



The concept of the right of the mortgagee to set-off between Islamic jurisprudence and the Algerian Civil Law

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Abstract:

The obligation of the mortgagee to preserve the mortgaged money sometimes requires him to spend on it and these expenses that he spends have the right to recover them by deducting them from the origin of the debt, and therefore this research will address the definition of set-off and the statement of its conditions and manner, between Islamic jurisprudence and the Algerian Civil Law.

Keywords: mortgagee - set-off - Islamic jurisprudence - Algerian law.

Introduction :

A personal obligation or right is a legal title that is due to a person requested by the debtor to another person required by the creditor for a specific performance that is the subject of the obligation, and it is diverse. The debtor's obligation may be to give something to the creditor, as in the sales contract where the seller is obligated to transfer ownership of the sold property to the buyer, or where the debtor undertakes to give something to the creditor. Creditor may perform a particular act, such as its obligation to build a house, or waive an obligation to perform a particular act, such as the merchant's obligation not to compete with other merchants in a particular place or commodity.

Moreover, in-kind implementation is the natural way for all obligations to lapse, but the debtor's intransigence to implement it makes it obligatory, with the assistance of the local authority, and the debtor must abide by the date agreed upon in the contract, otherwise it is considered late for implementation, which leads to the emergence of contractual liability that entitles the creditor to claim compensation.

In some cases, it is a coincidence that the debtor overturns and becomes a creditor of his debtor, due to the diversity of the legal relationship between individuals. The Algerian legislator allowed cases in which the creditor becomes a debtor due to legal cases, including the right of the mortgagee to set off what is owed to his mortgagee, and what is owed to him.

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The first topic: The right of the mortgagee to set-off in the Civil Law

The first requirement: The definition of set-off and its conditions in the law

In this part, we talk about the definition of set-off, its conditions and how it is mortgaged in the Civil Law.

1/ Definition of Set-Off: It is not the duty of the codified definitions, so the definition of set-off is left to jurisprudence and the judiciary, but it regulates its provisions in Articles 227 to 303, and by reference to positive jurisprudence, we find that they defined it as: “Set-off is a meeting of the capacity of the creditor and the debtor in relation to one debt in the same person, which leads to the expiry of the debt to the union of the debt to the extent that it is united or is a means that leads to the expiry of the two opposing debts in the opposite debts between the two debtors, each creditor to the other and the debtor together, to the extent of less than them”.

2/ Set-off conditions: Article 297 of the Civil Law states: “The debtor has the right to set off between what is due from him to his creditor and what is due to him towards him, even if the reason for the two debts differs, if the subject of each of them is money or lesbians of different types and quality, and each of them is fixed, free from dispute, worthy of performance, and fit to claim justice.

Set-off does not prevent the delay of the date of payment of the deadline granted by the judge or donated by the creditor”. From the text of the article, it is clear that set-off is one of the ways of the lapse of the obligation and is in two opposite debts between the same two persons and has the meaning of payment. It is the deduction of the debt of both the creditor and the debtor in a way that makes everyone who has a right take his right, and the meaning of the guarantee, as it guarantees the fulfillment of his debt in advance to other creditors, from which conditions must be met to do set-off, which are as follows:

A: The existence of two opposite debts: the mortgagee's obligation to manage the money pledged to spend on it and reap its fruits from one party, and the original debt owed by the mortgagor from the other party.

B: The symmetry of the two opposing religions: There is a symmetry between the original religion and the value of the fruits, which can be evaluated with money because they are lesbians.

C: The two debts must be free from dispute: In the mortgage, there is no dispute, and if any, the mortgagee is not entitled to invest the mortgaged money.

D: The maturity of the two debts together: This condition can be met if the maturity date of the debt comes, but if the maturity date does not come, the mortgagee's deduction of his right from the fruits is inconceivable.

E: The validity of the debt to claim it judicially: That is, the debt must be civil and not natural, as in the case of the debt's forfeiture by prescription, while in the possessory mortgage, the debt is not forfeited as long as the mortgaged property is in the possession of the mortgaged creditor. If the debt has been for 15 years, the existence of the mortgage in the hands of the mortgagee creditor does not lapse. Article 318 of the Algerian Civil Law states: “The statute of limitations shall be interrupted if the debtor explicitly or implicitly acknowledges the right of the creditor. It is considered an implicit declaration that the debtor leaves in the hands of the creditor property that has a mortgage in full possession to pay the debt”.

And: That the set-off does not harm the rights of others: that is, that the third party whose right is related to one of the two debts is not harmed, as if the precautionary seizure of



the debt of one of the parties from this third party occurred before the set-off occurred, Article 302 states: "The set-off does not harm the rights of others. If a third party imposes the seizure in the hands of the debtor and then the latter becomes a creditor of his creditor, it is not permissible for him to adhere to the set-off to the detriment of the barrier".

The second requirement: how to set-off

1/ How to set off: It is known that we spend the mortgage on the mortgagor, it is the one who bears it. Set off varies according to the expenses spent by the mortgagee on the mortgaged money, so we will show how the mortgagee obtains his right to set off from the necessary expenses and then how it is done from the beneficial or ameliorative expenses.

A: The right of the mortgagee to set off one of the necessary expenses: If the mortgagee spends on the mortgaged money, all that is spent shall be returned to the mortgagor if the mortgaged money requires the necessary expense to keep it and repair it, and the maintenance here shall be obligatory on the mortgagor, as stated in the Civil Law in Article 839/1 "The owner to whom his property is returned shall pay to the holder all the necessary expenses... "The text is considered as a basis for recovering the necessary expenses incurred on the mortgaged property such as the expense of preserving it. Article 968/1 of the Algerian Civil Law states:" The mortgagee must maintain the property and the expenses necessary to preserve it, and pay the taxes and costs due annually on the property, provided that he deducts from the fruits he receives the value of what was spent or meets this value of the price of the property in the rank to which he is entitled by law. "The mortgagee creditor of these expenses shall take the same rank as the mortgage in which it is guaranteed, he is an original for himself and not a representative of the mortgagor, and they stipulated two conditions for this:

- To be necessary to save the mortgage.
- The Pledgor shall refrain from spending after being required to do so.

If the mortgaged property is movable, the mortgagee creditor can collect what he spent in preserving the movable by virtue of a concession right, and he occupies the first place in the collection of his right before other mortgaged creditors, even if they preceded him in rank, under the concession of the expenses of preserving the movable. Article 992 of the Algerian Civil Law states: "The amounts spent in preserving the movable and the necessary restoration for it shall have a concession over all of it. These amounts shall be collected from the price of this movable that is burdened with the right of concession after the judicial expenses and the amounts due to the public treasury directly, but between them, some of them shall precede each other in the reverse order of the dates of their disbursement.

B: The right of the mortgagee to set off beneficial (improvement) expenses: It is all that the mortgagee creditor spent on the mortgagee during his management and investment, that is, what would have increased the value of the mortgage, because what was to prevent loss and damage is included in the necessary expenses, also called improvement expenses.

As for how to fulfill what was spent, he has the right to the financial value chosen by the mortgagor as the owner with the right to the option and the mortgagor always has the right to the option because the mortgagee creditor is considered in bad faith, that is, he knows that the mortgagee belongs to the mortgagor and Article 784 is applied in this regard. He also has the right to imprison the mortgagor to pressure the mortgagor and charge him with expediting the payment, in accordance with what is stated in the general rules. In Article 200 of the Algerian Civil Law: " Anyone who has committed to perform something may refrain



from fulfilling it as long as the creditor has not offered to fulfill an obligation that has resulted from it and has a causal relationship and a link to the debtor's obligation, or as long as the creditor has not provided sufficient insurance to fulfill this obligation. This shall be especially for the possessor or possessor of the thing, if he spends necessary or beneficial expenses on it, he may refrain from returning this thing until he meets what is due to him, except that the obligation to return arises from an illegal act. In the case of the sale of the mortgagee, the mortgagee is not distinguished from other creditors, but he divides with them what he spent by dividing the fines.

The second topic: The right of the mortgagee to set-off in Islamic jurisprudence

The first requirement: Set-off in Islamic jurisprudence and its conditions

With reference to the books of jurisprudence, we find that the jurists did not single out the set-off with a special definition, but rather they were interested in researching its terms and conditions, However, the jurists of Al-Malikiyah have devoted a full chapter to talk about it by defining it and clarifying its issues, and therefore we will try to find out the definition of set-off, its conditions and how it is in Islamic jurisprudence.

1/ Definition of Set-off in Islamic Jurisprudence :It is the projection of a debt required of a person on his opponent, in an interview of a debt required of that person for his opponent. Or is the omission of a debt with equal or unequal debts against each other.

Al-Ahsai defined it as "If you owe a debt to a person and you have a debt like that, each of you may leave his money in exchange for what he owes."

It appears from the definitions of jurists that set-off is a projection of a debt against a debt of equal or similar value.

2/ Set-off conditions in Islamic jurisprudence: Set-off three types of automatic set-off (compulsory), judicial set-off (compulsory order) and agreement set-off(optional), and each type has conditions. The most important of these conditions are:

- Convergence of the two rights(that each of the parties is a creditor and a debtor to the other).
- The similarity of the two religions(the equality of the two religions in terms of gender, types, recipe and solutions).
- It does not entail a legitimate right(such as falling into the suspicion of usury).
- Absence of harm(that is, the non-attachment of a third party's right to one of the two religions).

As for the Maliki jurists, they do not say the compulsory set-off that occurs by itself except rarely, Dessouki said: Most of the set-off conditions are permissible, but its obligation is few.

The second requirement: How to set-off the jurists

1/ How to set-off in Islamic jurisprudence: The jurists agreed that the mortgagee has the right to recourse against the mortgagor for what has been spent and is not considered a donor in this regard, if the expenditure is with the permission of the mortgagor or the judge, but if the mortgagee's expenditure is on the place of mortgage without the permission of the mortgagor or the judge, the jurists have disagreed on its recourse.

A: The public: (Al-Malikiyah, Hanbali, and Shafi'i) allowed the mortgagee the right to recourse against the mortgagee for what was spent on the place of mortgage, but they differed in releasing and restricting this recourse.



Al-Malikiyah: Al-Malikiyah released the right of the mortgagee to recourse against the mortgagor for what he spent, whether he was authorized to do so or not, detailing this according to the type of alimony:

-If alimony is necessary: (It is all that the mortgagee needs to keep it from reform and others), the principle in it is that it is obligatory on the mortgagor, and the evidence of this is the rule of "sheep in fine" and the mortgagee is under the hand of the mortgagor, he is obligated to do it, and in this case he has the right of recourse because he is a representative of the mortgagor in spending, stated in the footnote of Al-Kharashi: "And the mortgagee returned with his alimony in the debtor... And if he is absent, raise him to the Imam.

-If the alimony is not necessary: This alimony is in the case of carrying out the obligation of maintenance and maintenance, such as repairs, restorations and improvements, or the pledgor refrains from alimony, here the pledgee can refer to the pledgor on two conditions:

-To be necessary to save the mortgage.

-The mortgagor shall refrain from spending after being asked to do so

If alimony is not necessary in preserving the mortgage, the mortgagee is considered a donor, but if the mortgagor refrains from spending on the mortgage place after asking him to do so, he can return, and this return is owed by the mortgagor and not in the eyes of the mortgagee, but if the two conditions are fulfilled, he starts with it from the price of the mortgage or its fruits, as stated in the footnote of Al-Kharashi: "Whoever mortgages a palm tree or a plant that fears destruction by the destruction of his well and the mortgagor refuses to repair it, the mortgagee shall spend alimony on it, he shall return the price of the palm or plantation before his debt because if he does not spend on it, the mortgage perishes, he shall be harmed..."

-Hanbalis: Hanbalis restrict the return of the mortgagee to the mortgagor while he spent on two conditions :

-The owner's permission to do so.

-The intention of the mortgagee to return what was spent.

Otherwise, he counted as a donor in what he spent, according to the mask scout: "(And if he spent) the mortgagee (on a mortgage without permission, he mortgaged with his ability), that is: his ability to ask permission (Q) is (a donor, even if he intends to return); because it is excessive, as the owner did not ask permission if he can return the meaning of the netting, so he lacked permission and consent, like all other netting This is if alimony is necessary, but if alimony is not unnecessary, they do not see the right of recourse in the mask scout: "(And if the house collapses) the mortgaged (the mortgagee's age without the permission of the mortgagor did not return) the mortgagee (him), that is because he spent it in its building; because it is not a duty on the mortgagor, unlike animal alimony".

*Shafi'ism: They allowed recourse on two conditions:

• Unable to ask permission for the absence.

• To attest that he wanted his spouse to return to the mortgagor or else count as a donor.

B: The tap does not give the mortgagee the right to recourse against the mortgagee for what he spent if this is without the permission of the mortgagor or the judgment of the judge, and in this case he is considered a donor, It is stated in the crafts of the crafts: "And everything that the mortgagee is obligated to do without his permission or the mortgagee is obligated to do without his permission, so the mortgagee does it without his permission, it is severable; because he ruled the religion of another without his order, and if he does by the order of the judge, he returns to his owner".



Conclusion:

At the end of this research, we have reached some results that are advisable to present:

- In terms of definition, Algerian law in its definition of set-off did not depart from the general meaning of set-off in Islamic jurisprudence.
- In terms of conditions, the Algerian legislator has added two conditions for accuracy and legal protection.
- In terms of how to set off in Algerian law, it lies in the fact that it is necessary to save the mortgage that the mortgagor refrains from spending after claiming it.
- As for Islamic jurisprudence, jurists differed in how between the public and Malikism.
- The Algerian Civil Law approved Maliki jurisprudence in terms of how set-off is performed.
- It turns out that the Algerian Civil Law approved the Islamic jurisprudence regarding the right of the mortgagee to set-off with great approval.

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