TRANSFER OF ACTIONABLE CLAIMS IN TRANSFER OF PROPERTY ACT 1882; ANALYTICAL STUDY IN THE LIGHT OF SHARĪAH AND LAW

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ABSTRACT

The law on transfer of actionable claims is incorporated in sections 130 to 137 of the Transfer of Property Act, 1882. This research paper undertakes the analytical study of legal rules on transfer of actionable claims in the light of Sharīah and law. This article will start with critical analysis of the meaning of actionable claims and meaning of transfer of actionable claims. It will later address the Sharīah issues in a transfer of actionable claims.

Keywords: Shar`iah law; Transfer of Property Act, 1882; Actionable Claims
INTRODUCTION

The legal rules on Transfer of Actionable Claims are incorporated in sections 130 to 137 of the Transfer of Property Act, 1882. This chapter aims to evaluate the concept of actionable claim and its transfer as provided in statutory law from Shari`ah viewpoint. The study in this chapter is restricted to the Shari`ah analysis of meaning of actionable claim and its transfer only.

Council of Islamic Ideology, in its 14th report on the Transfer of Property Act, 1882, did not evaluate the provisions of this chapter in detail and only made a declaratory statement that transfer of actionable claims amounts to contract of agency for collection of debts. The analysis of Council of Islamic Ideology in its report is not sufficient and needs further research. This chapter is designed to conduct Shari`ah analysis of transfers of actionable claims.

MEANING OF ACTIONABLE CLAIM

The term “actionable claim” is defined in section 3 of the Transfer of Property Act, 1882. Section 3 (Paragraph 6) of the Transfer of Property Act, 1882 defined the term “actionable claim” as,

“A claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession either actual or constructive, of the claimant, which the civil courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.” ¹

It is evident from the plain reading of definition of actionable claim that a claim to a debt that is being secured through mortgage, pledge or hypothecation is excluded from the purview of actionable claim. Therefore, actionable claim includes a claim to a debt that is unsecured and it also includes a claim to a beneficial interest in moveable property, not in possession of the claimant, which can be claimed by a person against another person and such a claim can be enforced in civil courts in accordance with a law. An actionable claim is transferable and

¹ Ehtasham Mehmood, Transfer of Property Act, 1882 (Mansoor Book House) 35.
inheritable. Therefore, actionable claim is considered to be a property in the hands of a person who has the claim. ²

The above mentioned definition also indicated that an actionable claim includes two conditions to be fulfilled for a claim to be actionable. The conditions are unsecured money debt and a claim to a beneficial interest in moveable property not in possession of the claimant. ³

An unsecured money debt is an obligation to pay certain amount of money and such a debt may be existent, accruing, contingent or conditional. A debt is existent when an amount of money has become due in the past and is payable at present. For instance, claim of arrears of salary has become due in the past and is payable at present. A debt is accruing when an amount of money has become due at present but it is payable on a future date. For instance, a claim for salary to fall due in the next month is an accruing debt. Similarly a debt is a conditional debt when the claim for a sum of money exists but the payment is dependent upon the fulfillment of any condition. For instance, Z promises to pay Rs. 5000 to Y every month provided that he marries within coming 5 years. The claim of Y is conditional actionable claim. A debt can also be contingent when claim for a sum of money exists but the payment is dependent upon some uncertain future event which may or may not happen. For instance, Z promises to pay Rs. 5000 to Y every month provided that Y’s first child is a son. The claim of Y is contingent actionable claim. ⁴

Under section 3 of the Transfer of Property Act, 1882, an actionable claim includes a claim to an unsecured debt. Therefore, a claim for damages or a claim for *mesne profits* does not come within the definition of actionable claim. ⁵

A claim to any beneficial interest in moveable property not in possession of the claimant is also an actionable claim. Such a claim must be in moveable property, the moveable property must not be in the possession of the claimant and such a beneficial interest must be recognized by the court. Where a person is not having any legal right of possession of moveable property, the claim is not

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³ *Ibid* (n 3) 411.
⁴ *Ibid* (n 3)
⁵ *Ibid* (n 3)
actionable. Where there is actual or constructive possession there is no question of claiming the possession of a moveable property. Beneficial interest in a moveable property is intangible moveable property. Therefore, actionable claim is considered as property and its transfer is included in the Transfer of Property Act, 1882.  

Some instances of actionable claim are the right to claim benefit of the contract for the purchase of goods, a claim to money under an insurance policy, a share in partnership, a claim for arrears of rent, a claim for return of earnest money, right to get back the purchase-money when sale is set aside, claim of a woman for her unpaid dower and right to get the proceeds of a business. Some instances of claims which are not actionable are the rights to recover damages for breach of a contract, a claim to mesne profit, a copyright.

The concept of actionable claim appears to be Shari‘ah compliant and is not in violation of any rule of Islamic law.

MEANING OF ‘TRANSFER OF ACTIONABLE CLAIMS’

Section 130 of the Transfer of Property Act, 1882 provides that, the transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent, shall be complete and effectual upon the execution of such instrument, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as in hereinafter provided be given or not.

Section 130 of the Transfer of Property Act, 1882 does not provide clearly that what is meant by ‘transfer of actionable claim’. Infact the section only reveals how the transaction of transfer of actionable claim can be made effective and complete and insists upon the execution of an instrument signed by the transferor or his duly authorized agent.

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6 Ibid (n 3) 412
7 Ibid (n 3) 412-413.
instrument in writing signed by the transferor. Section 130 states that on execution of an instrument in writing duly signed by the transferor all the rights and remedies of the transferor shall vest in the transferee. The transferee of an actionable claim is entitled to institute a suit or proceeding on his own name and can do so without seeking the consent of transferor to do so and without making him a party. The transfer of an actionable claim can be made with or without consideration. Furthermore, section 130 also contains two illustrations which are as follow, illustration no 1: A owes money to B, who transfers the debt to C. B then demands the debt from A, who pays, B. The payment is valid and C cannot sue A for the debt. Illustration No. 2: A effects a policy on own life with an insurance company and assigns it to a bank for securing the payment of an existing or future debts. If A dies, the bank is entitled to receive the amount of the policy and can sue on it without the concurrence of A’s executor.

The Council of Islamic Ideology, in its 14th report, only declares that transfer of actionable claim involves the transfer of a claim to a debt or unsecured money by creditor to a third person and it resembles with the assignment of a right. This analysis of Council of Islamic Ideology is lacking in various aspects that the analysis conducted by Council of Islamic Ideology did not identify the gaps in the law.

The above quoted two illustrations show that ‘Transfer of actionable claim’ means transfer of payable right or receivable debt. The first illustration indicates a transaction in which the claim to a debt is transferred from a creditor to a third person who is not the debtor of a transferor, it does not amount to ḥawālah and is called as agency contract for collection of a debt. Apparently the transaction seems to be within the parameters of Shari`ah but it must contain that the consent of debtor, creditor and third person must be obtained and is mandatory.

The second illustration indicates the assignment of a claim to a debt from one creditor to another creditor. In Islāmic law, ḥawālah al-ḥaq appears to be counterpart of the transaction indicated in second illustration. In order to make the transaction valid as quoted in second illustration, the conditions required to be met are those which are mentioned in a contract of ḥawālah generally.

Transfer of debt or assignment of a debt whereby liability of one debtor is transferred to another debtor is called as ḥawālah al-dayn.

Transfer of a liability from one debtor to another debtor and transfer of a right or claim from one creditor to another creditor can be made only while complying with the rules of contract of ḥawālah.

Section 130 of the Transfer of Property Act, 1882 needs amendments in various aspects. The definition needs improvement so that it covers the transaction itself and not only the modus operandi of it. The section must be amended to contain clearly the conditions or the requisites required to make the transfer of actionable claim to be valid form Shari`ah viewpoint.

Section 130 (last paragraph) provides an exception that the legal rule incorporated in section 130 is not applicable to the transfer of a marine or fire policy of insurance. Sections 130-A and 135 appear to be in contradiction with section 130 (last paragraph) because section 130-A deals with the transfer of policy of marine insurance and section 135 deals with the assignment of rights under policy of insurance against fire. The contradiction within the law must be removed.

**BAY‘ AL-DYN IN ISLAMIC LAW AND JURISPRUDENCE**

*Bay‘* means a sale and *dyn* means a debt, obligation, liability or financial liability.  

10 *Dyn* can be defined as a thing which is due.  

11 *Dyn* can be monetary or it can also be a commodity.  

12 *Bay‘ al-dyn* connotes the meaning of sale of debt. *Bay‘ al-dyn* can be defined as the sale of payable rights or receivable debts either to the debtor himself or to any third party. It can be on immediate payment or it can be affected on the basis of deferred payment.  

Shari`ah permits *bay‘ al-dyn* only where it is subject to the rules of ḥawālah.  

14 The conditions required for the validity of contract of ḥawālah includes that the consent of all the parties i.e. transferor, transferee and assignee. The parties to the contract of ḥawālah must be legally

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13 Ibid.
14 Muhammad Ayub, *Understanding Islamic Finance* (John Wiley and Sons Ltd, 2007), 168.
competent to act independently. The claim to a debt must be known, definite and must also be matured and becomes payable. Both the debts, transferred debt and the debt to be used for settlement, must be of equal amount and must be known and transferable.\footnote{Abdur Rahmān Bin Muhammad ‘Iwaḍ Al-Jazīrī, Al-Fiqh ‘alā Al-Madhāhib Al-Arba‘ah, vol. 3 (2\textsuperscript{nd} edition, Dār Al-Kutab Al-‘Ilmiyyah, 2003), 251-254.}

**CONCLUSION**

On the basis of above discussion, it can be concluded that statutory law on transfer of actionable claims need amendment to define clearly that transaction covers transfer of debt from one debtor to another debtor or it covers transfer of a claim or a right from one creditor to another creditor or it amounts to transfer of a claim or right by creditor to a third party which is called as agency contract for collection of debt. The law must also be amended to provide the rights and liabilities of parties to above mentioned transactions. The statutory provisions must also be amended to provide the requisites necessary for the validity of transfer of actionable claim.
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