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**Jurisprudential Conditions of Mortgage in Financial Matters in the  
Context of the Principles of Four Imams: A Research Review.**

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**Abstract**

Financial matters have immense importance in Islam. In human society, one has to deal with other human beings. There are two types of affairs: The one that deals with lifestyle and morality. In such matters, Islam only demands that a person should not harm anyone. The second types are financial matters, whereby the Holy Prophet (PBUH) has stated that the property of a Muslim is not permissible for another man unless he has given his approval. In these financial matters, Islam has made mortgages lawful Its purpose is that if a person borrows something or takes a loan from someone, then the Shari'ah gives the lender and the seller the right to receive a mortgage from the other party equal to the value of the thing being lent or borrowed. In case of any default in payment, the right can be recovered from the thing being mortgaged. This research paper examines mortgages in light of Islamic jurisprudence. Thus, the jurisprudential rules of the mortgage have been researched in the context of the teachings of four Imams.

**KEY WORDS:** Mortgage, Loan, Islamic jurisprudence

### Introduction:

Islam is a whole way of life that provides direction in all spheres. There is no area of life about which the teachings of Islam are silent. Any religion in the world cannot claim so much.

Social life is an integral part of human life- Human is civilized and interacts with other human beings. Any human being living in human society, no matter how rich, wealthy and powerful he may be, has to deal with other human beings. The only demand of Islam is that man should not harm anyone-

A famous hadith which has been declared as a quarter of the religion of Islam-

Holy Prophet (saw) says: perfect Muslim is one from whose tongue and hand other Muslims are safe.<sup>1</sup>

Similarly, the following statement of the Holy Prophet (saw) is fundamental in financial matters

لا يجل مال امرئ مسلم ، إلا بطيب نفس منه.

“Muslim's property is unlawful for another man without his consent”.<sup>2</sup>

The Prophet (peace and blessings of Allah be upon him) gives a comprehensive concept,

It is not permissible to use one's property unless the owner's heartfelt consent is involved, so it is essential in financial matters that He should take care of his property and should never dispose of his property without his consent and pleasure.

Shari'a gives everyone the full right to receive their due to make it possible for them to receive their right. Islam has prescribed a mortgage, which means if a person takes a loan or buys something on deferred payment from someone, while these two are strangers or know each other, but do not have an atmosphere of trust in financial matters.

In such a case, the Shari'ah gives the lender and the seller the right to receive a mortgage from the other party equal to the value of his debt and his property, so that he can get his payment from the mortgage in case of

negligence. This article highlights the legitimacy, need and importance of a mortgage in financial matters.

### Literature Review:

All books on jurisprudence have chapters entitled "Mortgage" but they are based on the principles of only one jurisprudential religion. In this article, we will discuss this topic in the light of the views of four Imams.

### Research Questions:

- 1: Is the legitimacy of a mortgage proven?
- 2: Is the mortgage absolutely prescribed or is it subject to conditions?
- 3: What are terms of holding Mortgage contract?
- 4: Is Mortgage of a child and insane property permissible?

### A Literal meaning of "Rahaan" (Mortgage)

In Arabic, the word "Rahaan رهن" is used for Mortgage. This word has several meanings, including evidence and permanence.<sup>3</sup>

### A Terminological Definition:

According to Fatawa Hindia is like this, which is to stop anyone because of right which can be recovered through the property.<sup>4</sup>

**Shafia's definition of mortgage:** The definition is as under:

”جعل عين مال وثيقة بدين يستوفي منها عند تعذر وفائه“

to keep the property in pledge in exchange for a loan, so in case of nonpayment of loan, the loan can be received through the property.<sup>5</sup>

### Malikia definition of mortgage:

According to Malikia,

معنى الرهن احتباس العين وثيقة بالحق ليستوفى الحق من ثمنه أو ثمن منافعها عند تعذر أخذه من الغريم مفردة كانت أو مشاعة.

Mortgage means to keep a thing as a security in exchange for a right, so that in case of not receipt of that thing or its profit, whether that right is separate or not.<sup>6</sup>

Also, according to the Maliki, it is correct to have a mortgage even before the obligation of the right, and the contract of the mortgage becomes obligatory only by word of mouth.

### **Hanabila's definition of mortgage:**

Hanbali jurist define mortgage as:

”الرهن في الشرع المال الذي يجعل وثيقة بالدين ليستوفى من ثمنه ان تعذر استيفاءه من ذمة الغريم“

In Shari'ah, the mortgage is a property in exchange for a loan (دين), so that in the case of non-receipt of loan, the loan can be received through this wealth.<sup>7</sup>

All of the above definitions have one thing in common, that mortgage is kept as a pledge for the realization of the right so that in a case of non-receipt of rights, right will be received by selling the mortgage or making a profit from them.

### **Legitimacy of Mortgage in Quran, Hadith and Fiqah:**

The Mortgage (رهن) is based upon four things i.e. Quran , Hadith, Ijama and Qiyas.

#### **Mortgage (رهن) in the light of Quran:**

The first proof of mortgage legitimacy is following verses of the Quran

وَإِنْ كُنْتُمْ عَلَى سَفَرٍ وَلَمْ تَجِدُوا كَاتِبًا فَرِهَانٌ مَّقْبُوضَةٌ

And if you are on a journey and cannot find a scribe, then a security deposit [should be] taken.<sup>8</sup>

Hazrat Abdullah bin Abbass (R.A) presents the detail in his commentary

”فليقرض الدائن من المدينون رهنا بدينه.“

The lender should take a mortgage in return for his debt.

#### **Mortgage (رهن) in the light of Hadith:**

The deed and saying of the Holy prophet and the companions are clearly evidence of this. Imam Bukhari Narrated on the authority of syedna Anaas(R.A)

عن أنس رضي الله عنه أنه مشى إلى النبي صلى الله عليه وسلم بخبز  
شعير وإهالة سنخة ولقد رهن النبي صلى الله عليه وسلم درعا له  
بالمدينة عند يهودي وأخذ منه شعيرا لأهله ولقد سمعته يقول ما أمسى  
عند آل محمد صلى الله عليه وسلم صاع بر ولا صاع حب وإن عنده  
لتسع نسوة.

Syedna Anas (R.A) went to the Prophet with barley bread having some dissolved fat on it. The Prophet had mortgaged his armor to a Jew in Medina and took from him some barley for his family. Anas heard him saying, the household of Muhammad did not possess even a single Sa'a (صاع) of wheat or food grains for the evening meal, although he has nine wives to look after.<sup>9</sup>

This Hadith is a very strong argument on the legitimacy of Mortgage. This hadith has been narrated by Imam Bukhari (may Allah have mercy on him), Imam Hamidi, Allama Ibn Al-Athir Al-Jazri and Allama Nawawi (may Allah have mercy on him) (Sahih-UI-Bukhari).

### **Terms of holding Mortgage contract:**

A mortgage is also a contract, like other contracts, and there are the same conditions for holding like other contracts, but a mortgage is not an obligatory (wajib) contract, but a volunteer (تبرع) contract. To hold a mortgage agreement, it is necessary to have a word of acceptance or its synonyms, for example, the mortgagor says take this thing and the mortgagee says I have kept it, etc.

Some jurists said that mortgage (رهن) is Aqde tabara (عقد تبرع). It is not necessary to have an acceptance to hold it, but only an offer is sufficient, the rest of possession/ Occupancy is a condition for holding a contract, the contract will not be completed until possession.

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The author of *al-Hidayah* said:

الرهن يتعد بالإيجاب والقبول ويتم بالقبض قالوا الركن الإيجاب بمجرد أنه عقد  
تبرع فيتم بالمتبرع كالهبة والصدقة والقبض شرط للزوم.

The contract of mortgage is held with an offer and acceptance, and is completed with possession. The only member of the mortgage contract is only offer (alJaab), because it is a contract of Tabaarah (تبرع) , so it is completed by the one who pledges it, such as gift and charity.<sup>10</sup>

### Terms of Mortgage:

1. The first condition of a mortgage contract is that the mortgage contract should not be attached to any condition; the condition here means such a condition which is contrary to mortgage a contract, like a mortgagee put a condition to mortgagor that you will give me a loan again.
2. The contract should not be attributed to any time. For example, the mortgagor says that he will mortgage this thing to you on certain date, then keeping such a mortgage will not be valid , because mortgage is one of those contracts which cannot be added to any time. However, in such a case, only a promise of a mortgage can be made, the fulfillment of which will be obligatory<sup>11</sup>

## Terms regarding to Mortgagor and Mortgagee:

1. The first condition for a mortgagor and mortgagee is that both be wise. So a madman or a child who has no understanding to mortgage or receive a Mortgage. However, adulthood is not a prerequisite for the validity of a mortgage.

Therefore, it is in Mujalah Al-Ahkam Al-Adlia

‘يشترط أن يكون الراهن والمرتهن عاقلين ولا يشترط بلوغهما’

The condition of a mortgage contract is that both the mortgagee and the mortgagor should be wise and prudent, however it is not a condition that both of them or one of them should be an adult.<sup>12</sup>

2. The second condition is that both the mortgagee and the mortgagor are free. In case of being a slave, the contract of mortgage will not be valid

However, if there is a slave who is allowed to trade, then it is permissible for him to deal with the mortgage's contract, whether he is a mortgagor or mortgagee.

3. The third condition is eligibility for mortgage, then what qualification is meant by eligibility? According to Hanafis and Malikis, the ability to buy and sell is meant, so every sensible child who has the ability to buy and sell, according to them, it is right to have a mortgage.<sup>13</sup>

## A Mortgage of child and insane property:

According to the Hanafis, since one of the conditions of a mortgage contract is that the mortgagor must be prudent and intelligent, then the question of whether the guardian can keep the mortgage on behalf of an ignorant child and a madman is also important. So the explanation is that it is correct to mortgage his property in return for the loan taken due to the

expenses of the child and the insane, similarly if the guardian trades with his property, so that the child's wealth increases then for business It is also permissible to have a mortgage in exchange for a loan taken.<sup>14</sup>

**Terms related to Mortgaged object:**

There are several conditions to mortgaged items.

- First of all, this item has potential to be sold. So that thing should have wealth, therefore something which has no wealth cannot be mortgaged. And wealth is called that thing towards which human nature tends, therefore, it is not right to mortgage the dead, because it has wealth. Wealth is the thing to which human nature inclines, so it is not right to mortgage the dead, because it is not a wealth.
- First of all, this thing has the potential to be sold. So that thing ought to have wealth, in this manner, something which has no wealth cannot be sold, and wealth is that thing towards which human nature inclines. Similarly, it isn't right to contract the dead since it isn't wealth.
- Owned by someone, so it is not right to keep a free man as a mortgaged item because he does not belong to anyone.
- Possession: The mortgagor has authority to deliver, so a bird in the air cannot be mortgaged because the mortgagor does not have authority to handover.
- A thing has come into being, so it is not right to mortgage a child in the womb of a female, such as a goat, etc., because there is a possibility of both existence and non-existence.<sup>15</sup>

**Conditions for the validity of the mortgage contract:**

There are two conditions for the validity of a mortgage contract. The first condition is that the mortgaged item can be divisible, meaning that if the mortgagor wants to mortgage something with which another



person shares or wants to mortgage half of what he owns. In this case, the mortgagor must distribute it and mortgage it separately. That is why jurists (may Allah have mercy on them) did not allow the mortgage of an undividable.

It is not permissible to mortgage a property that is shared between two or more people, and the percentage is known.

The second condition is that the thing is separated and not be occupied with any mortgagor rights.

Therefore, the jurists (May God has mercy on them), did not validate the marriage contract in the following cases:

- I. To mortgage a house in that, the owner's goods are present.
- II. A Mortgage of land in which the owner has planted crops.
- III. Only mortgage trees that bear fruit without fruit.

In the above cases, the real reason for the non-validity of the mortgage is non-possession.

### **Details of conditions on a mortgage contract:**

#### **Hanafi Point of View:**

According to Hanafi jurists, the contract of a mortgage is similar to the contract of sale. However, the difference between a sale and a mortgage is that the sale is from the contract of compensation; therefore, the sale becomes invalid (*fasid*) from the invalid condition, while the mortgage is not from the contract of compensation, but is a contract of volunteer (تبرع) contract. Therefore, there is a difference of opinion regarding its corruption based on an invalid condition-

Allama Kasani (may Allah have mercy on him) says that a mortgage also becomes invalid (*fasid*) on the condition of invalidity.<sup>16</sup>

والرهن تبطله الشروط الفاسدة

But it is clear from the words of the Ziyadaat and fatawa Bazaria, that the mortgage will not (*fasid*) invalidated by an invalid condition, so if any *fasid* condition is imposed, then the condition will be invalid and the mortgage 's contract will be valid.<sup>17</sup>

قال رهنك عبدي بشرط أن أستخدمه أو على أن الرهن إن ضاع ضاع بلا شيء أو إن لم أوف متاعك لك إلى كذا فالرهن لك بمالك بطل الشرط وضح الرهن-

### Shafi'i religion

According to the Shafi'is, the conditions imposed on a mortgage contract are of three types:

1) The conditions those are valid in the contract:

It is permissible to make any condition in the contract that the contract requires, such as the condition of the mortgagor that I will repay the mortgage when you pay my debt, or he says that I will keep the mortgage in my possession or the contract I will make a witness on the mortgage, etc., both of these conditions are per requirements of the mortgage contract, so such conditions will be accepted.

2) Terms that will be considered null and void:

The second type of condition, that is against the requirements of the mortgage contract, and not related to anyone's interest or purpose.

3) The conditions by which the contract will be invalidated:

The third type of condition is that 'which causes loss to either mortgagor or mortgagee.<sup>18</sup>

### According to Malikia:

There are two types of mortgage terms:

1) The valid (*Saheeh*) conditions:

The valid (*Saheeh*) condition refers to a condition, which is in accordance with the requirements of the contract, and does not lead to anything which is forbidden by the Shari'ah, such as the condition of the lender that the

debtor will remain in my possession until I receive all my debts. It is permissible to make such a condition.

## 2) **Void condition:**

Prohibited by Shari'ah and is contrary to the requirements of the mortgage contract The borrower says that the mortgage will remain in my possession or that the lender will not have the right to sell the mortgage even after the due date.

Therefore, imposing such conditions will invalidate the mortgage agreement.

وأما الشرط المحرم الممنوع بالنص فهو أن يرهن الرجل رهنا على أنه إن جاء بحقه عند أجله وإلا فالرهن له فاتفقوا على أن هذا الشرط يوجب الفسخ، وأنه معنى قوله عليه الصلاة والسلام "لا يعلق الرهن"

But the condition which is haraam and forbidden by Shari'ah is that a person should keep a mortgage on the condition that if he does not pay to the lender at due time of payment, then the lender will become his owner. It has been agreed that it is obligatory to annul the contract because it is stated in the Holy Hadith that a mortgage cannot be stopped.<sup>19</sup>

## **According to Hanabila:**

There are two types of mortgage terms:

### **Valid (Saheeh):**

**The valid (Saheeh)** condition is that, which is expedient for the contract and does not contradict the requirements of the contract, and does not lead to any forbidden ( *haram*) thing.

It is permissible to impose such conditions that a mortgage will be kept by to one or two just(عادل) men or It is permissible to impose such condition, that in case of non-payment on due time, these just people will sell the mortgage instead of the lender.

### **Invalid/void condition:**

An invalid condition is that, contrary to the contract's requirements, such as in case of non-payment in time, the mortgage will not be sold or, the debt

will not be recovered from the mortgaged object, or even in case of fear of the mortgage being lost. The lender will not have the right to sell it or will be obliged to sell it at the price at which the borrower agrees.

In addition, the following conditions are also invalid:

- i. The borrower has the power to decide whether or not to have a mortgage.
- ii. Set aside time for the mortgage so that the mortgage will last for so many days.
- iii. A mortgaged item will be considered a mortgage one day and not a mortgage one day.
- iv. The mortgaged item will remain in possession of the mortgagor.
- v. The debtor will still be entitled to the benefit from the debt.
- vi. The mortgagor will be allowed to benefit from the debt.
- vii. The debt will be bailed out by the mortgagor. Even if a debt is lost via no fault of the lender's own, the lender will still be required to pay it off.<sup>20</sup>

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