

Termination Decline of Damaged Objects of Sale

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ABSTRACT

Different ways of revocation such as condition made as a part of the contract is the cancellation (of the contract) by the order of law. Revocation is a one-sided disposition and the terminator should be competent. The effect of revocation begins from the time of its application and its importance is due to the benefits it has. In some cases, the right of option owner to terminate the contract will be vanished due to the option of defect, and for compensation there remains only the right to claim a penalty for certain damages. In this paper the author is tried to study the reason for the decline of revocation right in the option of defect; moreover he tried to revise subject V of the 3rd chapter of Civil Law for clarifying this section of law and preventing people from the abuse of their right.

KEYWORDS: option of defect, waiver, release from obligation, consent, revocation.

1. INTRODUCTION

The exemption to the principles of accuracy and necessity is an option. Therefore, when the vendee found that the transacted object is not mutually equal to the paid money, based on his legal mandate he may disrupt the transaction and apply to the price (Article 457 of the Civil Law).

Destruction or transfer of the object of sale

The destruction or defect of transacted object in the option of defect is different from other options. Because in other options the right of revocation and rejection will not be extinguished with the destruction of the object sold, but the vendee can reject the counterpart of the defected object and terminate the sale. Therefore the option of defect will remain after destruction, but with the destruction of the object of sale in this option the right of revocation will be void.

By saying destruction, we mean both deliberate destruction and indirect destruction. Because the lack of power to reject the exact object sold is the same in all cases (Emami, 2001: 489). Of course, destruction of object sold is important as far as object sold is the same as *definite object* because if the object of sale is overall, customers' ownership is finalized if its evidence is determined and delivered to the customer (Eftekhari, 2012)

Destruction of object sold by vendee's action prior to delivery

If prior to the delivery the vendee has somehow been considered responsible for the destruction of object of sale, due to the fact that he was aware of the transacted object and of the incidence of sale, he has acted to his detriment; hence in the case of any claim about the existence of defect in the object of sale, the vendee would not be able to cancel the transaction. Therefore, we must believe that on the basis of the option of defect and through indirect destruction, his act will lead to the decline of his revocation right.

Even though the object of sale is not delivered by vendor to vendee, but the vendee's right to terminate the transaction will be null and void, and according to the aforesaid Article the vendee must pay the whole price. It is obvious in this case that if during the transaction the vendor proves the deficiency of the object of sale, he shall be of right to claim a penalty for certain damages.

Post-delivery destruction of object of sale, not in the time of vendee-specific option

If the vendee dominates over the object of sale in a way that he is allowed to make any change in the object, he actually takes the possession and in this sense the vendor's consent will not matter; this is related to the fact that the transfer of ownership is taken from the incidence of the contract, and the vendee shall be

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of right to make any change in his property, thereafter.

However, the delivery of object of sale can be assumed in two forms:

1. **Direct delivery:** this is the state that the vendor wants to deliver the object of sale in its due time and the vendee takes it.
2. **Indirect delivery:** this is the state that the vendor wants to deliver the object of sale in its due time but, for different reasons, the vendee refrains from taking possession or due to the fact that he has been of unknown location and has not participated for taking possession in its due time; hence the vendor needs to refer to the governor for the delivery.

It should be noted that, by assuming the post-delivery destruction of object sold in the time of vendee-specific option, the decline of vendee's right, partially or completely, to terminate the contract will contain the destruction in both cases. Suppose an object of sale, which is of different parts and the whole of it stands for the whole price, without specifying any price for each part, is occupied by a vendee and then one part of this object undergoes destruction; it is clear that the right of rejection or revocation by the option of defect will not be of effect in other parts, and the vendee can only ask for the penalty for certain damages; and since the price stands for the whole object of sale, in the case of revocation it would not be possible to return the whole object of sale to the vendor, therefore one could not compel him to accept the undamaged part. On the other hand since it is possible to compensate the vendee's loss by paying money for the damaged part, the termination of transaction will not be allowed by the law.

Obviously, if the whole object of sale is destructed, the vendee's right to terminate the transaction due to the existence of defect in the object sold during the transaction will be void, and since the possibility to return the object does not exist, we must take it as a situation, which leads to the decline of the vendee's right of revocation. Here, we review the destruction of object of transaction in three different paragraphs.

Paragraph 1- Destruction by force majeure

Revocation is practiced for the compensation of vendee's loss, but one cannot compensate this loss by an action, which leads to the detriment of other party to the contract. If due to the incidence of one of the proofs of force majeure, the object of sale is destructed in the hands of the vendee, he will not be of any right to terminate the transaction; and since in the case of revocation it is impossible to restore the vendor's situation to the pre-contract state due to the damage in the object of sale, the decline of vendor's right seems logical. But this decline will not lead to the non-compensation of vendee's loss and he will be of right to claim penalty for certain damages. It should be noted that if in the transaction the vendee be of option of sale, and the destruction or loss is done through force majeure in the time of vendee-specific option, the destruction will belong to the vendor and the vendee shall be of right to terminate the transaction and ask for the price. The Article 399 of Civil Law stipulates that: "In the contract of sale, it is possible to condition that the vendor, the vendee or both of them and or a third party are of right to cancel the transaction in a certain period." Therefore, by the existence of vendee-specific option, if the object of sale is destructed by an unwanted event, this destruction will obviously belong to the vendor.

Paragraph 2- Destruction by the vendee's action

The vendee becomes the owner of object sold and the vendor of its price as soon as a sale is effected (Article 362 of Civil Law, Paragraph 1). But if after the contract, the object of sale is destructed by the vendee's action, either in the time of vendee-specific option with the this party's fault or after the expiration of this time, the vendee's right of revocation will decline and he will not be of right to cancel transaction for the existence of defect during the transaction. Because in this assumption, one cannot restore the object sold in its original form and cannot obligate the vendor to accept the counterpart for the object of sale or its price against other options.

Paragraph 3- Destruction by the third party's act

Generally, after the acceptance of the object sold by the vendee and the lack of making the condition of option for him or by the expiration of the time of vendee-specific option, if the object of sale is destroyed by the third party or vendor, the vendee shall be responsible for the destruction and he cannot cancel the sale with reference to the destruction of the object sold by the vendor.

According to the predication of 1st paragraph of the Article 429 of the Civil Law it seems that immediately after the destruction or transference of object sold by the vendee to other person (which is tantamount to destruction), it must be accepted that there will be no right for the vendee to cancel the transaction again, even though the object of sale has given back to the vendee thereafter, but he will be of right to ask for a penalty for certain damages.

The transfer of object of sale

Generally, the transfer of object sold by one of the transferring contract is among the cases, which declines the vendee's right of revocation in applying the option of defect. The last part of the aforementioned paragraph indicates that: "...or transference of object sold by the vendee to other person"

The jurisprudents in humanities are unanimous in this case, and the dominant opinion is for the decline of vendee's right of revocation after he transfer the object of sale to other person, which is followed by the Civil Law too.

Immediately after the transfer of the object sold to another person by the vendee, his right of revocation will decline and even after the transfer of the object to himself again by a form of transfer-specific contract, he cannot use his right of revocation in this matter.

Voluntary transfer

Transference means "the decline of owner's ownership in regard to some certain property (properties) to the benefit of new owner" (Jafari Langroudi, 2001, P 88). To move a property means "dispossession of an owner from a certain property (properties) and conferring it to other person either by the owner's consent (like the vendor's consent in sale and releaser's consent in release from obligation) or by the order of law (like selling hoarder's property by the ruler's order) (the same source, P 720). Intention or will is defined as "ego's movement toward a definite action after imagining a situation and approving its benefit (the same source, P 24).

Therefore, it should be noted that if after imagining a situation and approving its benefit and with a sound intention, the vendee performs to transfer his ownership to other person after accepting the object of sale by one of the transfer-specific contracts, his transfer is done voluntarily.

If the vendee sign the aforesaid transaction, his endorsement indicate that the transfer is done voluntarily, hence he cannot cancel previous transaction; if the vendee transfers the object of sale to other person without noticing its defect and the object is given in a way back to the vendee, due to the fact that he had not aware of its defect but notices it at the present, he should be of right to cancel the transaction and ask for the compensation of his loss; but with regard to the stipulation of 1st paragraph of the Article 429 of the Civil Law, before the return of the object's ownership to him by a form of transfer-specific contract or by the revocation of second vendee, the assumption of law which is transfer, is done and since there is another legal solution for the compensation of vendee's loss, even if it would be possible to return the object to the vendor, he will not be able to cancel the first transaction by reference to the existence of defect in the object of sale during the transaction. Because in this case the vendee shall be of right to ask for a penalty for certain damages from the vendor; with the assumption of voluntary transference and vendee's awareness of the defect, it must be imagined that the vendee has noticed the defect after the delivery of the object sold, and with his awareness of the defect transfer the object to the second vendee.

Obligatory transfer

Obligatory transfer (or transfer by the writ of legal authorities) is the other kind of transfer in which despite the vendee's opposition to transfer the object of sale, due to the creditors' action for recovering their money through reference to the legal authorities and introducing the object of sale as the debtor's (or vendee's) property, it is transferred to the creditors' benefit.

It is clear that after this introduction, the legal authority act according to their legal duty to seize the introduced property and after some legal processes transfer it to the creditors or a third party in return for the demand of the creditors. This kind of transfer, although is done without debtor or vendee's consent, is a kind of obligatory transfer. In this case on behalf of the debtor (or vendee) the legal authorities perform this act to adjudicate on taking creditors' rights, hence it must be considered in the order of voluntary transfer (Article 145 of Civil Law).

In this case after transferring the object of sale to a third party, the vendee's right to cancel the transaction will be void, spontaneously. Because by this process the vendee's ownership of object sold will decline, but in the case of his awareness of the defect in the object sold during the transaction, he shall be of right to ask for a penalty of certain

Obligatory transfer (inheritance)

According to 4th paragraph of Article 140 of Civil Law, inheritance is one of the means through which one can possess something, and in the inheritance the properties of a dead man is transferred obligatorily to his heirs and heiresses by observing the materials stipulated in Articles 868 and 869 of Civil Law. The last part of Article 868 and paragraph 3 of Article 869 of Civil Law are referred to accomplishment of the deceased's debts and rights like accomplishment of his will.

Article 445 of Civil Law stipulates that: "all of the options of a man will transfer to his heirs and heiresses after his death." Generally, we cannot consider transferring inheritance as something, which causes the decline of vendee or his legal representative's right of revocation stipulated in the 1st paragraph of Article 429 of Civil Law; unless the heirs have become aware of the object's defect during the transaction and unanimously want to cancel the contract and the customary time for applying the right of revocation had been expired. Certainly, this issue will be one of the reasons for the decline of their right of revocation, and only their legal representatives with regard to the degree of their shares would be of right to claim a penalty for certain damages. But according to the no harm law, which indicates that no loss must be remained uncompensated, after the decline of right of revocation, the heirs, unanimously or individually, may claim a penalty for certain damages and apply to the vendor.

The urgency for applying the option

Most legislators of Civil Law have no doubt in applying the right of revocation immediately after the vendee notices the existence of a defect in the object of sale, because they believe that maintaining urgency in applying the right of revocation is for preventing from the loss, which may affect the vendor because of negligence and delay (Emami, 1999, P 495). Unlike to the unanimity of the juris consults and following the minority of the juris consults' opinion, Civil Law consider the urgency of applying the option, in the case of being defect in the object of the sale, as a necessary condition for applying the right of revocation. As it is stipulated in Article 435 that: "the option of defect is urgent immediately after it becomes known." Observing the customary time for applying the vendee's right of revocation is predicted rightfully in the law, meanwhile it solidifies the position of transactions more than ever.

Waiver

The waiver of right stands against the transfer of right, and it is said that naturally every right is transferrable (either voluntarily or obligatory) and capable of waiving unless one proves their opposite. Waiver is from one-sided dispositions (Jafari Langroudi 2001, P 43).

In Civil Law of Iran, the option of defect is the only case among the options which with receiving a penalty for certain damages by the loser allows the acceptance of the transaction, but in other options the loser will only be of right to cancel the transaction or accept it as it is. Since the option owner is of two rights, for preventing from vendee's abuse, the legislator extinguish the vendee's right of revocation and only allows him to claim penalty for certain damages. One of the cases which extinguish the right of revocation is the waiver of option(s) during the contract, and this power is given by Article 448 of Civil Law to both parties to the contract. According to jurists' opinion, the waiver of option(s) is from one-sided dispositions; therefore, it can be stated directly or indirectly, during the contract. Moreover, the option of defect is among the options, which exist, by the writ of law and juris prudence in all kinds of transactions. With regard to the opinions taken from religious jurisprudence to prevent loss, or in a better word for compensating the parties' loss, the legislator stipulates that: if it becomes known that the object of sale is defect and the vendee was not aware of it during the contract, even though his ignorance be due to negligence, the said option is putative for him; and if it is said that the aim was to compensate the loss of other party to the contract, but due to the existence of the defect, the continuation of the contract has not satisfy the vendee and the urgency to maintain justice necessitates the cancellation of the contract by applying option. If during the contract of sale the parties to the contract condition the cancellation of option and as it is stipulated in Article 448 of Civil Law that

“cancelling all or some of the options can be done during the contract”, even though the option of defect has not been proved during the contract to extinguish it, after the appearance of the said option and immediately after its proof it will be extinguished.

In Article 450, it is stipulated that: “the occupations, which are generically done through consent in the transaction is a practical agreement. Just like the situation in which the vendee who owns option, with awareness of its existence sells or mortgages the object of sale.

However, from legal and jurisprudential point of view the ceasing of option in this mood has been considered as an implicit ceasing. On the other hand, although the vendor has not extinguished his right of revocation explicitly, he has acted in a way that shows the necessity to sale and refraining from applying the option. It is clear from the said situation that with the decline of vendor’s right of revocation, he shall be of right to claim a penalty for certain damages and this right will not bound to definite time.

Release from obligation and consent

Releasing vendor from the existing or possible defects in the object of sale by the vendee is from among the reasons which cease the vendee’s right of revocation. Releasing the vendor from the defect is done through vendor’s statement at the time of the contract, which indicates that he is released from all existing defects in the object sold or the vendee states that he buys the object of sale with all of the defects in it. Releasing from the defects is undoubtedly involves all hidden and obvious defects in the object of sale during the contract, but it is the vendor who is generally responsible for the post-contract defect in the object of the sale (Najafi, PP 238, 321, 322). Helli states in his Sharaye that: “the option of rejection is extinguished due to refraining from the defect” (Helli, 1274 Hegira). Of course, regarding the releasing from the defects, defects are during the contract and do not include the following defects.

Vendee’s consent from the vendor after the appearance of the defect and during the contract is among the cases which leads to the decline of his right of revocation, in a way that he could not claim even the penalty for certain damages in this case. It is observed that vendee’s consent after his awareness of the defect is also considered in the jurisprudence as one of the reasons, which leads to his right of revocation and it is clear that after this consent he would not be of right to claim penalty for certain damages.

Conclusion and suggestions

For preventing parties from abuse of their right against each other or preventing the possible loss which may be forced by the option owner to the other party in the case when there is no written declaration for the party who must stand to the benefit; there are some contrivances in the civil law to end this right for the option owner. It should be noted that in all of the cases indicated in this paper about the vendee’s right of revocation and his reference to the price, due to the credibility of the object of sale and the price like consideration if the price be an external object it is also credible to the vendor. And for this reason Article 433 of Civil Law indicates that: “with regard to the rules of defect, the private price is like the private object of sale.”

Therefore, with regard to the situation we live in and with regard to frequent abuses which are done by some people due to applying their right, and because of irreparable losses of this kind of abuse, it seems necessary to review and clarify subject V of the 3rd chapter of the Civil Law approved in 1928.

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