149 of Registration Code and Article 355 of Civil Law are about excess of quantity in the object of sale but they are not in contradiction with each other. Article 149 is only about properties with issued deed, and Article 355 is about all properties except undividable ones.

It is noteworthy that we can also condition the quantity as the object of sale in undividable properties too.

If the object of sale is more than what is conditioned, in this case the vendor's awareness or ignorance is of no effect; because there will be no contract or agreement about the excess of object sold.

If the object of sale is less than what is conditioned and the vendee accepts the contract while he is aware of this shortage, according to rules of action he cannot use his right of annulment; however, he is able to reduce the price. That is, in proportion to the shortage of object sold the price will be reduced and if this is not done and the vendee pay the entire price, the possession of the property is void for the vendor. The vendee shall have the right to annul the contract only when he did not aware of the shortage of object sold. In support of the abovementioned materials, Article 443 of Civil Law specifies that "sale unfulfilled in part is only optional when the vendee does not aware of it at the time of transaction; however, the price will be reduced".

According to the rule of action if vendee or vendor be aware of the shortage or excess of the object sold, they cannot use the right of annulment stipulated in Articles 355 and 358 of Civil Law. Because they act to their own detriment, and anybody who acts to his own detriment must pay for it; they can use their right of annulment only if they are not aware of the excess or shortage of the object sold.

Executive warranty of transgression from the condition of quantity in Article 355 is the option of unfulfilled condition, which is also stipulated in Article 235; and executive warranty of transgression from the condition of quantity in Article 384, in case when there is a shortage in the object of sale is the option of sale unfulfilled in part, and if the object of sale is more than what is conditioned the excess of the property will belong to the vendor, because there is no contract about that extra part.

Executive warranty of transgression from Article 385 is the option of unfulfilled condition, because the entire price stands for the entire object of sale and the quantity is in the role of description of object sold.

In Article 149 executive warranty of transgression from the condition of quantity is to calculate and compensate the shortage of the price, and in this case the legislator deviates from the generalities in the Civil Law and mainly tries to maintain the contract.

The basis for executive warranty of transgression from the condition of quantity is the rule of Lazarar and value equilibrium. Because everybody who loss his property must be recompensed; moreover in the case of trespassing from the condition, the equilibrium between the object of sale and price will disturb.

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