OWNERSHIP AND POSSESSION

Define and discuss the concept of Ownership under Islamic Civil Law. What are the modes of acquiring and losing ownership?

What are modes of acquiring Ownership and loosing it in Islam?

DEFINITION OF OWNERSHIP

Meanings : The Arabic word for Ownership is milk which literally means relation of owner with the thing owned.

Introduction:

Some of the most important objects to which a man's worldly desires relate and with reference to which men deal with one another are regarded in law as the ' subject of Milk (Sub) which is usually translated as ownership. The proper subject- matter of milk is physical objects, but the word as used by the jurists, covers -a wider' range of ideas than those included in merely proprietary rights. So long as this is borne in mind there is no harm.in adopting the word "Ownership" as the nearest English equivalent of 'milk'.

Definition

2. Meaning of Milk :

Arabic term 'milk' literally means 'kingdom', or "relation of owner with the thing owned". , ,

3. Definition:

"Milk" or ownership has been defined by Muhammadan jurists as follows:

(a) According to Sadru'sh Shariat : Ownership is the expression of the connection existing between a man and a thing which is under his absolute power and control to the exclusion of control and disposition by others."

(b) According to English Jurisprudence: It means a right which avails against everyone who is subject to the law conferring the right to put thing to user of indefinite nature.'

(2) Taftarani:

Ownership is "the power of exclusive control and disposition".

(3) A1 Mujalla:

"The word 'milk' is often used to denote a thing itself over which the right or power of the malik or owner extends.

4. Terms Associated with Islamic Concept Of Ownership;

Following arc important terms which are essentially, associated with the ownership. ■*

(1) "Milk":

This terms it means "ownership". It also signifies a thing itself over which the right or power of the "malik" or owner extends.

(2) "Malik":

The person who has exclusive power, control and dispositions is called the malik. '

(3) "Mal":

The thing over which the juristic conception 'milk' extends may be 'mal, that is a physical object, or what is connected therewith, namely useful (manafat) cither in the shape of produce of a physical object or of laborer or services of man, or muta't (that is right to conjuged society, the last forms the subject of manakihat or matters relating to marriage and will be dealt with as a subject of family laws.

SUBJECT MATTER OF OWNERSHIP:

The subject matter of ownership is some physical object, termed as Mal. There could be no ownership, the subject matter of which is not Mal. The Ownership

and physical object go together, one cannot own that which is not material object.

ISLAMIC CONCEPT OF OWNERSHIP:

The Islamic concept of ownership is totally different from other concepts of ownership. Following points are notable in this respect

1. The real owner of each and every thing is only and only the Almighty God.
2. The proprietary rights of ownership has been given by God.
3. Nobody is authorized to use the private ownership of any person without his consent
4. There is a right fixed for poor and needy in the ownership of that person who is Shahib-Nisab.
5. Acquisition of ownership must be by some legal ways.
6. Use of ownership must be within the limits prescribed by Goa.

TERMS ASSOCIATED WITH ISLAMIC CONCEPT OF OWNERSHIP :

The following terms are closely associated with Islamic concept of ownership.

(a) Milk ; It is used for the thing itself over which the power of the owner extends.

(b) Malik (Owner) : The person whose control over a thing is exclusive is called Malik.

(c) Mal : The thing over which the juristic conception of milk, the ownership extends is physical object termed as Mal.

KINDS OF OWNERSHIP :

Ownership is of three kinds:'

(1) Milk raqba : Ownership of proprietary rights
(2) Milk-ul-yad : Ownership of the rights of possession.
(3) Milk-ul-tasarruf : Ownership of the right of disposition.

When 'milk' refers to mal or physical objects, it is divisible into 'milk-ur-raqba which may be a described or proprietary rights, 'milk-ul-yad'. That is, right of' possession, and 'milk-ut-tasarruf, that is right of disposition. The first, expresses the fact of the owner being specialy identified with the thing owned, and it leads to rights of the last two categories and right of disposition has been legalized for the acquisition of right of control and possession.

MODES OF ACQUISITION OF OWNERSHIP :

According to Islamic law, Ownership could be acquired in any of the following ways.

1. By Mawat
2. By Trade.
3. By Hunting.
4. By Gift
5. By Succession
6. By Will
7. By Iqtaa.

1) By Mawat : If a land is not the property of any one, nor it forms part of the pasture or forest belonging to village then it is a Waste land and whosoever secures and revives this land with the sanction of the head of the State, he gets the ownership of that land, so this is the first mode

through which ownership can be acquired.

2) **By trade :** Trade is a big mode of acquiring ownership. If it is made within the prescribed limits of Islam and without interest then the profit gaining from it will also be counted in ownership.

3) **By hunting :** Through hunting one can get the ownership of a mal (thing) Here Mal means free birds, animals and fishes. Hunting may be made with the help of animals, weapons, or it may be made by way of a trap.

4) **By Gift :** Transferring of a thing from one person to another person without any consideration is called gift. By this act ownership can also be acquired. That means to say, when one person delivers a thing to another person in the form of gift then such person to whom the thing is delivered becomes its owner. The person who makes gift called doner and person to whom favour it is being made called doner.

5) **By Succession** : When a person dies, all his property whether movable or immovable passes to his legal heirs according to the proportion fixed by Shariah and in this way his heirs become its owner through succession.

6) **By will :** Will is also considered a mode of acquiring Ownership, So if a person gets something W through will then he is the owner of that thing. But the Will must be of l/3rd of the total property.

7) **By Iqtaa :** An Islamic State can give a barren land to any person for cultivation. Such land is called lqtaa and this Iqtaa is considered the ownership of that person. So Iqtaa is also a mode of acquiring ownership.

7. Modes of Acquisition of Ownership

■Every human being has a right as inherent to his status to make such use of his physical and mental faculties as he chooses, provided he does not interfere with similar liberty of others. It is by' the exercise of these inherent rights and obligations connected with property are mostly acquired, transferred or extinguished.

As stated in Al-Mujallah, Ownershp is acquired either by;

a. Ihraz or original acquisition

b. Naql or transfer

c. Khalf or succession (1) Original Acquisition;

It is securing or taking possession of things not already owned by another. Such physical objects as arc intended for common use and have not already been appropriated by .someone may be secured as property. The nature of securing by means of which res nullius is converted into property depends upon the character of the thing.

i. - Illustration;

Trees growing on mountains are regarded as res nullius. If a person cuts such a tree or has it cut by his servants or by employing labourers, he will be deemed to have done enough to secure it as his property.

ii. Illustration:

Grass is also secured in some .way as trees, Water is secured by separating it from the source of its supply as by collecting rain water in a jar or a reservoir. But suppose a man digs a well or a tank and collects water therein from the underground current, such water cannot be said to be fully secured as it is not isolated from the source of its supply.

iii. Illustration;

Waste land, that is land which is not the property of any one, nor forms' part of the pasture or forest belonging to a village, can be secured by a man as his private property if he revives it with the sanction of the head of the state. Land is said to be revived if it is actually brought under cultivation or prepared for the purpose as by irrigation or by protecting it with a boundary wall or fence.

(2) Prescription:

According to the strict theory of Muhammadan Law a' thing that belongs to another cannot be acquired by mere possession however long, in other words there

can be no acquisition of property by prescription- But the same result has to a great ' extent been achieved indirectly in modem time. By the lawyers of Turkey and Egypt recognizing the power of the Sultan to forbid the Qazi to hear suits instituted after the head of the state who appoints a Qazi may limit his jurisdiction to a particular class of cases and thus excluded from the jurisdiction of the court', suits which have been, instituted after a lapse of-certain time. Though property cannot, according to the original1 theory, be acquired by mere prescription the law permits acquisition of rights connected with property in the nature of easements by prescription.

Illustration;

A right of way over another's land or a right to discharge rain water and a right to a certain amount of privacy for females. *

(3) **Khalf or Succession;**

This is a mode of acquisition which belongs to the department of family law. The property of a' deceased is divided among his heirs according to the shares specified in Quran.

(4) **Naql or Transfer:**

The most important and frequent mode of acquisition of ownership is transfer by an act of the person hiring the ownership to another person. Usually, such transfer is affected by means of a contract, which as a technical term has a wider significance in the Muhammadan Law than in the English Law. How a contract is made has been discussed under a separate chapter. However, contracts, in Muhammadan Law, having regard to their principal features may be classified as under -

1. .Alienation of property; for exchange namely sale.
2. without exchange, namely, hiba or simple gift
3. By way of dedication, namely, waqf.
4. To create succession, namely, bequest.

MODES OF LOSING OWNERSHIP :

Losing of ownership may be in the following ways.

1. **By Sale :** If a person sales out anything, then his ownership to that thing will be extinguished and will pass to that person to whom property or thing has been sold out.
2. **By Gift :** If a person makes a gift of anything then his ownership to that thing will be extinguished and will pass to that person to whom gift is made,
3. **By death of owner :** If a person dies, then his ownership extinguishes due to his death and passes to his legal heirs.
4. **By extinction of a thing :** If a thing over which a man shows his ownership is extinguished then in that case ownership of owner over that thing is also extinguished.
5. **By Operation of law :** One may lose his ownership over a thing by operation of law.

6. Curtailment of Rights Incidental to Ownership may Suspend or

Curtailed:

• - Some of the rights incidental to property may-be temporarily suspended or curtailed either by the act of the owner or by the law without affecting ownership.

For instance:

(1) Pledge:

Owner may pledge the thing or let it out and so long as he does not pay off the debt or the lease does not expire heis not entitled to possession though he is ' still the owner.

(2) Minor and Lunatic:

A minor and a lunatic are not allowed to have possession of their property until their disability is ceased, nor have they any power of alienation.

(3) Slave's Life:

The law absolutely forbids the destruction of a slave’s life and also puts a limitation on the right, to destroy other kind$ of living property such as cattle.

(4) Suspension of Rights to Destroy:

Sometimes the power of the owner to destroy his property may be suspended or currtailed having regard to the rights of others. For instance, if he has pledged a thing he cannot destroy it before paying his creditor.

(5) Sole and Joint Ownership

Ownership may be sole or joint. When property is owned by two or more persons in undivided shares it is described as Shirkatu’I-milk. Each of the coroners has a right to his share in every portion of his property. The Muhammadan Law as a general rule does not recognize joint tenancy in the sense of the English Law. Each co-sharer is entitled to dispose of his share and on his death it depends ' to his heirs and does not pass to the survivors. From the very nature, however, of undivided property no individual co-owner can have exclusive possession of or dominion over the thing and there is thus a ‘confusion of rights’ or ‘musha’. This is as we shall see considerably affected a co-owner’s powers of disposition over it, particularly when the intended disposition is of a voluntary nature.

Q. 39. WRITE A SHORT NOTE ON THE CONCEPT OF CONTRACT IN ISLAM.

CONTRACT:

Contract is called *“aqd”* in Islamic Jurisprudence. It is a bilateral transaction in contract with a unilateral transaction like will, needing proposal (ijaab) and acceptance (*qabool*). It is a transaction which gives rise to legal effects.

ESSENTIALS OF CONTRACT:

The essentials of a contract, under Islamic Law, are:

(1) Two parties or *'faalia'* to the contract, possessing full legal capacity that is to say they should be of the age of majority and of sound mind.

(2) One party should make the offer (ijaab) and the other party should accept (*qabool*) that proposal. Offer and acceptance ore the *sine qua non* of a contract.

(3) Although no formality is necessary for a contract, yet some outward manifestation *(suriah)* is necessary for the declaration of on offer and its acceptance. Actual delivery of the possession of gifted property by

a donor to the donee is an example of such *(suriah*

(4) The object *(ghaijiah)* of the contract should be a lawful one. For example the *ghaijiah of* a *nikah* is legalization of cohabitation between a man and a woman and the legalization of procreation.

(5) Consideration is essential in many contracts but not in all contracts under Islamic Law.

4. Essentials of Contract:

Islamic law specifies following four essentials of a valid contract

(1) Faa'Iia (Parties) .

This cause appertains to the persons making the contract. A valid contract requires that there must be two parties involved.

(2) Mad'dia (Proposal and Acceptance)

This appertains the essence, namely, proposal and acceptance. It is essential to constitute a valid contract that there must be two parties, one party should make a proposal and the other should accept it

(3) Suaria (Agreement of Minds) . .

This cause relates to the outward manifestation that is the minds of parties must agree and their declaration must relate to the same matter.

Illustration;

A owns, two hbuses, one in Karachi and sccond.in Hyderabad. B offers him to buy one of his houses. B wants to buy the house in Karachi and in pursuance of this object he makes offer, but on the other hand, A accepts his offer considering the house in Hyderabad as the subject matter of the contract The contract is not valid because their promises do not release to the same matter. -

(4) Ghayia (Legal relationship)

This cause relates to the result aimed at, i.e., the object of the contract must be to produce a legal result. This is regarded as the dominant idea of a contract in Muhammadan Law that it establishes a tie of legal relations arising from the consent of the minds of two persons to deal with each other in respect of certain rights. ' '

Illustration

A sells or gives an object to B. The former consents to pass on his proprietary rights therein to the latter who consents to take the property with whatever obligations might be incidental thereto, such as the liability to pay, taxes if - the subject matter of the transaction be land, and to feed if the thing sold or given be an animal and in the case of sale, also to pay the price. In the case of a gift, on the other hand, there is the moral obligation of gratitude on the part of the donee towards the donor, and the Muhammadan Law docs not ignore the moral aspect of a transaction.

If the contract is of property then immediate delivery of possession (*seisin*) is also essential in some contracts such as a gift.

If the contract is of the nature of gift *(hiba)* it also requires '*tangiz*', *i.e.,* immediate operation or effect of the contract absolute and unconditional. *Tangiz* is the essential condition for the validity of a contract.

Contract belongs to the part of the Islamic Jurisprudence classed as *'muamaalat"*. Contracts are of different varieties such of sale, gift, partnership, agency, bail, *etc.* Islamic Jurisprudence lays much stress upon the performance of contracts. Even the Holy Qur'an, the basic source of Islamic Law, itself lays down :

"*And keep the covenant, certainly of the covenant it will be asked."* (XVII: 45).

The Holy Qur'an orders to write down the terms of a contract and to get the documents properly witnessed:

'Believers ! when you contract a debt for a fixed term, record it in writing. (II: 282).

CLASSIFICATION OF CONTRACTS:

Islamic Law classifies the contracts as under :

(1) **Contract for the transfer of property:** (a) For exchange such' as sale, *(b)* without exchange such as *hiba,* waqf, will, *etc.* Contract for the transfer of mere usufruct: (a) For exchange such as bailments, carriage of goods, leases, personal and professional services; (*b*) Without exchange such as '*ariat'.*

(2) **Contract for representation such as agency *(wakalat).***

(3) **Contract for contracting and discharging obligation such as debt, pledge, surety,**

(4) **Contract for consortium, *eg.,* marriage.** This has been called *"meesqqon ghaleezon'* (strong covenant) by the Holy Qur'an,

CONTRACT IN THE EYE OF HOLY PROPHET (PEACE BE UPON HIM):

Prophet (peace be upon him) says, "He who has no respect for keeping promises, does not possess deen.'

ESSENTIAL -INGREDIENTS OF A VALID CONTRACT UNDER ISLAMIC LAW : Following are the essential ingredients of a valid contract.

1. Parties : There must be at least two parties to a contract One person cannot make a valid contract with himself. So there must be at least two parties to make a contract
2. Capacity to enter into contract : The parties must have the capacity to enter into a contract. That means to say, they must be sane, major *etc. etc.* Legal Capacity of Parties: The validity of a contract depends first of all on the legal fitness of the person entering into it. If the persons making a contract or disposition have not the necessary capacity, contract would be'void altogether.
3. Offer and acceptance (Ijab and Qabul): A contract requires that one party should make the offer (ijab) and the other party should accept (qabol) that offer. Offer and acceptance are *sine- qua-non* of a contract

EXAMPLE : A offers to sell his house to B. B accepts this offer. This is a contract between A and B.

Conditions for offer and acceptance: The conditions which have been laid down by the jurists for making a valid offer and acceptance are as follows.

1. The acceptance must be in conformity with the offer. For instance if 'A' offers his car to B for 10,000 Rupees and B accepted.it for 8,000 Rupees. Then this will not be an acceptance but counter offer by B. Therefore the acceptance must conform with the offer. As any change in it make it a counter offer.
2. The offer and acceptance must be made at one and the same session, either in fact or what the law considers as such.
3. Acceptance should correspond to the offer. It should not be tendered after the offer has expired. If acceptance and offer has been communicated by post, contract is made at the place and time of acceptance.
4. Existence of subject matter : Existence of subject matter is necessary at the time of making a contract so that it may be transferred to other

party. If the subject matter docs not exist then there is no contract between the parties. Therefore the subject matter must be present at the time of making contract. FITNESS OF THE SUBJECT MATTER : Another essential of a valid contract like that of any other juristic act is the fitness of its subject matter (mahal); if the subject matter is not fit for the purposes, the contract relating thereto will be void altogether.

5. Fitness of Subject Matter:

Another essential of a valid contract like that of any other juristic act is the fitness of its subject matter (mahal); if the subject matter is not fit for the purpose, the contract relating thereto would be void altogether.

Illustration:

If A and B enter into a contract for the sale of a horse* and while they discuss the sale price, the horse dies, there is no consent, as the subject of the contract itself is extinct Similarly, a marriage within prohibitory relationship is void ab initio.

CONSENT OF THE PARTIES :

The contract must have been made by the free consent of the parties. To constitute free consent, following conditions must be fulfilled.

1. Both the parties must agree upon the same thing in the same sense.
2. Such consent should not have been caused by—
   a) Coercion.
   b) Undue influence.
   c) Fraud
   d) Misrepresentation.
   e) Mistake.

Free consent:

Consent is the essence of contract; where there is no consent there is no agreement and the consent should be free.

Illustration:

The contract of marriage must be based on the free consent of parties, if the consent is not free, the marriage is not valid, under Islamic Law.

(4) The consent without knowledge of the Articles:
It is again necessary that a contract for an article which does not exist or which is defective apparently or otherwise is ineffective is void

LAWFUL OBJECT :

The object of the contract must be lawful. The presumption is that every object of contract is lawful unless expressly prohibited by a provision of law.

The term object means purpose or design. There may be nothing objectionable so far as the consideration for an agreement is concerned and yet the purpose for which it was entered into may be unlawful and agreement would be void. A contract is illegal if it be in contravention of a statute or opposed to its genera] policy and intent or is forbidden by law or legislature enactments.

CONSIDERATION :

Consideration is essential, in many contracts but not in all contracts under Islamic law.

(5) Consideration: This is an important factor but it can be explained that in agreements where price is a deciding factor, the consideration surely passes on to the other. As regards agreement of gift though there is no exchange of consideration, yet the donee is morally obliged to the donor.

FULFILMENT OF CONDITION :

If at the time of making a contract, some conditions are also added to it, then the fulfilment of those conditions is necessary' otherwise contract will become

null and void. Therefore if any condition is added to the contract then the same should be fulfilled so that the contract may be effectual between the parties.

5. Formation of Contract:

Generally, Muhammadan Law does not require any formality such as ' English law but the following requirements have to be fulfilled to form a valid contract

(1) Declaration of consent

(2) Majlis faceting)

(3) Use of words

(1) Declaration of Consent: -.

All that is required, as we have seen, is declaration of consent by each party. The declaration which is first made is called proposal and the second declaration is called acceptance. The two minds must be in agreement otherwise there is no real consent

(2) Same meeting (Majlis)

The proposal and acceptance must be made at the same meeting (Majlis), either in fact or what the law considers as such.

Illustration:

A man proposes face to face to another to sell his. horse to him, if the person addressed leaves the place without signifying his acceptance the offer comes to an end, because there is no obligation on the owner of the horse to keep his- , offer open. But, if the offer is communicated by means of a messenger or a letter, the meeting for the purpose of acceptance is held to be at the place, and time the message reaches the person for whom the offer was intended. If the person then signifies his acceptance the contract is concluded.

(3) Use of words:

The books speak of certain words as being plain (Surech) and certain other words as being allusive (Kinaya) in relation to particular kind of disposition. What is meant is that when a man has used plain language, there is no need for inquiry as to what he meant, but such an inquiry becomes necessary when he has used ambiguous language. It is not to be supposed that so far as contracts and dispositions relating to property are concerned that the mere utterance of certain words, without the corresponding intention as understood in Muhammadan Law, would effectuate a transfer of property or create any obligation.

Q. 41. Define 'Milk[1] and what properties are included in 'Mal' ? Are wises and pigs included in Mal and can they be owned by a Muslim ?

MILK:

Milk are objects to which a man's wordly desires relate and with reference to which men deal with one another. The proper subject-matter of *milk* is physical objects, but the word as used by the jurists covers a wide range of ideas than those included in mere proprietary rights.

Milk is defined by *Sadrush Sharit* as the expression of connection existing between a man and a thing which is under his absolute power and control, to the exclusion of control and disposition by other. *Taftazani* defines it as the power of exclusive control and disposition. But the word *milk* is often used for the thing itself over which the power of *malik* (owner) extends.

The things over which the juristic conception of *milk* extends may be *mal,* that is, a physical object, or what is connected therewith, namely, usufruct *(manf* at) either in the shape of produce of a physical object or of labour and services of man *muta't* that is right to conjugal society.

Mal is defined as that which can be hoarded or secured for use and enjoyment at a time of need, or that to which a man's desires incline and which

men are in the habit of giving away to others and of excluding others therefrom. This removes from the category of *mal* usufruct and right to conjugal society. The word, mal is narrower than the English word ‘property’ and is properly applicable only to objects which have a perceptible existence in the outside world, that is to say, to things corporeal and tangible. Future produce or *munfa'at,* for instance, may be the subject to ownership, but is not called *mal.*

Nothing can be property unless it be such that men can derive advantage from it, that is, it must be of some use to them. Sometimes the law prohibits the use of a certain thing in any way whatever by a particular class of men; in that cause, it fails to possess any use or advantage for them. But such things would still possess the quality of property if they are of use to persons to whom the prohibition does not extend. For instance, the use of wines and pigs which are declared unclean is forbidden to a Muslim but so their use is lawful to non-Muslims, they are regarded as property, though to Muslims they have no value. On the other hand, things which are of no use to any one, such as dead bodies or human blood are not property.

So wines and pigs are property but they cannot be owned by a Muslim, as their use is prohibited by Islam.

Things have very inconsiderable value like a handful of earth or broken crumbs are not considered to be property by jurists.

Things which are for the common use of mankind and indispensable to individual and social life cannot be exclusively appropriated by one person such as air, fire, light, grass, water of seas, rivers, streams and public roads. The only condition relating to the extent and mode of use of such things is that it should not cause injury to the community.