The Sale of items prior to gaining ownership and possession

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Contents

1. Need to comply to Nabi SAW

Firstly, we need to remember that the instructions of Nabi S.A.W. regarding financial transactions required to be appropriately understood and implemented.

2. The essentiality of ownership of an asset prior to having allowance to sell it.

1. The first principal in regard to the sale of items that are not to be manufactured by you is that you have ownership of those items.

   Ownership (or ***Milkiyyah***) is essential to establish an individual or juristic person's (e.g. company's) claim on an asset, and grant him/her/them the right to dispose or sell the same in formats allowed by the Shariah.

   It is rational that you cannot sell an item that is not yet in your ownership. Although there is great possibility and available financial means to gain ownership of a items sought by clients which are normally manufactured or sold by distributors or original manufacturing concerns, the reality of the matter is that such items are not in your ownership until and unless you have purchased the same from the suppliers.

   Gaining profit from that which you still do not own is a further impermissibility since you would then be profiting on an item of sale that you do not even own.

   The object of sale must be in the ownership of the seller at the time of sale. The sale of anything before acquiring ownership is invalid e.g. A sells to B a car which is presently owned by C. A is hopeful that he will buy it from C and subsequently deliver it to B. This sale is invalid because the car was not owned by A at the time of sale.

   This is the very reason why selling shares/stock before gaining ownership is impermissible.

   This is shown in the following hadith

السنن الكبرى للنسائي - (ج 4 / ص 39)

بيع ما ليس عند البائع (6205) أخبرنا عثمان بن عبد الله قال حدثنا سعيد بن سليمان عن عباد بن العوام عن سعيد بن أبي عروبة عن أبي رجاء قال عثمان هو محمد بن سيف عن مطر الوراق عن عمرو بن شعيب عن أبيه عن جده قال قال رسول الله صلى الله عليه وسلم ليس على الرجل بيع فيما لا يملك

In this hadith, where Amr bin Shu'aib narrates through his grandfather, Nabi SAW clearly prohibits the sale of that which you do not own.

السنن الكبرى للنسائي - (ج 4 / ص 39)

(6206) حدثنا زياد بن أيوب قال حدثنا هشيم قال حدثنا أبو بشر عن يوسف بن ماهك عن حكيم بن حزام قال سألت النبي صلى الله عليه وسلم قلت يا رسول الله يأتيني الرجل يسألني بيع ما ليس عندي أبيعه منه ثم ابتاعه له من السوق فقال لا تبع ما ليس عندك السلم في الطعام

In this hadith, Hakeem bin Hizaam says: I asked Nabi SAW (saying) O Messenger of Allah, a person comes to me asking me to sell (to him) that which I do not have. Can I conclude such a sale, then buy it (the article of sale) for (delivery to) him from the market. He answered: Do not sell that which you do not have. Prepayment (or a salaam contract) can be done in regard to food (and not other commodities that are available in the market).

3. The essentiality of possession

لا تبع ما ليس عندك

The second principle that Nabi SAW advocated is "Do not sell that which you do not have".

The wording in the hadith does not state "Do not sell that which you do not own" since it is rational that you do not have a right to sell that which is not in your ***Milkiyyah***.

The preposition "inda" which is prefixed to the masculine singular pronoun "ka" refers to possession and not ownership.

The expression "that which you do not have" refers to an item of sale, which despite being in your ownership, is not within your possession.

In fact the previous hadith of Hakeem bin Hizaam also entails the same wording and this indicates that this hadith is referring to possession and not ownership.

Where we regard the hadith "that which you do not have" to also refers to an item of sale, which despite being in your ownership, cannot be in your possession, and is therefore in your "constructive possession" (in relation to immovable assets like property etc.) we would be using a legal innovation of either secular law or may consider it as a legal innovation allowed in the Shariah in terms of Maslahah. A property e.g. house or land that you may own few thousand kilometers away from your residence or present location would be in your constructive possession only because the title deeds which reflect ownership in terms of a legal system operative in a specified political boundary.

Possession of an item generally refers to either something that is immediately with you on your very person. In a more figurative sense, it would refer to something that is contained within the space and domain of your private property (home or business).

Where an asset you own is within the domain of the private property of another to which you have access you do not have actual possession. Rather, you enjoy an assumed possession. In fact when you are actually physically distant from an asset you own, and which is physically located at any remote premise, then also you do not have actual possession even though your ownership is established. Possession in this case is also assumed. Assumed possession is certain cases, like the cited example, cannot be equated to actual possession since "assumed possession" is divided into immediately or presently deliverable and undeliverable categories.

You cannot claim to have possession of an asset that you own that has been usurped by a known person since you do not have present access to the asset.

Possession differs from ownership in the sense that although I may possess a vehicle or an asset, it may not necessarily be in my ownership.

The quoted hadith literally refers to possession and not ownership since absence of ownership is already regarded to result, as a foregone conclusion, in the impermissibility of the contract of sale.

4. Constructive possession

Since the hadith لا تبع ما ليس عندك refers to possession does such possession refer to every type of possession or can we limit the formats of possession to which it would imply? We affirm that actual possession (together with ownership) is a norm in sale contracts.

Is "Immovable Assets" within the purview of the hadith or is it a specific exception. After analysis of the fact that it is generally impossible to relocate certain fixed assets, and that being actually present before such fixed assets at the instance of a contract may not be financially or otherwise possible for the seller, we may safely infer that generally immovable assets is a specific exception to the rule in the hadith rather than within the purview of the literal text of the quoted hadith (prophetic statement). This is supported by the conduct of some of the Sahabah who sold land they owned in distant territories.

Therefore the general sense of the hadith refers to actual or real possession that is deliverable, and would include some levels of assumed possession since not every level of the latter allows for delivery to the client.

The previously quoted hadith which prohibits the sale of an item prior to gaining possession substantiates the fact that prior ownership is being elementary and foundational to a contract of sale.

The latter hadith renders ownership alone as an insufficient basis to sell unless it is accompanied gaining possession so that the latter allows the purchaser to generally dispose thereof in whatever manner he/she finds suitable. Details of this other hadith are hereafter discussed (See 5.).

In a non-Islamic context, what is the legal meaning and implications of "constructive possession" in the case of a motor vehicle or other movable asset?

Constructive possession refers to where the owner has not taken physical delivery of the commodity, but it has come into his control, and all rights and liabilities of the commodity are passed on to him including the risk or consequences of its destruction.

We can agree, for Shariah purposes, that this definition can validly be applied in regard to immovable assets. However, this definition violates the shariah demands in regard to *Qabh* "Taking possession" of movable assets. Disregard for this critical difference would imply that we are now adopting a Kufr based definition to apply to movable assets, which, in the primary sense of the Shariah, are not governed within the purview of the Kufr definition, although we admit that some movable assets like motor vehicles etc. are better protected through secular legal registrations and transfers. However, the latter mechanism is grounded on the Maslahah or public and consumer interest, rather than a natural right of ownership.

In the Muraabahah applications of Islamic Banking contracts, the purchaser (or bank's client) is given a mandate to simultaneously act as an agent (Wakeel) of the bank to gain delivery on the bank's behalf.

Thus, constructive possession of movable assets may not necessarily imply that the owner thereof can guarantee or assure delivery of the same. It can thus not be equated to actual possession in every sense. Also, constructive possession may not necessarily imply that a client or the buyer has a genuine and certain description of every aspect of the asset for sale. Sales of items in constructive possession are more often subject to buyer's right to exercise the option to terminate the contract if the subject of sale is not to the exact descriptions provided by the seller or to the personal or other preferences of the purchaser.

الهداية

باب المرابحة

(وَيَجُوزُ بَيْعُ الْعَقَارِ قَبْلَ الْقَبْضِ عِنْدَ أَبِي حَنِيفَةَ وَأَبِي يُوسُفَ رحمه الله . وَقَالَ مُحَمَّدٌ رحمه الله : لَا يَجُوزُ) رُجُوعًا إلَى إطْلَاقِ الْحَدِيثِ وَاعْتِبَارًا بِالْمَنْقُولِ وَصَارَ كَالْإِجَارَةِ , وَلَهُمَا أَنَّ رُكْنَ الْبَيْعِ صَدَرَ مِنْ أَهْلِهِ فِي مَحَلِّهِ , وَلَا غَرَرَ فِيهِ ; لِأَنَّ الْهَلَاكَ فِي الْعَقَارِ نَادِرٌ , بِخِلَافِ الْمَنْقُولِ , وَالْغَرَرَ الْمَنْهِيَّ عَنْهُ غَرَرُ انْفِسَاخِ الْعَقْدِ , وَالْحَدِيثُ مَعْلُولٌ بِهِ عَمَلًا بِدَلَائِلِ الْجَوَازِ وَالْإِجَارَةِ , قِيلَ عَلَى هَذَا الْخِلَافِ ; وَلَوْ سَلَّمَ فَالْمَعْقُودُ عَلَيْهِ فِي الْإِجَارَةِ الْمَنَافِعُ وَهَلَاكُهَا غَيْرُ نَادِرٍ .

العناية شرح الهداية

وَيَجُوزُ بَيْعُ الْعَقَارِ قَبْلَ الْقَبْضِ عِنْدَ أَبِي حَنِيفَةَ وَأَبِي يُوسُفَ . وَقَالَ مُحَمَّدٌ : لَا يَجُوزُ رُجُوعًا إلَى إطْلَاقِ الْحَدِيثِ وَاعْتِبَارًا بِالْمَنْقُولِ بِجَامِعِ عَدَمِ الْقَبْضِ فِيهِمَا وَصَارَ كَالْإِجَارَةِ فَإِنَّهَا فِي الْعَقَارِ لَا تَجُوزُ قَبْلَ الْقَبْضِ وَالْجَامِعُ اشْتِمَالُهُمَا عَلَى رِبْحِ مَا لَمْ يُضْمَنْ , فَإِنَّ الْمَقْصُودَ مِنْ الْبَيْعِ الرِّبْحُ وَرِبْحُ مَا لَمْ يُضْمَنْ مَنْهِيٌّ عَنْهُ شَرْعًا , وَالنَّهْيُ يَقْتَضِي الْفَسَادَ فَيَكُونُ الْبَيْعُ فَاسِدًا قَبْلَ الْقَبْضِ لِأَنَّهُ لَمْ يَدْخُلْ فِي ضَمَانِهِ كَمَا فِي الْإِجَارَةِ وَلَهُمَا أَنَّ رُكْنَ الْبَيْعِ صَدَرَ مِنْ أَهْلِهِ) لِكَوْنِهِ بَالِغًا عَاقِلًا غَيْرَ مَحْجُورٍ عَلَيْهِ (فِي مَحَلِّهِ) لِأَنَّهُ مَحَلٌّ مَمْلُوكٌ لَهُ , وَذَلِكَ يَقْتَضِي الْجَوَازَ , وَالْمَانِعُ وَهُوَ الْغَرَرُ مَعْدُومٌ فِيهِ لِأَنَّهُ بِاعْتِبَارِ الْهَلَاكِ وَهُوَ فِي الْعَقَارِ نَادِرٌ فِيهِ فَصَحَّ الْعَقْدُ لِوُجُودِ الْمُقْتَضِي وَانْتِفَاءِ الْمَانِعِ , بِخِلَافِ الْمَنْقُولِ فَإِنَّ الْمَانِعَ فِيهِ مَوْجُودٌ , وَمَنْعُ انْتِفَاءِ الْمَانِعِ فِي الْعَقَارِ فَإِنَّهُ غَرَرُ الِانْفِسَاخِ , وَقَدْ يُوجَدُ بِالرَّدِّ بِالْعَيْبِ . وَأُجِيبَ بِأَنَّهُ لَا يَصِحُّ لِأَنَّهُ إذَا جَازَ الْبَيْعُ فِيهِ قَبْلَ الْقَبْضِ صَارَ مِلْكًا لِلْمُشْتَرِي , وَحِينَئِذٍ لَا يَمْلِكُ الْمُشْتَرِي الْأَوَّلُ الرَّدَّ , وَفِيهِ نَظَرٌ لِأَنَّهُ إنْ رُدَّ عَلَيْهِ بِقَضَاءِ الْقَاضِي عَادَ لَهُ الرَّدُّ . وَالْأَوْلَى أَنْ يُقَالَ : كَلَامُنَا فِي غَرَرِ الِانْفِسَاخِ وَمَا ذَكَرْتُمْ غَرَرُ الْفَسْخِ , وَإِذَا كَانَ الْهَلَاكُ فِي الْعَقَارِ نَادِرًا كَانَ غَرَرُ انْفِسَاخِ الْعَقْدِ الْمَنْهِيِّ عَنْهُ مُنْتَفِيًا . وَالْحَدِيثُ مَعْلُولٌ بِهِ فَلَمْ يَدْخُلْ فِيهِ الْعَقَارُ فَجَازَ بَيْعُهُ قَبْلَ الْقَبْضِ عَمَلًا بِدَلِيلِ الْجَوَازِ مِنْ الْكِتَابِ وَالسُّنَّةِ وَالْإِجْمَاعِ , وَاعْتُرِضَ بِأَنَّهُ تَعْلِيلٌ فِي مَوْضِعِ النَّصِّ وَهُوَ مَا رُوِيَ { أَنَّهُ عليه الصلاة والسلام نَهَى عَنْ بَيْعِ مَا لَمْ يُقْبَضْ } وَهُوَ عَامٌّ . وَالتَّعْلِيلُ فِي مَوْضِعِ النَّصِّ غَيْرُ مَقْبُولٍ . وَأُجِيبَ أَنَّهُ عَامٌّ دَخَلَهُ الْخُصُوصُ لِإِجْمَاعِنَا عَلَى جَوَازِ التَّصَرُّفِ فِي الثَّمَنِ وَالصَّدَاقِ قَبْلَ الْقَبْضِ , وَمِثْلُ هَذَا الْعَامِّ يَجُوزُ تَخْصِيصُهُ بِالْقِيَاسِ فَنَحْمِلُهُ عَلَى الْمَنْقُولِ , كَذَا فِي الْمَبْسُوطِ , وَفِيهِ بَحْثٌ لِأَنَّ الْمُرَادَ بِالْحَدِيثِ النَّهْيُ عَنْ بَيْعِ مَبِيعٍ لَمْ يُقْبَضْ بِدَلِيلِ حَدِيثِ حَكِيمِ بْنِ حِزَامٍ { إذَا ابْتَعْتَ شَيْئًا فَلَا تَبِعْهُ حَتَّى تَقْبِضَ } سَلَّمْنَا أَنَّهُ نَهَى عَنْ بَيْعِ مَا لَمْ يُقْبَضْ مِنْ مِلْكِهِ الَّذِي ثَبَتَ بِسَبَبٍ مِنْ الْأَسْبَابِ , لَكِنَّ الْإِجْمَاعَ لَا يَصْلُحُ تَخْصِيصًا , سَلَّمْنَا صَلَاحِيَّتَهُ لِذَلِكَ , لَكِنَّ التَّخْصِيصَ لِبَيَانِ أَنَّهُ لَمْ يَدْخُلْ فِي الْعَامِّ بَعْدَ احْتِمَالِهِ تَنَاوُلَهُ , وَإِذَا كَانَ الْحَدِيثُ مَعْلُولًا بِغَرَرِ الِانْفِسَاخِ لَا يَحْتَمِلُ تَنَاوُلَ مَا لَيْسَ فِيهِ ذَلِكَ , إذْ الشَّيْءُ لَا يَحْتَمِلُ تَنَاوُلَ مَا يُنَافِيهِ تَنَاوُلًا فَرْدِيًّا وَاعْلَمْ أَنِّي أَذْكُرُ لَك مَا سَنَحَ لِي فِي هَذَا الْمَوْضِعِ بِتَوْفِيقِ اللَّهِ تَعَالَى عَلَى وَجْهٍ يَنْدَفِعُ بِهِ جَمِيعُ ذَلِكَ وَهُوَ أَنْ يُقَالَ : الْأَصْلُ أَنْ يَكُونَ بَيْعُ الْمَنْقُولِ وَغَيْرِ الْمَنْقُولِ قَبْلَ الْقَبْضِ جَائِزًا لِعُمُومِ قَوْلِهِ تعالى { وَأَحَلَّ اللَّهُ الْبَيْعَ } لَكِنَّهُ خَصَّ مِنْهُ الرِّبَا بِدَلِيلٍ مُسْتَقِلٍّ مُقَارِنٍ وَهُوَ قوله تعالى { وَحَرَّمَ الرِّبَا } وَالْعَامُّ الْمَخْصُوصُ يَجُوزُ تَخْصِيصُهُ بِخَبَرِ الْوَاحِدِ , وَهُوَ مَا رُوِيَ { أَنَّهُ نَهَى عَنْ بَيْعِ مَا لَمْ يُقْبَضْ } , ثُمَّ لَا يَخْلُو إمَّا أَنْ يَكُونَ مَعْلُولًا بِغَرَرِ الِانْفِسَاخِ أَوْ لَا , فَإِنْ كَانَ فَقَدْ ثَبَتَ الْمَطْلُوبُ حَيْثُ لَا يَتَنَاوَلُ الْعَقَارَ , وَإِنْ لَمْ يَكُنْ وَقَعَ التَّعَارُضُ بَيْنَهُ وَبَيْنَ مَا رُوِيَ فِي السُّنَنِ مُسْنَدًا إلَى الْأَعْرَجِ عَنْ أَبِي هُرَيْرَةَ أَنَّ النَّبِيَّ صلى الله عليه وسلم { نَهَى عَنْ بَيْعِ الْغَرَرِ } وَبَيْنَهُ وَبَيْنَ أَدِلَّةِ الْجَوَازِ وَذَلِكَ يَسْتَلْزِمُ التَّرْكَ , وَجَعْلُهُ مَعْلُولًا بِذَلِكَ إعْمَالٌ لِثُبُوتِ التَّوْفِيقِ حِينَئِذٍ , وَالْإِعْمَالُ مُتَعَيَّنٌ لَا مَحَالَةَ . وَكَمَا لَمْ يَتَنَاوَلْ الْعَقَارَ لَمْ يَتَنَاوَلْ الصَّدَاقَ وَبَدَلَ الْخُلْعِ , وَيَكُونُ مُخْتَصًّا بِعَقْدٍ يَنْفَسِخُ بِهَلَاكِ الْمَعُوَّضِ قَبْلَ الْقَبْضِ , هَذَا وَاَللَّهُ أَعْلَمُ بِالصَّوَابِ (قَوْلُهُ وَالْإِجَارَةُ) جَوَابٌ عَنْ قِيَاسِ مُحَمَّدٍ صُورَةَ النِّزَاعِ عَلَى الْإِجَارَةِ وَتَقْرِيرُهُ أَنَّهَا لَا تَصْلُحُ مَقِيسًا عَلَيْهَا لِأَنَّهَا عَلَى الِاخْتِلَافِ . قَالَ فِي الْإِيضَاحِ : مَا لَا يَجُوزُ بَيْعُهُ قَبْلَ الْقَبْضِ لَا تَجُوزُ إجَارَتُهُ , لِأَنَّ صِحَّةَ الْإِجَارَةِ بِمِلْكِ الرَّقَبَةِ , فَإِذَا مَلَكَ التَّصَرُّفَ فِي الْأَصْلِ وَهُوَ الرَّقَبَةُ مَلَكَ فِي

التَّابِعِ وَقِيلَ : لَا يَجُوزُ بِلَا خِلَافٍ وَهُوَ الصَّحِيحُ , لِأَنَّ الْمَنَافِعَ بِمَنْزِلَةِ الْمَنْقُولِ , وَالْإِجَارَةُ تَمْلِيكُ الْمَنَافِعِ فَيَمْتَنِعُ جَوَازُهَا كَبَيْعِ الْمَنْقُولِ .

The above difference between Shaikhain's (Imam Abu HAnifah and his student, Imam Yusuf) and Imam Muhammad in regard to the sale of immovable property establishes that in the Shariah (in terms of Hanafi Fiqh), true Qabd of even property is established by being physically located on the property for whatever period that may imply. The concept of "Constructive possession" would be denied by Imam Muhammad. In fact, in the land ownership system of the case where Shaikhain allows the sale of immovable property before possession, there is neither any constructive possession of that land through any legal document that was recognised in an Islamic State.

In almost all of these early contracts, there were no documents and title deeds to establish ownership. Thus, what did not originally exist as a valid means of representing ownership cannot be truly regarded as subsequently rightful to be conferred such a status on an absolute basis.

We do not deny the legal necessity in a developed economy where land is properly defined and demarcated with the best of surveying, architectural and other geographic tools that legal registration is an absolute necessity, and that this prevents the abuse of ownership claims by allowing the immovable asset to be traced from owner to owner, allowing it to be geographically located by central municipal or government authorities as well as the fact that it grants the legal system a sound basis to establish ownership with certainty or a great degree thereof.

We admit that constructive possession in the case of immovable assets can be include under the purview of Maslahah Mursalah, but deny that such possession be extended over movable assets.

5. Difference between *Murabahah* and *Musawamah*

A simple sale without disclosing the cost price to the client is called *Musawamah* (a bargaining sale) in Arabic. This sale can be cash or on credit with a preferability of a specified date of payment.

However when the cost price is disclosed to the client it is called Murabahah. A Murabahah can be concluded on a cash payment basis or on deferred payment basis (Murabahah Muajjal).

6. The view of Imam Shafi

الأم للشافعي
كتاب البيوع

بَابُ حُكْمِ الْمَبِيعِ قَبْلَ الْقَبْضِ وَبَعْدَهُ (أَخْبَرَنَا الرَّبِيعُ بْنُ سُلَيْمَانَ) : قَالَ أَخْبَرَنَا الشَّافِعِيُّ قَالَ أَخْبَرَنَا سُفْيَانُ بْنُ عُيَيْنَةَ عَنْ عَمْرِو بْنِ دِينَارٍ عَنْ طَاوُسٍ عَنْ ابْنِ عَبَّاسٍ رضي الله عنهما قَالَ أَمَّا { الَّذِي نَهَى عَنْهُ رَسُولُ اللَّهِ صلى الله عليه وسلم أَنْ يُبَاعَ حَتَّى يُقْبَضَ : الطَّعَامُ } قَالَ ابْنُ عَبَّاسٍ بِرَأْيِهِ وَلَا أَحْسِبُ كُلَّ شَيْءٍ إلَّا مِثْلَهُ . (قَالَ الشَّافِعِيُّ) : وَبِهَذَا نَأْخُذُ , فَمَنْ ابْتَاعَ شَيْئًا كَائِنًا مَا كَانَ فَلَيْسَ لَهُ أَنْ يَبِيعَهُ حَتَّى يَقْبِضَهُ , وَذَلِكَ أَنَّ مَنْ بَاعَ مَا لَمْ يَقْبِضْ فَقَدْ دَخَلَ فِي الْمَعْنَى الَّذِي يَرْوِي بَعْضُ النَّاسِ { عَنْ النَّبِيِّ صلى الله عليه وسلم أَنَّهُ قَالَ لِعَتَّابِ بْنِ أَسَيْدٍ حِينَ وَجَّهَهُ إلَى أَهْلِ مَكَّةَ انْهَهُمْ عَنْ بَيْعِ مَا لَمْ يَقْبِضُوا وَرِبْحِ مَا لَمْ يَضْمَنُوا } . (قَالَ الشَّافِعِيُّ) : هَذَا بَيْعُ مَا لَمْ يُقْبَضْ وَرِبْحُ مَا لَمْ يُضْمَنْ , وَهَذَا الْقِيَاسُ عَلَى حَدِيثِ النَّبِيِّ صلى الله عليه وسلم أَنَّهُ { نَهَى عَنْ بَيْعِ الطَّعَامِ حَتَّى يُقْبَضَ } , وَمَنْ ابْتَاعَ طَعَامًا كَيْلًا فَقَبَضَهُ أَنْ يَكْتَالَهُ وَمَنْ ابْتَاعَهُ جُزَافًا فَقَبَضَهُ أَنْ يَنْقُلَهُ مِنْ مَوْضِعِهِ إذَا كَانَ مِثْلَهُ

يُنْقَلُ , وَقَدْ رَوَى ابْنُ عُمَرَ { عَنْ النَّبِيِّ صلى الله عليه وسلم أَنَّهُمْ كَانُوا يَتَبَايَعُونَ الطَّعَامَ جُزَافًا فَبَعَثَ رَسُولُ اللَّهِ صلى الله عليه وسلم مَنْ يَأْمُرُهُمْ بِانْتِقَالِهِ مِنْ الْمَوْضِعِ الَّذِي ابْتَاعُوهُ فِيهِ إلَى مَوْضِعٍ غَيْرِهِ } , وَهَذَا لَا يَكُونُ إلَّا لِنَلَّا يَبِيعُوهُ قَبْلَ أَنْ يُنْقَلَ . (قَالَ الشَّافِعِيُّ) : وَمَنْ مَلَكَ طَعَامًا بِإِجَارَةِ بَيْعٍ مِنْ الْبُيُوعِ فَلَا يَبِيعُهُ حَتَّى يَقْبِضَهُ , وَمَنْ مَلَكَهُ بِمِيرَاثٍ كَانَ لَهُ أَنْ يَبِيعَهُ , وَذَلِكَ أَنَّهُ غَيْرُ مَضْمُونٍ عَلَى غَيْرِهِ بِثَمَنٍ , وَكَذَلِكَ مَا مَلَكَهُ مِنْ وَجْهٍ غَيْرِ وَجْهِ الْبَيْعِ كَانَ لَهُ أَنْ يَبِيعَهُ قَبْلَ أَنْ يَقْبِضَهُ إنَّمَا لَا يَكُونُ لَهُ بَيْعُهُ إذَا كَانَ مَضْمُونًا عَلَى غَيْرِهِ بِعِوَضٍ يَأْخُذُهُ مِنْهُ إذَا فَاتَ , وَالْأَرْزَاقُ الَّتِي يُخْرِجُهَا السُّلْطَانُ لِلنَّاسِ يَبِيعُهَا قَبْلَ أَنْ يَقْبِضَهَا وَلَا يَبِيعُهَا الَّذِي يَشْتَرِيهَا قَبْلَ أَنْ يَقْبِضَهَا ; لِأَنَّ مُشْتَرِيَهَا لَمْ يَقْبِضْ , وَهِيَ مَضْمُونَةٌ لَهُ عَلَى بَائِعِهَا بِالثَّمَنِ الَّذِي ابْتَاعَهُ إيَّاهَا بِهِ حَتَّى يَقْبِضَهَا أَوْ يَرُدَّ الْبَائِعُ إلَيْهِ الثَّمَنَ , وَمَنْ ابْتَاعَ مِنْ رَجُلٍ طَعَامًا فَكَتَبَ إلَيْهِ الْمُشْتَرِي أَنْ يَقْبِضَهُ لَهُ مِنْ نَفْسِهِ فَلَا يَكُونُ الرَّجُلُ قَابِضًا لَهُ مِنْ نَفْسِهِ , وَهُوَ ضَامِنٌ عَلَيْهِ حَتَّى يَقْبِضَهُ الْمُبْتَاعُ أَوْ وَكِيلُ الْمُبْتَاعِ غَيْرِ الْبَائِعِ , وَسَوَاءٌ أَشْهَدَ عَلَى ذَلِكَ أَوْ لَمْ يُشْهِدْ , وَإِذَا وَكَّلَ الرَّجُلُ الرَّجُلَ أَنْ يَبْتَاعَ لَهُ طَعَامًا فَابْتَاعَهُ ثُمَّ وَكَّلَهُ أَنْ يَبِيعَهُ لَهُ مِنْ غَيْرِهِ فَهُوَ بِنَقْدٍ لَا بِدَيْنٍ حَتَّى يُبِيحَ لَهُ الدَّيْنَ فَهُوَ جَائِزٌ كَأَنَّهُ هُوَ ابْتَاعَهُ وَبَاعَهُ , وَإِنْ وَكَّلَهُ أَنْ يَبِيعَهُ مِنْ نَفْسِهِ لَمْ يَجُزْ الْبَيْعُ مِنْ نَفْسِهِ , وَإِنْ قَالَ قَدْ بِعْته مِنْ غَيْرِي فَهَلَكَ الثَّمَنُ أَوْ هَرَبَ الْمُشْتَرِي فَصَدَقَهُ الْبَائِعُ فَهُوَ كَمَا قَالَ , وَإِنْ كَذَّبَهُ فَعَلَيْهِ الْبَيِّنَةُ أَنَّهُ قَدْ بَاعَهُ , وَلَا يَكُونُ ضَامِنًا لَوْ هَرَبَ الْمُشْتَرِي أَوْ أَفْلَسَ أَوْ قَبَضَ الثَّمَنَ مِنْهُ فَهَلَكَ ; لِأَنَّهُ فِي هَذِهِ الْحَالَةِ أَمِينٌ . (قَالَ الشَّافِعِيُّ) : وَمَنْ بَاعَ طَعَامًا مِنْ نَصْرَانِيٍّ فَبَاعَهُ النَّصْرَانِيُّ قَبْلَ أَنْ يَسْتَوْفِيَهُ فَلَا يَكِيلُهُ لَهُ الْبَائِعُ حَتَّى يَحْضُرَ النَّصْرَانِيُّ أَوْ وَكِيلُهُ فَيَكْتَالُهُ لِنَفْسِهِ .

In the above text, Rasulullah S.A.W. had prohibited the sale of that which was not taken into possession. Although he referred to food, Ibn Abbaas was of the opinion that the hadith had a general implication and thus referred to all other items of sale immaterial whether these were not natural foods.

Imam Shafi adopts this opinion.

In another hadith here above stated, part of what Nabi SAW instructed Attaab bin Usaid was that he does not reap profits from items that did not enter into the domain of his economic risks. Thus, without the transfer of ownership to the purchaser, the economic risks on a commodity likewise do not shift from the seller to the purchaser.

(قَالَ) : وَمَنْ سَلَّفَ فِي طَعَامٍ ثُمَّ بَاعَ ذَلِكَ الطَّعَامَ بِعَيْنِهِ قَبْلَ أَنْ يَقْبِضَهُ لَمْ يَجُزْ , وَإِنْ بَاعَ طَعَامًا بِصِفَةٍ وَنَوَى أَنْ يَقْضِيَهُ مِنْ ذَلِكَ الطَّعَامِ فَلَا بَأْسَ ; لِأَنَّ لَهُ أَنْ يَقْضِيَهُ مِنْ غَيْرِهِ ; لِأَنَّ ذَلِكَ الطَّعَامَ لَوْ كَانَ عَلَى غَيْرِ الصِّفَةِ لَمْ يَكُنْ لَهُ أَنْ يُعْطِيَهُ مِنْهُ , وَلَوْ قَبَضَهُ وَكَانَ عَلَى الصِّفَةِ كَانَ لَهُ أَنْ يَحْبِسَهُ وَلَا يُعْطِيَهُ إيَّاهُ , وَلَوْ هَلَكَ كَانَ عَلَيْهِ أَنْ يُعْطِيَهُ مِثْلَ صِفَةِ طَعَامِهِ الَّذِي بَاعَهُ

(قَالَ) : وَمَنْ سَلَفَ فِي طَعَامٍ أَوْ بَاعَ طَعَامًا فَأَحْضَرَ الْمُشْتَرِي عِنْدَ اكْتِيَالِهِ مِنْ بَائِعِهِ وَقَالَ أَكْتَالُهُ لَك لَمْ يَجُزْ ; لِأَنَّهُ بَيْعُ طَعَامٍ قَبْلَ أَنْ يُقْبَضَ , فَإِنْ قَالَ : أَكْتَالُهُ لِنَفْسِي وَخُذْهُ بِالْكَيْلِ الَّذِي حَضَرْت لَمْ يَجُزْ ; لِأَنَّهُ بَاعَ كَيْلًا فَلَا يَبْرَأُ حَتَّى يَكْتَالَهُ مَنْ يَشْتَرِيهِ وَيَكُونُ لَهُ زِيَادَتُهُ وَعَلَيْهِ نُقْصَانُهُ , وَهَكَذَا رَوَى الْحَسَنُ عَنْ النَّبِيِّ صلى الله عليه وسلم أَنَّهُ { نَهَى عَنْ بَيْعِ الطَّعَامِ حَتَّى يَجْرِيَ فِيهِ الصَّاعَانِ } فَيَكُونَ لَهُ زِيَادَتُهُ وَعَلَيْهِ نُقْصَانُهُ .

(قَالَ الشَّافِعِيُّ) : وَمَنْ بَاعَ طَعَامًا مَضْمُونًا عَلَيْهِ فَحَلَّ عَلَيْهِ الطَّعَامُ فَجَاءَ بِصَاحِبِهِ إلَى طَعَامٍ مُجْتَمِعٍ فَقَالَ : أَيُّ طَعَامٍ رَضِيت مِنْ هَذَا اشْتَرَيْت لَك فَأَوْفَيْتُك . كَرِهْت ذَلِكَ لَهُ , وَإِنْ رَضِيَ طَعَامًا فَاشْتَرَاهُ لَهُ فَدَفَعَهُ إلَيْهِ بِكَيْلِهِ لَمْ يَجُزْ ; لِأَنَّهُ ابْتَاعَهُ قَبْلَ أَنْ يَقْبِضَهُ , وَإِنْ قَبَضَهُ لِنَفْسِهِ ثُمَّ كَالَهُ لَهُ بَعْدُ جَازَ , وَلِلْمُشْتَرِي لَهُ بَعْدَ رِضَاهُ بِهِ أَنْ يَرُدَّهُ عَلَيْهِ إنْ لَمْ يَكُنْ مِنْ صِفَتِهِ وَذَلِكَ أَنَّ الرِّضَا إنَّمَا يَلْزَمُهُ بَعْضُ الْقَبْضِ .

(قَالَ الشَّافِعِيُّ) : وَمَنْ حَلَّ عَلَيْهِ طَعَامٌ فَلَا يُعْطِي الَّذِي لَهُ عَلَيْهِ الطَّعَامُ ثَمَنَ طَعَامٍ يَشْتَرِي بِهِ لِنَفْسِهِ مِنْ قِبَلِ أَنَّهُ لَا يَكُونُ وَكِيلًا لِنَفْسِهِ مُسْتَوْفِيًا لَهَا قَابِضًا لَهَا مِنْهَا وَلِيُوَكِّلَ غَيْرَهُ حَتَّى يَدْفَعَ إلَيْهِ .

وَمَنْ اشْتَرَى طَعَامًا فَخَرَجَ مِنْ يَدَيْهِ قَبْلَ أَنْ يَسْتَوْفِيَهُ بِهِبَةٍ أَوْ صَدَقَةٍ أَوْ قَضَاهُ رَجُلًا مِنْ سَلَفٍ أَوْ أَسْلَفَهُ آخَرَ قَبْلَ أَنْ يَسْتَوْفِيَهُ فَلَا يَبِيعُهُ أَحَدٌ مِمَّنْ صَارَ إلَيْهِ عَلَى شَيْءٍ مِنْ هَذِهِ الْجِهَاتِ حَتَّى يَسْتَوْفِيَهُ مِنْ قِبَلِ أَنَّهُ صَارَ إنَّمَا يَقْبِضُ عَنْ الْمُشْتَرِي كَقَبْضِ وَكِيلِهِ .

(قَالَ الشَّافِعِيُّ) : وَمَنْ كَانَ بِيَدِهِ ثَمَرٌ فَبَاعَهُ وَاسْتَثْنَى شَيْئًا مِنْهُ بِعَيْنِهِ فَالْبَيْعُ وَاقِعٌ عَلَى الْمَبِيعِ لَا عَلَى الْمُشْتَرَى وَالْمُسْتَثْنَى عَلَى مِثْلِ مَا كَانَ فِي مِلْكِهِ لَمْ يُبَعْ قَطُّ , فَلَا بَأْسَ أَنْ يَبِيعَهُ صَاحِبُهُ ; لِأَنَّهُ لَمْ يَشْتَرِهِ إنَّمَا يَبِيعُهُ عَلَى الْمِلْكِ الْأَوَّلِ .

(قَالَ الشَّافِعِيُّ) : وَلَا يَصْلُحُ السَّلَفُ حَتَّى يَدْفَعَ الْمُسْلَفُ إلَى الْمُسْلِفِ الثَّمَنَ قَبْلَ أَنْ يَتَفَرَّقَا مِنْ مَقَامِهِمَا الَّذِي تَبَايَعَا فِيهِ وَحَتَّى يَكُونَ السَّلَفُ بِكَيْلٍ مَعْلُومٍ بِمِكْيَالٍ عَامَّةٍ يُدْرَكُ عِلْمُهُ وَلَا يَكُونُ بِمِكْيَالٍ خَاصَّةٍ إنْ هَلَكَ لَمْ يُدْرَكْ عِلْمُهُ أَوْ بِوَزْنٍ عَامَّةٍ كَذَلِكَ وَبِصِفَةٍ مَعْلُومَةٍ جَيِّدٍ نَقِيٍّ وَإِلَى أَجَلٍ مَعْلُومٍ إنْ كَانَ إلَى أَجَلٍ وَيُسْتَوْفَى فِي مَوْضِعٍ مَعْلُومٍ وَيَكُونُ مِنْ أَرْضٍ لَا يُخْطِئُ مِثْلُهَا أَرْضٍ عَامَّةٍ لَا أَرْضٍ خَاصَّةٍ وَيَكُونُ جَدِيدًا طَعَامَ عَامٍ أَوْ طَعَامَ عَامَيْنِ وَلَا يَجُوزُ أَنْ يَقُولَ أَجْوَدُ مَا يَكُونُ مِنْ الطَّعَامِ ; لِأَنَّهُ لَا يُوقَفُ عَلَى حَدِّهِ وَلَا أَرْدَأُ مَا يَكُونُ ; لِأَنَّهُ لَا يُوقَفُ عَلَى حَدِّهِ فَإِنَّ الرَّدِيءَ يَكُونُ بِالْغَرَقِ وَبِالسُّوسِ وَبِالْقِدَمِ فَلَا يُوقَفُ عَلَى حَدِّهِ وَلَا بَأْسَ بِالسَّلَفِ فِي الطَّعَامِ حَالًّا وَآجِلًا , إذَا حَلَّ أَنْ يُبَاعَ الطَّعَامُ بِصِفَةٍ إلَى أَجَلٍ كَانَ حَالًّا , أَوْ إلَى أَنْ يَحِلَّ . (قَالَ الشَّافِعِيُّ) : وَإِنْ سَلَّفَ رَجُلٌ دَنَانِيرَ عَلَى طَعَامٍ إلَى آجَالٍ مَعْلُومَةٍ بَعْضُهَا قَبْلَ بَعْضٍ لَمْ يَجُزْ عِنْدِي حَتَّى يَكُونَ الْأَجَلُ وَاحِدًا وَتَكُونُ الْأَثْمَانُ مُتَفَرِّقَةً مِنْ قِبَلِ أَنَّ الطَّعَامَ الَّذِي إلَى الْأَجَلِ الْقَرِيبِ أَكْثَرُ قِيمَةً مِنْ الطَّعَامِ الَّذِي إلَى الْأَجَلِ الْبَعِيدِ , وَقَدْ أَجَازَهُ غَيْرِي عَلَى مِثْلِ مَا أَجَازَ عَلَيْهِ ابْتِيَاعَ الْعُرُوضِ الْمُتَفَرِّقَةِ , وَهَذَا مُخَالِفٌ لِلْعُرُوضِ الْمُتَفَرِّقَةِ ; لِأَنَّ الْعُرُوضَ الْمُتَفَرِّقَةَ نَقْدٌ وَهَذَا إلَى أَجَلٍ , وَالْعُرُوضُ شَيْءٌ مُتَفَرِّقٌ وَهَذَا مِنْ شَيْءٍ وَاحِدٍ . (قَالَ الشَّافِعِيُّ) : وَإِذَا ابْتَاعَ الرَّجُلَانِ طَعَامًا مَضْمُونًا مَوْصُوفًا حَالًّا أَوْ إلَى أَجَلٍ فَتَفَرَّقَا قَبْلَ أَنْ يُقْبَضَ الثَّمَنُ فَالْبَيْعُ مَفْسُوخٌ ; لِأَنَّ هَذَا دَيْنٌ بِدَيْنٍ .

(قَالَ الشَّافِعِيُّ) : وَإِنْ اشْتَرَى الرَّجُلُ طَعَامًا مَوْصُوفًا مَضْمُونًا عِنْدَ الْحَصَادِ وَقَبْلَ الْحَصَادِ وَبَعْدَهُ فَلَا بَأْسَ , وَإِذَا اشْتَرَى مِنْهُ مِنْ طَعَامِ أَرْضٍ بِعَيْنِهَا غَيْرَ مَوْصُوفٍ فَلَا خَيْرَ فِيهِ ; لِأَنَّهُ قَدْ يَأْتِي جَيِّدًا أَوْ رَدِينًا . (قَالَ) : وَإِنْ اشْتَرَاهُ مِنْهُ مِنْ الْأَنْدَرِ مَضْمُونًا عَلَيْهِ فَلَا خَيْرَ فِيهِ ; لِأَنَّهُ قَدْ يَهْلِكُ قَبْلَ أَنْ يُدْرِيَهُ . (قَالَ الشَّافِعِيُّ) : وَلَا بَأْسَ بِالسَّلَفِ فِي الطَّعَامِ إلَى سَنَةٍ قَبْلَ أَنْ يَزْرَعَ إذَا لَمْ يَكُنْ فِي زَرْعِ بِعَيْنِهِ

(قَالَ الشَّافِعِيُّ) : وَلَا خَيْرَ فِي السَّلَفِ فِي الْقَدَادِينَ الْقَمْحِ وَلَا فِي الْقَرْطِ ; لِأَنَّ ذَلِكَ يَخْتَلِفُ

(قَالَ الشَّافِعِيُّ) : وَمَنْ سَلَّفَ رَجُلًا فِي طَعَامٍ يَحِلُّ فَأَرَادَ الَّذِي عَلَيْهِ الطَّعَامُ أَنْ يُحِيلَ صَاحِبَ الطَّعَامِ عَلَى رَجُلٍ لَهُ عَلَيْهِ طَعَامٌ مِثْلُهُ مِنْ بَيْعٍ ابْتَاعَهُ مِنْهُ فَلَا خَيْرَ فِيهِ , وَهَذَا هُوَ نَفْسُ بَيْعِ الطَّعَامِ قَبْلَ أَنْ يُقْبَضَ , وَلَكِنَّهُ إنْ أَرَادَ أَنْ يَجْعَلَهُ وَكِيلًا يَقْبِضُ لَهُ الطَّعَامَ فَإِنْ هَلَكَ فِي يَدَيْهِ كَانَ أَمِينًا فِيهِ , وَإِنْ لَمْ يَهْلِكْ وَأَرَادَ أَنْ يَجْعَلَهُ قَضَاءً جَازَ . (قَالَ) : وَكَذَلِكَ لَوْ ابْتَاعَ مِنْهُ طَعَامًا فَحَلَّ فَأَحَالَهُ عَلَى رَجُلٍ لَهُ عَلَيْهِ طَعَامٌ أَسْلَفَهُ إيَّاهُ مِنْ قِبَلِ أَنَّ أَصْلَ مَا كَانَ لَهُ عَلَيْهِ بَيْعٌ وَالْإِحَالَةُ بَيْعٌ مِنْهُ لَهُ بِالطَّعَامِ الَّذِي عَلَيْهِ بِطَعَامٍ عَلَى غَيْرِهِ

(قَالَ الشَّافِعِيُّ) : وَمَنْ ابْتَاعَ طَعَامًا بِكَيْلٍ فَصَدَّقَهُ الْمُشْتَرِي بِكَيْلِهِ فَلَا يَجُوزُ إلَى أَجَلٍ , وَإِذَا قَبَضَ الطَّعَامَ فَالْقَوْلُ فِي كَيْلِ الطَّعَامِ قَوْلُ الْقَابِضِ مَعَ يَمِينِهِ , وَإِنْ ذَكَرَ نُقْصَانًا كَثِيرًا أَوْ قَلِيلًا أَوْ زِيَادَةً قَلِيلَةً أَوْ كَثِيرَةً , وَسَوَاءٌ اشْتَرَاهُ بِالنَّقْدِ كَانَ أَوْ إلَى أَجَلٍ , وَإِنَّمَا لَمْ أُجِزْ هَذَا لِمَا وَصَفْت مِنْ حَدِيثِ الْحَسَنِ عَنْ النَّبِيِّ صلى الله عليه وسلم وَإِنِّي أُلْزِمُ مَنْ شَرَطَ لِرَجُلٍ شَرْطًا مِنْ كَيْلٍ أَوْ صِفَةٍ أَنْ يُوَفِّيَهُ شَرْطَهُ بِالْكَيْلِ وَالصِّفَةِ فَلَمَّا شَرَطَ لَهُ الْكَيْلَ لَمْ يَجُزْ إلَّا أَنْ يُوَفِّيَهُ شَرْطَهُ , فَإِنْ قَالَ قَائِلٌ فَقَدْ صَدَّقَهُ فَلِمَ لَا يَبْرَأُ كَمَا يَبْرَأُ مِنْ الْعَيْبِ ؟ قِيلَ لَوْ كَانَ تَصْدِيقُهُ يَقُومُ مَقَامَ الْإِبْرَاءِ مِنْ الْعَيْبِ فَشَرَطَ لَهُ مِائَةَ فَوَجَدَ فِيهِ وَاحِدًا لَمْ يَكُنْ لَهُ أَنْ يَرْجِعَ عَلَيْهِ بِشَيْءٍ كَمَا يَشْتَرِطُ لَهُ السَّلَامَةَ فَيَجِدُ الْعَيْبَ فَلَا يَرْجِعُ عَلَيْهِ بِهِ إذَا أَبْرَأَهُ مِنْهُ .

(قَالَ الشَّافِعِيُّ) : وَإِذَا ابْتَاعَ الرَّجُلُ الطَّعَامَ كَيْلًا لَمْ يَكُنْ لَهُ أَنْ يَأْخُذَهُ وَزْنًا إلَّا أَنْ يَنْقُصَ الْبَيْعَ الْأَوَّلَ وَيَسْتَقْبِلَ بَيْعًا بِالْوَزْنِ وَكَذَلِكَ لَا يَأْخُذُهُ بِمِكْيَالٍ إلَّا بِالْمِكْيَالِ الَّذِي ابْتَاعَهُ بِهِ إلَّا أَنْ يَكُونَ يَكِيلُهُ بِمِكْيَالٍ مَعْرُوفٍ مِثْلِ الْمِكْيَالِ الَّذِي ابْتَاعَهُ بِهِ فَيَكُونُ حِينَئِذٍ إنَّمَا أَخَذَهُ بِالْمِكْيَالِ الَّذِي ابْتَاعَهُ بِهِ , وَسَوَاءٌ كَانَ الطَّعَامُ وَاحِدًا أَوْ مِنْ طَعَامَيْنِ مُفْتَرِقَيْنِ وَهَذَا فَاسِدٌ مِنْ وَجْهَيْنِ : أَحَدُهُمَا أَنَّهُ أَخَذَهُ بِغَيْرِ شَرْطِهِ , وَالْآخَرُ أَنَّهُ أَخَذَهُ بَدَلًا قَدْ يَكُونُ أَقَلَّ أَوْ أَكْثَرَ مِنْ الَّذِي لَهُ وَالْبَدَلُ يَقُومُ مَقَامَ الْبَيْعِ وَأَقَلُّ مَا فِيهِ أَنَّهُ مَجْهُولٌ لَا يُدْرَى أَهُوَ مِثْلُ مَا لَهُ أَوْ أَقَلُّ أَوْ أَكْثَرُ ؟ .

(قَالَ الشَّافِعِيُّ) : وَمَنْ سَلَّفَ فِي حِنْطَةٍ مَوْصُوفَةٍ فَحَلَّتْ فَأَعْطَاهُ الْبَائِعُ حِنْطَةً خَيْرًا مِنْهَا بِطِيبِ نَفْسِهِ أَوْ أَعْطَاهُ حِنْطَةً شَرًّا مِنْهَا فَطَابَتْ نَفْسُ الْمُشْتَرِي فَلَا بَأْسَ بِذَلِكَ وَكُلُّ وَاحِدٍ مِنْهُمَا مُتَطَوِّعٌ بِالْفَضْلِ وَلَيْسَ هَذَا بَيْعُ طَعَامٍ بِطَعَامٍ , وَلَوْ كَانَ أَعْطَاهُ مَكَانَ الْحِنْطَةِ شَعِيرًا أَوْ سُلْتًا أَوْ صِنْفًا غَيْرَ الْحِنْطَةِ لَمْ يَجُزْ , وَكَانَ هَذَا بَيْعَ طَعَامٍ بِغَيْرِهِ قَبْلَ أَنْ يُقْبَضَ , وَهَكَذَا التَّمْرُ وَكُلُّ صِنْفٍ وَاحِدٍ مِنْ الطَّعَامِ .

(قَالَ الشَّافِعِيُّ) : وَمَنْ سَلَّفَ فِي طَعَامٍ إلَى أَجَلٍ فَعَجَّلَهُ قَبْلَ أَنْ يَحِلَّ الْأَجَلُ طَيِّبَةً بِهِ نَفْسُهُ مِثْلَ طَعَامِهِ أَوْ شَرًّا مِنْهُ فَلَا بَأْسَ , وَلَسْت أَجْعَلُ لِلتُّهْمَةِ أَبَدًا مَوْضِعًا فِي الْحُكْمِ إنَّمَا أَقْضِي عَلَى الظَّاهِرِ .

(قَالَ الشَّافِعِيُّ) : وَمَنْ سَلَّفَ فِي قَمْحٍ فَحَلَّ الْأَجَلُ فَأَرَادَ أَنْ يَأْخُذَ دَقِيقًا أَوْ سَوِيقًا فَلَا يَجُوزُ , وَهَذَا فَاسِدٌ مِنْ وَجْهَيْنِ : أَحَدُهُمَا : أَنِّي أَخَذْت غَيْرَ الَّذِي أَسْلَفْت فِيهِ , وَهُوَ بَيْعُ الطَّعَامِ قَبْلَ أَنْ يُقْبَضَ , وَإِنْ قِيلَ هُوَ صِنْفٌ وَاحِدٌ فَقَدْ أَخَذْت مَجْهُولًا مِنْ مَعْلُومٍ فَبِعْت مُدَّ حِنْطَةٍ بِمُدِّ دَقِيقٍ وَلَعَلَّ الْحِنْطَةَ مُدٌّ وَثُلُثُ دَقِيقٍ وَيَدْخُلُ السَّوِيقُ فِي مِثْلِ هَذَا , وَمَنْ سَلَّفَ فِي طَعَامٍ فَحَلَّ فَسَأَلَ الَّذِي حَلَّ عَلَيْهِ الطَّعَامُ الَّذِي لَهُ الطَّعَامُ أَنْ يَبِيعَهُ طَعَامًا إلَى أَجَلٍ لِيَقْبِضَهُ إيَّاهُ فَلَا خَيْرَ فِيهِ إنْ عَقَدَا عَقْدَ الْبَيْعِ عَلَى هَذَا مِنْ قِبَلِ أَنَّا لَا نُجِيزُ أَنْ يُعْقَدَ عَلَى رَجُلٍ فِيمَا يَمْلِكُ أَنْ يُمْنَعَ مِنْهُ أَنْ يَصْنَعَ فِيهِ مَا يَصْنَعُ فِي مَالِهِ ; لِأَنَّ الْبَيْعَ لَيْسَ بِتَامٍّ , وَلَوْ أَنَّهُ بَاعَهُ إيَّاهُ بِلَا شَرْطٍ بِنَقْدٍ أَوْ إلَى أَجَلٍ فَقَضَاهُ إيَّاهُ فَلَا بَأْسَ , وَهَكَذَا لَوْ بَاعَهُ شَيْئًا غَيْرَ الطَّعَامِ , وَلَوْ نَوَيَا جَمِيعًا أَنْ يَكُونَ يَقْضِيهِ مَا يَبْتَاعُ مِنْهُ بِنَقْدٍ أَوْ إلَى أَجَلٍ لَمْ يَكُنْ بِذَلِكَ بَأْسٌ مَا لَمْ يَقَعْ عَلَيْهِ عَقْدُ الْبَيْعِ . (قَالَ الشَّافِعِيُّ) : وَهَكَذَا لَوْ أَسْلَفَهُ فِي طَعَامٍ إلَى أَجَلٍ فَلَمَّا حَلَّ الْأَجَلُ قَالَ لَهُ بِعْنِي طَعَامًا بِنَقْدٍ أَوْ إلَى أَجَلٍ حَتَّى أَقْضِيَك فَإِنْ وَقَعَ الْعَقْدُ عَلَى ذَلِكَ لَمْ يَجُزْ , وَإِنْ بَاعَهُ عَلَى غَيْرِ شَرْطٍ فَلَا بَأْسَ بِذَلِكَ كَانَ الْبَيْعُ نَقْدًا أَوْ إلَى أَجَلٍ .

(قَالَ الشَّافِعِيُّ) : وَمَنْ سَلَّفَ فِي طَعَامٍ فَقَبَضَهُ ثُمَّ اشْتَرَاهُ مِنْهُ الَّذِي قَضَاهُ إيَّاهُ بِنَقْدٍ أَوْ نَسِيئَةٍ إذَا كَانَ ذَلِكَ بَعْدَ الْقَبْضِ فَلَا بَأْسَ ; لِأَنَّهُ قَدْ صَارَ مِنْ ضَمَانِ الْقَابِضِ وَبَرِئَ الْمَقْبُوضُ مِنْهُ , وَلَوْ حَلَّ طَعَامُهُ عَلَيْهِ فَقَالَ لَهُ : اقْضِنِي عَلَى أَنْ أَبِيعَك فَقَضَاهُ مِثْلَ طَعَامِهِ أَوْ دُونَهُ لَمْ يَكُنْ بِذَلِكَ بَأْسٌ وَكَانَ هَذَا مَوْعِدًا وَعَدَهُ إيَّاهُ إنْ شَاءَ وَفَّى لَهُ بِهِ , وَإِنْ شَاءَ لَمْ يَفِ , وَلَوْ أَعْطَاهُ خَيْرًا مِنْ طَعَامِهِ عَلَى هَذَا الشَّرْطِ لَمْ يَجُزْ ; لِأَنَّ هَذَا شَرْطٌ غَيْرُ لَازِمٍ , وَقَدْ أَخَذَ عَلَيْهِ فَضْلًا لَمْ يَكُنْ لَهُ وَاَللَّهُ أَعْلَمُ

7. The view of Imam Malik

موطأ مالك - (ج 4 / ص 398)

بَاب الْبَيْعِ عَلَى الْبَرْنَامَجِ قَالَ مَالِك الْأَمْرُ عِنْدَنَا فِي الْقَوْمِ يَشْتَرُونَ السِّلْعَةَ الْبَزَّ أَوْ الرَّقِيقَ فَيَسْمَعُ بِهِ الرَّجُلُ فَيَقُولُ لِرَجُلٍ مِنْهُمْ الْبَزُّ الَّذِي اشْتَرَيْتَ مِنْ فُلَانٍ قَدْ بَلَغَتْنِي صِفَتُهُ وَأَمْرُهُ فَهَلْ لَكَ أَنْ أُرْبِحَكَ فِي نَصِيبِكَ كَذَا وَكَذَا فَيَقُولُ نَعَمْ فَيُرْبِحُهُ وَيَكُونُ شَرِيكًا لِلْقَوْمِ مَكَانَهُ فَإِذَا نَظَرَ إلَيْهِ رَآهُ قَبِيحًا وَاسْتَغْلَاهُ قَالَ مَالِك ذَلِكَ لَازِمٌ لَهُ وَلَا خِيَارَ لَهُ فِيهِ إذَا كَانَ ابْتَاعَهُ عَلَى بَرْنَامَجٍ وَصِفَةٍ مَعْلُومَةٍ

قَالَ مَالِك فِي الرَّجُلِ يَقْدَمُ لَهُ أَصْنَافٌ مِنْ الْبَزِّ وَيَحْضُرُهُ السُّوَّامُ وَيَقْرَأُ عَلَيْهِمْ بَرْنَامَجَهُ وَيَقُولُ فِي كُلِّ عِدْلٍ كَذَا وَكَذَا مِلْحَفَةً بِصُرِّيَّةٍ وَكَذَا وَكَذَا رَيْطَةً سَابِرِيَّةً ذَرْعُهَا كَذَا وَكَذَا وَيُسَمِّي لَهُمْ أَصْنَافًا مِنْ الْبَزِّ بِأَجْنَاسِهِ وَيَقُولُ اشْتَرُوا مِنِّي عَلَى هَذِهِ الصِّفَةِ فَيَشْتَرُونَ الْأَعْدَالَ عَلَى مَا وَصَفَ لَهُمْ ثُمَّ يَفْتَحُونَهَا فَيَسْتَغْلُونَهَا وَيَنْدَمُونَ قَالَ مَالِك ذَلِكَ لَازِمٌ لَهُمْ إذَا كَانَ مُوَافِقًا لِلْبَرْنَامَجِ الَّذِي بَاعَهُمْ عَلَيْهِ

قَالَ مَالِك وَهَذَا الْأَمْرُ الَّذِي لَمْ يَزَلْ عَلَيْهِ النَّاسُ عِنْدَنَا يُجِيزُونَهُ بَيْنَهُمْ إذَا كَانَ الْمَتَاعُ مُوَافِقًا لِلْبَرْنَامَجِ وَلَمْ يَكُنْ مُخَالِفًا لَهُ

Translation:

Book 031, Hadith Number 079

Section : Sale according to List of Contents

Malik said: The rule according to us in the case of a group of people who bought goods, drapery or slaves, and a man then hears about it and says to one of the men in the group, " (in regard to) the drapery goods you bought from so-and-so, I have heard about its description and matter. Would you allow me to grant you such-and-such profit to take over your portion?" This person (Shareholder) agreed, and the man gave him the profit and became a partner to the others in the group in his place. However, when he (the new partner) saw it (the purchase), he saw that it was ugly/not good and found it too expensive (over

priced). Malik said, "That sale is obliged on him and he has no choice in the matter (to cancel the purchase) if he bought it according to a list of contents with a known description."

Malik spoke about a man who receives a variety of fabrics, and salesmen then come to him. He then reads to them his list of contents and says: "In each bag is such-and-such a blanket (or cover) from Basra and such-and-such a light wrap from Sabir of such-and-such size," and he then names to them the types of drapery goods by their sort, and he says to them, "Buy them from me according to this description." They then buy the bags according to what he described to them. Then they open them, and find them too expensive and regret it. Malik said, "The sale is binding on them, if the goods agree with the list of contents upon which he sold them."

Malik said, "This is the way of doing things which people to adopt in our place (Madina). They permit the sale among them when the goods agree with the list of contents and are not different from it."

Thus, according to Imam Malik where the purchaser buys goods which he has not seen but fully comply with the description of the seller, the purchaser would be obligated to honour the agreement even though he may be unhappy with the purchase. The ethical consideration where the seller should consider the unhappiness of the buyer is obviously a virtue.

Any items excluded from the requirement of possession before sale
Muwatta Book 031, Hadith Number 040.

Section : Buying on Delayed Terms and Re-Selling for Less on More Immediate Terms.

Yahya related to me from Malik from Nafi from Abdullah ibn Umar that the Messenger of Allah, may Allah bless him and grant him peace, said, "Someone who buys food, must not resell it until he takes delivery of all of it."

8. The Hanafi Interpretation

الهداية

باب المرابحة

(فَصْلٌ) : وَمَنْ اشْتَرَى شَيْئًا مِمَّا يُنْقَلُ وَيُحَوَّلُ لَمْ يَجُزْ لَهُ بَيْعُهُ حَتَّى يَقْبِضَهُ , لِأَنَّهُ عليه الصلاة والسلام نَهَى عَنْ بَيْعِ مَا لَمْ يُقْبَضْ وَلِأَنَّ فِيهِ غَرَرَ انْفِسَاخِ الْعَقْدِ عَلَى اعْتِبَارِ الْهَلَاكِ .

"Whoever buys anything that is movable and can be shifted, he cannot sell it until he had taken possession thereof since Nabi SAW prohibited the selling of that which was not taken into possession, and also because (rationally), such a sale would entail Gharar (a level of uncertainty) related to the annulment of the contract due to destruction (of the asset under consideration prior to delivery)"

العناية شرح الهداية

فَصْلٌ) وَجْهُ إيرَادِ الْفَصْلِ ظَاهِرٌ لِأَنَّ الْمَسَائِلَ الْمَذْكُورَةَ فِيهِ لَيْسَتْ مِنْ بَابِ الْمُرَابَحَةِ . وَوَجْهُ ذِكْرِهَا فِي بَابِ الْمُرَابَحَةِ الِاسْتِطْرَادُ بِاعْتِبَارِ تَقْيِيدِهَا بِقَيْدٍ زَائِدٍ عَلَى الْبَيْعِ الْمُجَرَّدِ عَنْ الْأَوْصَافِ كَالْمُرَابَحَةِ وَالتَّوْلِيَةِ . قَالَ (وَمَنْ اشْتَرَى شَيْئًا مِمَّا يُنْقَلُ) نَقْلًا حِسِّيًّا (وَ) هُوَ الْمُرَادُ بِقَوْلِهِ (يُحَوَّلُ) فَسَّرَهُ بِذَلِكَ لِئَلَّا يُتَوَهَّمَ أَنَّهُ احْتِرَازٌ عَنْ الْمُدَبَّرِ (لَمْ يَجُزْ لَهُ أَنْ يَبِيعَهُ حَتَّى يَقْبِضَهُ لِأَنَّهُ صلى الله عليه وسلم { نَهَى عَنْ بَيْعِ مَا لَمْ يُقْبَضْ }) وَهُوَ بِإِطْلَاقِهِ حُجَّةٌ

عَلَى مَالِكٍ رحمه الله فِي تَخْصِيصِ ذَلِكَ بِالطَّعَامِ وَلَا تَمَسُّكَ لَهُ بِمَا رُوِيَ عَنْ ابْنِ عَبَّاسٍ رضي الله عنهما أَنَّهُ صلى الله عليه وسلم قَالَ { إنْ اشْتَرَى أَحَدُكُمْ طَعَامًا فَلَا يَبِعْهُ حَتَّى يَقْبِضَهُ } وَفِي رِوَايَةٍ { حَتَّى يَسْتَوْفِيَهُ } فَإِنَّ تَخْصِيصَ الطَّعَامِ يَدُلُّ عَلَى أَنَّ الْحُكْمَ فِيمَا عَدَاهُ بِخِلَافِهِ , لِأَنَّ ابْنَ عَبَّاسٍ قَالَ : وَأَحْسِبُ كُلَّ شَيْءٍ مِثْلَ الطَّعَامِ . وَذَلِكَ دَلِيلٌ عَلَى أَنَّ التَّخْصِيصَ لَمْ يَكُنْ مُرَادًا وَكَانَ ذَلِكَ مَعْرُوفًا بَيْنَ الصَّحَابَةِ . حَدَّثَ الطَّحَاوِيُّ فِي شَرْحِ الْآثَارِ مُسْنَدًا إلَى ابْنِ عُمَرَ رضي الله عنهما أَنَّهُ قَالَ : ابْتَعْت زَيْتًا فِي السُّوقِ , فَلَمَّا اسْتَوْفَيْته لَقِيَنِي رَجُلٌ فَأَعْطَانِي بِهِ رِبْحًا حَسَنًا , فَأَرَدْت أَنْ أَضْرِبَ عَلَى يَدِهِ , فَأَخَذَ رَجُلٌ مِنْ خَلْفِي بِذِرَاعِي , فَالْتَفَتُّ فَإِذَا زَيْدُ بْنُ ثَابِتٍ فَقَالَ : لَا تَبِعْهُ حَيْثُ ابْتَعْته حَتَّى تَحُوزَهُ إلَى رَحْلِك , فَإِنَّ { رَسُولَ اللَّهِ صلى الله عليه وسلم نَهَى عَنْ ابْتِيَاعِ السِّلَعِ حَيْثُ تُبْتَاعُ حَتَّى تَحُوزَهَا التُّجَّارُ إلَى رِحَالِهِمْ } وَإِنَّمَا قَيَّدَ بِالْبَيْعِ وَلَمْ يَقُلْ لَمْ يَجُزْ لَهُ التَّصَرُّفُ لِيَقَعَ عَلَى الِاتِّفَاقِ , فَإِنَّ الْهِبَةَ وَالصَّدَقَةَ جَائِزَةٌ عِنْدَ مُحَمَّدٍ , وَإِنْ كَانَ قَبْلَ الْقَبْضِ قَالَ كُلُّ تَصَرُّفٍ لَا يَتِمُّ إلَّا بِالْقَبْضِ فَإِنَّهُ جَائِزٌ فِي الْمَبِيعِ قَبْلَ الْقَبْضِ إذَا سَلَّطَهُ عَلَى قَبْضِهِ فَقَبَضَهُ , لِأَنَّ تَمَامَ هَذَا الْعَقْدِ لَا يَكُونُ إلَّا بِالْقَبْضِ وَالْمَانِعُ زَائِلٌ عِنْدَ ذَلِكَ . بِخِلَافِ الْبَيْعِ وَالْإِجَارَةِ فَإِنَّهُ يَلْزَمُ بِنَفْسِهِ . وَالْجَوَابُ أَنَّ الْبَيْعَ أَسْرَعُ نَفَاذًا مِنْ الْهِبَةِ بِدَلِيلِ أَنَّ الشُّيُوعَ فِيمَا يَحْتَمِلُ الْقِسْمَةَ يَمْنَعُ تَمَامَ الْهِبَةِ دُونَ الْبَيْعِ , ثُمَّ الْبَيْعُ فِي الْمَبِيعِ قَبْلَ الْقَبْضِ لَا يَجُوزُ لِأَنَّهُ تَمْلِيكُ الْعَيْنِ مَا مَلَكَهُ فِي حَالِ قِيَامِ الْغَرَرِ فِي مِلْكِهِ فَالْهِبَةُ أَوْلَى (قَوْلُهُ وَلِأَنَّ فِيهِ غَرَرَ انْفِسَاخِ الْعَقْدِ) اسْتِدْلَالٌ بِالْمَعْقُولِ , وَتَقْرِيرُهُ : فِي الْبَيْعِ قَبْلَ الْقَبْضِ غَرَرُ انْفِسَاخِ الْعَقْدِ الْأَوَّلِ عَلَى تَقْدِيرِ هَلَاكِ الْمَبِيعِ فِي يَدِ الْبَائِعِ , وَالْغَرَرُ غَيْرُ جَائِزٍ { لِأَنَّهُ صلى الله عليه وسلم نَهَى عَنْ بَيْعِ الْغَرَرِ } . وَالْغَرَرُ : مَا طُوِيَ عَنْك عِلْمُهُ وَقَدْ تَقَدَّمَ . وَاعْتُرِضَ بِأَنَّ غَرَرَ الِانْفِسَاخِ بَعْدَ الْقَبْضِ أَيْضًا مُتَوَهَّمٌ عَلَى تَقْدِيرِ ظُهُورِ الِاسْتِحْقَاقِ وَلَيْسَ بِمَانِعٍ . وَلَا يُدْفَعُ بِأَنَّ عَدَمَ ظُهُورِ الِاسْتِحْقَاقِ أَصْلٌ لِأَنَّ عَدَمَ الْهَلَاكِ كَذَلِكَ فَاسْتَوَيَا . وَأُجِيبَ بِأَنَّ عَدَمَ جَوَازِهِ قَبْلَ الْقَبْضِ ثَبَتَ بِالنَّصِّ عَلَى خِلَافِ الْقِيَاسِ لِثُبُوتِ الْمِلْكِ الْمُطْلَقِ لِلتَّصَرُّفِ الْمُطْلَقِ بِقَوْلِهِ تَعَالَى { وَأَحَلَّ اللَّهُ الْبَيْعَ } وَلَيْسَ مَا بَعْدَ الْقَبْضِ فِي مَعْنَاهُ لِأَنَّ فِيهِ غَرَرَ الِانْفِسَاخِ بِالْهَلَاكِ وَالِاسْتِحْقَاقِ , وَفِيمَا بَعْدَ الْقَبْضِ غَرَرُهُ بِالِاسْتِحْقَاقِ خَاصَّةً فَلَمْ يُلْحَقْ بِهِ .

The above details, the Hanafi scholars view that it is not permissible to sell anything movable prior to possession. The fact that Ibn Abbass, a great companion and uncle of Nabi SAW also interpreted the prohibition of selling food before possession to also refer to all other movable items is indicative of a more authoritative interpretation.

Hanafi scholars regard this as a proof against Imam Malik who restricts the hadith pertaining to the prohibition of selling food before possession to what has been stated in that specific hadith, and does not inferentially extend that ruling to other movables. In fact, what must be noted in regard to Imam Malik's opinion is that he narrates the practise in Madina and does not give a purely personal opinion.

The hadith quoted by Imam Tahawi does indicate towards the applicability of the prohibition to all movables.

The Question

In our business we some times have a client wanting something and we need to import it for him so we take a deposit and let him pay the balance when it arrives. Is this unacceptable?

When your client orders a product that you do not have in stock but can provide through ordering it, the specified product is not in your ownership even at the instance of the order. You only gain a degree of ownership once the supplier has billed you and is ready to make physical delivery either directly to you or to a location specified by the client.

I do not know the commercial law ruling within the South African context in regard to whether the risk and liability of ownership is shifted to the purchaser once the supplier has railed, shipped or dispatched the goods or whether such risks remain to be the onus of the supplier. In the latter case, even after the

supplier has dispatched the goods, you cannot profit from selling the goods since there is no perfect ownership established unless the goods are safely delivered to you.

Where the risks of ownership is transferred to you as the client of the supplier at the instance of dispatch to you or the location specified by your client,

1. You would be allowed, in terms of Maliki fiqh, to profit (sell the same) after having been invoiced (or given a receipt) together with having the goods dispatched.

2. In terms of Hanafi fiqh, you cannot do so until you acquire perfect possession.

The issue here is how can you then modify such a sale to fit in with a model that allows you to acquire Islamically valid profits.

1. Specify to the client the total cost of the product but do not regard the sale contract concluded until you have ordered the goods, received notification of having been invoiced for the product and acquired possession of the product on any of your business premises or any other location that equivalently reflects your gaining possession of the items you bought. Where the risks of the goods are not transferred to you as a business, but is retained as the liability of the supplier until it is delivered to the premises of your client, you should appoint the client to act as your agent to accept delivery at his premises or specified location on your behalf. Only after the completion of such delivery can you then concluded the actual contract of sale.

Any upfront deposit taken from the client should be regarded, in this case where the risk of the goods in transfer remains the liability of the supplier, either as:

1. An *Amaanah* (and thus be not used by you or your business but kept in safety on behalf of the client). In such a case, any loss thereof without negligence from the business person or entity will not entitle the client to demand repayment.

2. Accepted as a repayable loan (which would then allow you to use it and liable for repayment in the event of any loss you occur).

3. Accepted as collateral (*Rahn*) in respected of the expenses and debt that the client is obligating you to incur in respect of ordering a product that may not be profitably sold if the client fails to discharge his obligation to pay for the ordered product. This is the best option from the three possible alternatives. However, the business entity (i.e. the مرتهن pledgee) or businessperson is then obliged to observe the rules of Rahn relative to the amount placed as Rahn and cannot make use of the amount in the business or personally except if permitted by the *Raahin* (pledger).

Where the risk of ownership are transferred by the supplier (to whom the order was given by the business entity) to the business that ordered the product, then

1. You can concluded the sale after been invoiced for the product together with gaining certainty regarding the dispatch of the goods in terms of Maliki Fiqh

2. In terms of Hanafi Fiqh, possession, after ownership, which establishes the transfer of economic risk to you, the business entity as the primary

> purchaser, is essential. This means that you must have taken delivery of the goods to any location where the risk of economic loss no longer rests on the supplier.

This implies that non-food items (in terms of Maliki Fiqh) that are purchased can be sold before gaining possession provided that you have ownership thereof. Such an allowance is most likely because there is generally normally no change or natural destruction of non-food items.

The above practise in Madina is indicative of the allowance to sell a commodity (non-food) in your ownership to a client who has a full description thereof although such an asset is not in your possession at the instance of the contract. This practise seems to be against the implication of another authentic hadith (prophetic tradition) which states "do not sell that which you do not have". However, this practise in the city of Madina, according to the jurist, Imam Malik, indicates towards the fact that this hadith does not refer to an absolute obligation upon the seller to have his sale items directly before him at the instance of the contract if these are fully describable and deliverable provided that these are in his possession.

This narration of Imam Malik cannot be used as a basis for allowing the sale of goods yet in freight or sea since not only is the risk of non-delivery is possible, even though the prospective purchaser be willing to accept such risks and may be aware of the insurance on such goods but also because factor of deception (Gharar) may be highly prevalent in such a contract especially in our era where the levels of honesty are extremely questionable.

Currently, various other financial intermediaries guarantee product description, quality and quantity etc. and could perhaps be used as safe tools to allow the sale of goods in transit which have been bought provided that the risk of ownership have passed on to the purchaser.

Often an importer visits another country where he purchases the goods, and perhaps even takes possession and then freights the goods. However, due to the hadith, that prohibits the sale of an asset that is not in your (actual) possession it is safer not to conclude such a contract. However, necessity to contract on this basis due to factors relating to cost of goods transferred, time, etc. would justify the granting of an allowance to sell goods (besides raw food) that have been purchased prior to gaining possession.

Most likely, processed foods and beverages which have a long shelve life and a known expiry could be excluded from the original prohibition which definitely related to raw food commodities like wheat, barley, etc. However, due to the explicit nature of the hadith prohibiting the sale of foods before Qabd (possession) it is essential that we restrict an inferential analysis that cannot be absolutely be verified with certainty.

9. The view of Shaykh Ibn 'Uthaymeen (may Allaah have mercy on him)

Question #69833: He imports goods and sells them before they arrive

I import goods for trade, then sell them before they arrive and I receive them[1]. What is the ruling on that?.

Answer :

Praise be to Allaah.

Selling goods before they arrive is not permissible, because the Prophet (peace and blessings of Allaah be upon him) forbade selling goods in the place where they were bought, until the merchants have taken them to their own place. So it is essential first to take possession of them, then you can sell them. As for selling them when they are in another country, and you do not know whether they will arrive in good condition or not, this is not permissible.

If someone were to say that the purchaser is obliged to take the goods whether they are faulty or not, we say: not even if he agrees to that, because he may agree to it when making the deal because he wants to make a profit, then after that he may regret it, and there may be a dispute between him and the seller. Islam – praise be to Allaah – has blocked all the ways that may lead to regret and disputes. Similarly if the goods are destroyed, there may be a conflict between the two parties. The point is that it is not permissible to sell goods until they reach their destination with the seller, then he may dispose of them.

Shaykh Ibn 'Uthaymeen (may Allaah have mercy on him)
Liqaa'aat al-Baab il-Maftoohah, 3/183. (www.islam-qa.com)

Notes by Ahmed Fazel

Firstly, the hadith where Nabi SAW forbade merchants to sell items they bought until these were shifted to their own premises requires further clarification. The ruling was to establish possession.

Secondly, in the case where the importer or his agent was not physically in the country from where they are importing, the seller may generally make the shipping arrangements. However, the importer might intend to sell before the goods were dispatched to him or while the goods are in freight (either by air, sea, rail or road) in order to profit or due to financial need.

Thirdly, in terms of details provided from the Muwatta of Imam Malik, as long as the seller had taken possession, he can sell the same through providing a description of the goods. The details recorded in that hadith of the Muwatta do specify that as long as the goods are as described by the seller, the sale would be concluded. Thus, the purchaser would have to either be reimbursed by the seller or re-negotiate prices if the goods were different from the description provided or if these were damaged. Even if the prospective purchaser accepted to accept any damaged goods then also justice in the shariah demands that he be equitably compensated for any loss.

The details in the Muwatta which allow for the sale of items that are not

[1] The question is somewhat ambiguous. Perhaps it means "I import goods for trade but sometimes sell the same before arrival although the same is later delivered to me."

immediately before the seller, but are offered by him through providing a description thereof via any form of listing have been allowed on the basis that the seller had already taken possession of the same after gaining ownership, and that these goods were in near proximity so that these could be delivered.

Often the seller is not at the location where he makes a transaction to sell goods that he already has purchased and taken delivery thereof. However, the location of these may be distant from the place of contract. Sometimes, this is to the advantage of the purchaser who seeks delivery in a remote or distant location which may be close to the location where the seller has stored his goods.

Thus, allowing the sale of items that the seller has already gained ownership and has made Qabd (taken possession), but which are not presently in his actual possession is not preferable due to the ahadith which instruct on not selling that which is not in your actual possession. Economic situations, depending on the nature of the goods sold, may demand that some of these contracts are allowed. However, in such a case, it is advisable to grant the purchaser the right to rescind the contract within a specified date so that he is allowed a time period to get to the location of the goods and inspect it in order to gain satisfaction.

We will try to provide further details from the Arabic publication of Islamic Development Bank titled Bai ala Sifah. (Refer to Hambali Fiqh)

Conclusion

The view of the Hanafi and Shafi Scholars is most sound and more authoritatively supported in reference to the sources reviewed and quoted.

Thus, you should not sell any immovables except after gaining ownership and such possession which ended the previous owner's liability towards the economic risks of that asset.

Response by Ahmed Fazel Ebrahim

and Allah knows best.