

The Ability or Inability to Collateral Shares in the Law Of Iran

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Abstract: *Mortgage and collateral of the property in the Jurisprudence and legal system of Iran is one of the most known subject, In conjunction with the property due to their nature, it is bondable or no, there are dissidence between legal scholars and jurists, civil law stipulated mortgages, that the material assets have the ability to mortgage, but immaterial property cannot be mortgage. Along with the progress of human society and evolution of human intelligence, the property also has changed. So the non-material property is formed as the stocks of companies both commercial and civil. Stock has financial value because it is useful and it can meet the need and convertible into money. In this case, the stock has a financial value and in the world of law is valid, so it is have ability to bond and bail out or not? This needs to be investigated, because for significance of shares in recent years the, researchers decided to study about to issue of hypothecate the shares in the rights in Iran, until to determine nature and dimension of shares in said legal system.*

Keywords: *Mortgage- collateral-civil law.*

I. Introduction

Bail out subject is one of the old issues in private law, although in the traditional system that it referred to as a result, in the form of other legal entities. After making loans or account it the bond with its nature it is to seek assurances for individuals that to pass their property and are entitled to payment (such as debt), or the people considering that have pledged but not able to fulfill their obligations. Along with this need, the various branches of guaranteed have been created in the world of rights to organize this target. Bond of lease is one of the solutions derived from the collateral. In fact, the security is a context in which it have been contracts such as mortgages, always the lease with respect to their property faced with various problems on rights. After human progress and formation other types of property, the lease also was confronted with new questions. One of these properties is stocks of companies. Traditionally, the form is considered to be collateral is the mortgage contract, that rules and provisions which have been described in products 771 to 795 of the Civil Code. According to article 771 of the Civil Code "Mortgage is a type of contract under which financial debt as collateral gives to the lender...". On the other hand, article 774 of the Civil Code has provided: "the mortgaged property must be determined and mortgage of loan and benefit is void ". While the mortgaged property in accordance with Article 772 should be given to the bill. Both of these have created doubts about the mortgage stock. In order to explore the possibility of collateral shares through the mortgage contract required to legal nature of shares to be examined.

First Discussion: The Legal Nature Of Stock

There is no doubt that the stock is a type of property and stock as the sheet that has economic value and is convertible into money, because the stock have two fundamental conditions to be considered property:

- A. useful and meet the need as material need or spiritual need.
- B. it can be able allocated to a certain person or nation(Katouzian. N,2005).

The main problem is that shares of stock companies in which the objective or loan is in what category of property because in Article 774 of the Civil Code has been agreed that the mortgaged property also must be determined.

A bill to amend part of the Commercial Code (1968) did not refer to the legal nature of stock, in other legal texts; the legislative has not demonstrated issue in relation to the legal nature of the stock. Only from Article 67 of the Civil Law enforcement (1977), it can be concluded that from the rights standpoint, the issue of shares placed in the category of movables. Title III of this law, is the inventory of movable property (paragraph 3 of Article 630 Legal Procedure Act (1906)).

According to one view, the right of shareholders via to company described as a loan right, that accordingly, shareholders can benefit from the company according to own shares and in case of cancellation of the company, shareholders can claim part of their legal assets(Eskini .R,2009).In recognition of this fact cited to Articles 24, 27, 33, 34, 35 and 38 amendment law trades. On the other hand stated that, the stocks is an independent financial and category in the objective property. However, if the objective is to treat tangible and material, in that case shares cannot be considered objective. Because the stock is not material and stock form is

only indicated the shares. so regarding the concept of " principle " for the property rather than its tangible can be stated that shares is in the objective property group(Bariklou.A, 2006).

Some experts also about of expression of the legal nature of stock believe that there is a difference between the stock of named and unnamed. According to this view, unnamed stock value mixed with the actual stock and embodied in that document and is given as the actual sentence. But in named stock there is no unity between the document and issue of stock, so this type of stock is in demand documents(Almasi.N, 2010).

Another approach is about the nature of stock that assumes the shares is certain rights, this means that nature of stock not correspond with loan rights and objective law. According to this view, shareholders have not the right objective on company property, because it is the property of the legal entity and shareholders not the creditor from company, and they can only take a certain share of company profits and when revocation of company, the company's property is shared between them(Tafreshi.I,1999).

With this perspective, it seems that cannot be described the right of a shareholder as a loan right, Because, Firstly: works that arises out of stock different from stock. The main effect of stock ownership is; right of company management, profit receipt and receive payments after the cancellation of the company. The right to receive profit alone is the right loan;the right of shareholders to own shares has be different with this right. Secondly:description of legal nature of the stock as a quest more concerns about partner with companies not related to partner with stock. However, when we want describe the legal nature of stock we should consider the relationship between the partner and shares, because this type of right is a partnership in a property. According to the description, it can be said that the legal nature of the stock is not in the category of loan.(Soltani. M,2012). If we insist that the issue of the objective right, is a property is a tangible and sensible, In this case we will be forced to know that shares right as a special right and assume that it does not follow the rules of objective law. But it seems that assuming the objective as a tangible and sensible property is rooted in the old definitions that entered to French law from Roman legal texts and entered into Iran's rights through translations from French texts. Objective concept fits perfectly with the same period has been in the past, But today all humans can place the immaterial and intangible assets as well as tangible and material property in a row. It seems that In determining the legal nature of shares, differentiate between registered shares and shares without a name is not correct, However, it has been common also in French law, Because The manner and method of transfer does not effecton the nature of the Said property, As well as the need to record the transfer of immovable property in the notary, does not effecton the nature of the Said property Compared with other property which they not required to sign the transfer. According to the legal definition the shares, is part of the company's capital and It does not seems misleading to describe this right as the objective right. With this view it can be stated that Shares is an independent property and is among the objective property. Limited assume the "objective" to external material objects is not reasonable;it is also not compatible with economic realities and developments. So if we consider to the objective as principle of property, it can be stated that shares is in the objective property group's.

The Second Discussion: The Ability Of Collateral Shares

Accordance with the provisions of the Civil Code, for a property to be filling must be it has two basic conditions: Mortgage property must be objective and be respected the seizure of property taken. In relation to the first condition if we does not assume that the stock have a concept of common objective in this case shares also cannot be a mortgage. In relation to the second condition, article 772 of the Civil Code states the seize requirement of accuracy to mortgage. So it may be thought that property mortgage there should sacral and tangible, until it is able to escheat with the traditional concept. Especially the main reason for cancellation of the mortgage loan contract is no possible to confiscate(Dashti. R, 2010).

According to top, there is a view that it is impossible to hypothecate the shares of Corporations. According to this view, because non-material assets such as stocks and goodwill are not objectively so they cannot be left to mortgage. And with article 774 of the Civil Code, We have no need to any argument. Article 774 of the Civil Code states that all non-material property, such as business documents, copyrights, goodwill arms they cannot be Mortgages and Their mortgage contract is void(Karimi.A 2008).

However, according to opinion, collateral the credit value and transaction documents such as bank notes and the anonymous shares of companies is correct; Because the subject is mixed thoroughly with the Objective document So Transfer and confiscation of them is the means of transmission and confiscation of their issue. But mortgage documents like-minded demand document is not correct, because there is no unity between the document and its subject(Sokuoti.Nasimi.R 2002).

There is another view that the stock is considered to be objective and believes that the corporation stock can be mortgages. One of the experts, called organic property the stock corporation, and he is described in Article 774 of the Civil Code says that:" Securities, stocks, government bonds and stamps are all objective and applying in mortgage"(Soltani. M, 2012).

Among those who hold this view (objective shares), some of them believe that mortgage of named and anonymous stocks with credit bonds are correct. According to this view, Shares can be described determined

objectively on the basis of equity. With regard to the questions that notaries public in connection with the mortgage documents of Company shares, the focus committee of precedent notaries and office helpers announced on 09/20/2010 that stock is specific objective and able to bond.

According to the above description, it seems the specified objective in Article 774 of the Civil Code, is the existence of property and not being tangible which placed against the loan and interest. So we can say that stock is an independent property that has value and can be converted to money and it is in the group of objective property and It is not considered as a loan and interest .to verify this claim may be used from donation contract. In definition of the donation contract in Article 795 of the Civil Code used from the property.This contract is too one of the objectives contract, so do not be claimed that expropriation is for a specific objective. The purpose of bail is keeping put to safe property from transfers, and to accomplish this it is not necessary that the property must be physically present to mortgage receiver.

In the realm of civil rights and mortgage rules, may claim that these interpretations cannot be attributed to the legislature and this is in accordance with Article 795 of the Civil Code on the objective of property is unacceptable. This approach will not damage to the issue of collateral stock as contract referred to in Article 10 of the Civil Code. By virtue of Article 10 of the Civil Code, It is not necessary that people bring their contracts into a format expected. This Article includes the principle of "freedom of contract" and will give a wide range to the government. Thus, Article 10 of the Civil Code is a solution to the issue of bail out stocks. It can be predicted the bail that the objective of property is not a condition of the mortgage contract. But check out this issue is important in which according to the rules of civil law, is the objective of mortgage property have a compulsory aspect or no? In accordance with Article 10 of the Civil Code, if this rule is mandatory, in this case, we should believe that security stocks are a false issue. to answer this question, we must refer to Article 975 of the Civil Code, that is as follows" whenever a law on public order it is mandatory law and it is a supplementary law when the purpose of the legislation is the only private interests". Now we need to know whether the compulsory mortgage property connected with the public interest and economic order partially that the principle of autonomy is ineffective to against it? Undoubtedly, the answer is negative. Because, when we doubt that a rule is mandatory or no, in accordance with the principle of Contracts it can be graduate Law. The draft law amending Article 114 is part of the Commercial Code puts an end to all doubts about this topic. Meaning that bail out stock of management not conflict with mandatory rules and public order in business law in addition, the second part of Article 47 of the law implementing the general policies of Article 44 of the constitution as well as states that mortgage stocks is possible (Falahatpisheh. B, 2013). Thus we can say that use the form of Article 10 of the Civil Code, is the perfect solution for collateral of corporation stock, even, if the form of mortgage is not acceptable .

II. Conclusion

1-Rules and regulations related to mortgage and collateral dose not progress along with the development of human society.

2-there is no obstacle in collateral shares in the current rules and regulations.

3-According to a survey conducted, legal nature of the stock is likely to be objective.

4-Given the nature of stock, collateral a company's stock is more compatible with developments in society.

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