

The Nature, Terms and Legal Effects of Presale or Pre-Construction Contracts of Building (Apartment)

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Abstract

Modern living in present-day in the territory of contracts, as in many other fields, has led to numerous and complex phenomena. One of its manifestations is the construction (constructing) phenomenon and its pre-sale contracts. Sale of the building and apartment units before their construct is a common problem in today's society that it depends on pre-sales or pre-construction contracts. The long duration of construction projects and fluctuations in materials prices, especially considering the today's economic situation is one of the important reason for the development of pre-sales contracts in Iran. This study has been carried as a descriptive analytical one to examine and identify the nature, conditions (terms) and legal effects of pre-sold or pre-construction contracts and among the results of this study are that; the presale contract of construction (building) despite the fact that sales did not exist at the time of conclusion of the contract, can be considered as the same sale. The producing of ordered goods is the responsibility of artificial maker (manufacturer) and the made should be determined and death and time to deliver the goods must be determined. The determination of price also as determination of made is very important and must be delivered to the makers according to contract.

Keywords: manufacturing order contract, presale contract, Istisna'a, sale

1. Statement of the Problem

With the increase in population in large cities due to the development of urbanization and increasing migration to the cities, housing today has been considered as a basic need and individuals professionally and sometimes in the form of a legal person has been involved in its construction. Following it the legal transactions and relationships with the issue of housing have been increased that the "pre-sales contracts for building" is the most original and most important of them. On the one hand, there were buyers who were not able to buy houses for cash and on the other hand, there were manufacturers that their capital was not enough to build standard buildings, so the pre-sales and preconstruction contracts and put into the market. In this way, no pressure was on the pre-buyers and builders (constructors) weren't facing with the shortage of capital and liquidity problems. Thus the pre-sale and preconstruction contracts were emerged.

Some problems of such contracts, are contrary transactions (sale of common units to several persons, pre-seller's fraud, get more money than the predicted amount in the initial contract, lack of accurately prediction of the characteristics and features of transacted building units (e.g. upscale area) as well as he technical and architecture specifications in which the building is instructed and the successive delays in timely contractual obligations action that often causes harm to pre-buyer.

As a result, such contracts are written in a broken way between the seller and the pre-buyer informally and cause several claims from uncovered check to ban the construction operations, insurance, building materials seller's demands and workers' demands and so on. Such problems somewhat will be resolved with the approval of building pre-sales bill. Thus the registration of construction contracts in the official documents offices has been required, therefore, in this study the understanding of the nature, conditions and legal effects of pre-sales or pre-construction contracts are addressed.

2. Pre-construction Contract (Pre-Sale) and Its Nature

Istisna'a or construction (constructing) order contract is a contract between two natural or legal persons based on the production of certain goods or the construction of a plan which in the future will be constructed and its price

is also to be paid in scheduled time in cash or in installments (Nazarpour, 2006, p 12).

The presale contract in the legal concept is another name of the forward sales or short sales and future property sale (or presale) is the sale that its sales do not exist in the time of contract. But the buyer agrees to provide it later and deliver on scheduled time (Jafari Langerodi, 1999, p. 92).

A building presale contract is a contract whereby the seller undertakes build (construct) and apartment, according to the map and the characteristics of the contract, and after completing it, in due course and for a contract fee, deliver to the buyer (Mansouri, 2010, pages 239 to 259).

The apartment presale contract can be considered as given the same sale despite the fact that sales did not exist at the time of conclusion of the contract. The given same sale (buying and selling of available property that is visible and can be touched) is one on sale and in fact is a clear example of the contract of sale so that the legislative in his/her definition in article 338 of the Civil Code of sale primarily has considered it. The legislator in the mentioned article has considered the sale as the same ownership as fixed consideration and according to article 361 of the Civil Code also if the in same sale it is determined that the sales does not exist, the sale is void. In fact, the seller with the conclusion of a contract transfers a part of an area at least as the buyer's share to him/her and since the arena is now available the contract of sale, is not seen as no sales. In addition, the seller is committed to the construction and delivery of the apartment under the provisions of the sales contract that finally the apartment presale contract can be justified and analyzed in the specified same sale contract. The contract can also be analyzed in the form of general in the disclosure sale. The legislative tendency to use "pre-seller and pre-buyer" in the building presale law approved in 2010 indicates identifying the nature of the transaction (sale) by the legislator for pre-sale apartment contracts.

In the apartment sale (if it isn't in the form of commitment to the sale) after finishing work, the same what has been made would be for the buyer and he or she can cite to this objective right against the creditors of the seller and any other buyer (Katouzian, Certain contracts, p 277 and 278). In the apartment pre-sale contracts if the seller does a violation and does not builds (constructs) exactly in accordance with the contract, in this case it can be objected since the this apartment has not been the parties mean thus the buyer does not have an objective right to it and the pre-seller's commitment has not been running and it will be unjust. Of course it can be said in this case, customary correspondence of built apartments with the agreed apartment will be sufficient. If the built apartment is consistent with the apartment of booking contract, the contract must be considered as valid, but the buyer has the right to terminate to terminate the contract if he/she does not consider the contract as an acceptable one. It should be noted that granting this right to terminate wouldn't be incompatible with the contract maintaining and compensation demand, meaning obtaining the remainder or shortcoming created due to lack of commitment performing of seller in the apartment.

3. The Principles of Pre-Construction Contract

To develop the Istisna contract considering five following principles is necessary:

- 1) The first and most important element is the client (Mostasne') meaning: a person who gives order making a certain good or construction of a specific plan for another one (the creator, contractor).
- 2) The second element is one who receives the order (makers or contractor): one who would admit making a particular commodity or deliver a specific plan with specific characteristics within the specified time to the other party.
- 3) Another element of it is the offer and acceptance: This contract like all other contracts can be concluded with the word, written or practical indicative of the will and consent of the parties.
- 4) Subject of the contract (the case of Istesna'a) is from other components (elements) of the contract is in this way that: Product or design that with certain characteristics and conditions which stated in the text of the contract or the order of construction, based on that qualifications, lead to both parties agreement.
- 5) The last element is the cost of the contract: The amount (cost) that is necessary to be paid to goods manufacturer or contractor of the plan (design) for carrying out the work specified in the schedule by the client.

4. Pre-Construction Contract Terms

4.1 The Clarity of Matter of the Transaction

The amount and type of material and the quality and size of the ordered goods must be clear and specific to any ignorance about a deal to be resolved. Article 216 of the Civil Code, which says: the deal should not be obscure except in special cases in which brief knowledge about it is sufficient or article 342 of the same law states: the amount and type and description of the object of sale must be known and determining the amount of it to weight,

or percentage or rug or area or view is the function of custom. It is clear that this requirement does not specific in sales and in all contracts in which the ownership is achieved in them is flow.

4.2 How to Pay the Price

In the Iranian civil code beside in the article 338 of the civil code in which the known instead and price have been specified the Article 339 of the same law stipulates that: After agreement of seller and customer in sales and its price, the contract occurs as the offer and acceptance and it is concluded before the offer and acceptance of the price must be agreed and sale with unknown or ambiguous price is not signed (concluded).

While the prices of goods in the market is fluctuating regularly and without reassuring stability, in such a condition the confidence in the market price is in fact reliance on the unknown and is required to deceives and consequently the invalidity of the transaction.

4.3 Certain Delivery Time

Article 344 of the civil code says: "If in the sale contract, no condition has been mentioned or to delivery of the object of sale or return of deadline price had not been determined, the sale is definitive and the preset price is considered unless according to common law or common law of trade in the trade transactions, the existence of a condition or an appointed term is traditional although in the sale contract does not mention". From this article it is derived that contract consideration is appropriate for cash payment, therefore, determination constitutes an important requirement for Istisna'a time and for any condition a part of the price is placed, so, for the time an amount of the price is developed. If this time is not known in fact the contract is coincided to unknown condition that causes ignorance in the price and eventually causes of nullity of the transaction. Consequently, in the Istisna'a contract, the timing of goods delivery it should be known at present to traditional customs or recorded deadline.

5. The Legal Effects of Pre-Sale Contracts

5.1 The Obligations of the Seller

Pre-sale or pre-construction contract as one of indefinite contracts of subject of legal Article 10 of the Civil Code can be discussed and reviewed. In the first place to prevent potential abuses of pre-seller or pre-buyer, according to case, about termination of the contract if its license, the construction contract should be considered necessary. The justification of this is a necessary principle in the contract; so that the parties have no right to disturb contract; except through forging option, rescission or the emergence of a cause for option. The seller in the pre-sale contracts or construction order is responsible for making commitments which are detailed in three paragraphs.

5.1.1 The Construction and Completion of Apartment (Building) under Contract

The commitment to construction and completion of apartment is the most important commitment of seller to buyer. This means that the seller is obliged construct (build) the pre- sold apartment (building) according to contract in the deadline delivers to the buyer. However, the buyer is obligated to take delivery his/her desired apartment on the deadline, but the seller can't force him/her deliver the apartment as is.

Taking the commitment to construction and completion of the apartment on the basis of article 22 of the pre-sales bill, attempt to pre-sales before the progress of construction at a rate of ten percent is not allowed.

5.1.2 Delivery of Apartment in Deadline

In Articles 333 and 384 of the Civil Code in relation to Article 7 of pre-construction law the buyer right to terminate the contract rate is limited and extradition of price also is according to contract rate. Article 7 of the law, has considered an advantage for the buyer, including the right to terminate and compensation if the area of the building is the price of day price of the building. This article provides more or less than the specified amount of the contract, the difference will be calculated based on the rate stipulated in the contract.

The delivery of an apartment unit and setting the formal document that exists in the paragraph 7 of Article 2 of the apartment (building) pre-sale is the ultimate goal of pre-sales contracts and their deadline should be determined early in pre-sale contract. The determination of this time is also effective in other cases such as:

- 1) We know a part of the contract price will be paid simultaneously with the delivery of building (apartment) and definitive transfer would be paid and therefore the determination of delivery date and setting document meaning the return date as a part of the price.
- 2) Accordance with paragraph 4 of Article 6 of the Law, if the pre-seller on the due date in the contract, does not deliver the entire building or part of it or does not transfer the official document to pre-seller, the buyer is

obliged to pay a certain delay penalty. So, the late penalties which the pre-seller will pay, in fact, after the due date for delivery or setting final document (in accordance with case) will be calculated.

3) At least ten percent of the transaction price would be paid on the date that the final document will be regulated (Katouzian, 1955; p. 123). About the sanction of this paragraph, it should be said: If the delivery time is not specified in the contract, the transaction would be and an uncertain and is void. Because the pre-seller under the pretext of the lack of timing of delivery indefinitely delay the construction of apartment and this lead to the loss of the buyer. But despite the timing of delivery, the definitive transfer date is not set, contract is correct, because according to Article 04 of pre-construction law the pre-buyer can refer to office and demanding the transfer of title to his/her name. However, delay in payment damage referred to in paragraph 4 of Article 6 pre-construction law is not demandable because the calculation of this damage is on the basis of the determined definitive transfer date which in our hypothesis (assumption) this date has not been specified.

5.1.3 Setting Official Transfer Document

One of the evidences of claim in accordance with paragraph 2 of Article 238 of the civil code is written documents. Although the legislator in this article has named this evidence a written document, but on top of article 284 of the civil code that attempts to expression of the definition, effects and value of this document, including: any entry (written) that in the case of a claim or defense can be invoked (attributable). The legislator only looks the written documents and other documents that aren't written, has removed from the scope of evidences. In the history of Iran law before the introduction of Article 286 of the civil code, we are not faced with division of the document into the formal sector; because this came as the office for registration of deeds, notary and new civil society organizations were established; therefore the existent documents before the introduction of the 0286 civil code have been identified in terms of proof; but with the growth of civil society and developing transactions (trading relations) and people's legal relationships and establishment of notaries and registration of transactions, the legislator concluded in order to prevent disputes arising from the issuance of common documents that the proof of their veracity is difficult, the documents are divided into two parts of normal and official (formal) and for official documents some advantages are considered that are not exist in the ordinary documents and thus the people encouraged to enjoy the benefits (advantages) attempt to set an official document (Bandarchi, 1953, p. 21).

Article 6 of the constitution indicates that if the pre-seller doesn't deliver the pre-sold apartment unit on the due date in the contract to pre-buyer or does not fulfill his/her obligations, in addition to the implementation of paragraph (9) of Article (2) of this Act, he/she is obliged to pay the delay penalty for pre-buyer as below, unless agree upon more funds for the benefit of the buyer. Application of the provisions of this Article shall not prevent the exercise of the options for the buyer.

- 1) If the pre-sold apartment unit and private sectors such as parking and warehouse are not useable in due time, until the time of delivery to the pre-buyer, is equivalent to the remuneration of undelivered sector.
- 2) In the case of non-fulfillment of mutual obligations, daily by half a percent of the day price of non-fulfilled obligations to the amount of buyer's share.
- 3) In case of non-fulfillment of the public service obligations referred to in paragraph (9) of Article (2) of the Act, such as streets, gardens, mosques, schools and so on, daily at a rate of one in a thousand of day price of the fulfilled obligations to the amount of the buyer's share.
- 4) In the case of failure to take timely action to transfer the official document, daily at a rate of one in a thousand of contract price, this article indicates that the law severely hit from the creators of the so-called perfidious. Because the pre-seller will be convicted liable for delays in fulfilling the obligation to pay heavy fines. For example, the fourth paragraph of Article 6 requires the pre-seller if no timely action to set an official document to pay daily one in a thousand of the transaction. That is, if, for example, almost three-year delay in document handling has taken place, the pre-seller is practically obliged to return the received price and deliver the building (apartment) and transfer the official document, too. Otherwise, in the event of further delays, it may also have to pay the out of pocket. The point of the matter is that since the legislator has been mentioned that the parties can't with each other agreement reduce the incidence and percentage rate of delay penalties and no escape is remained for the pre-seller offender to pay the these penalties. However, even though the content of building pre-sell law is inconsistent with public order, this is sufficient that the pre-seller and the pre-buyer can't agree against the law, but perhaps legislator has suggested that different interpretations exist on this issue, has inevitably annulled void agreement against these amounts (prices) in order to reduce the amount of delay charges. So, this sanction is quite encouraging the pre-buyers to conclude the pre-sell contract resort to the official document, because these heavy consequences either cause as much as possible in due course to achieve their

housing or at least their losses will be compensated to a large extent. Of course, this solution is not all because it is possible the pre-seller to be in a position that prefers construction halt to continuing it and at the time the monetary penalty may not be suitable sanction. Thus, it was better the legislature predicted the stock (share) amount in pre-sales contract so that if for any reason the pre-sold project is not reached to delivery of apartment units, the pre-buyer will be the owner of specific area of the project land which by selling it can compensate paid fees.

In the pre-sale apartment (building) law and according to its Article 3, the pre-buyer at the same time of installments payment is the owner of the building. So this article puts an end to legal disputes and the pre-buyer in case of contract conclusion in the pre-buyer, on the proportion of office installments can use this legal. This article requires the payment or exchange contract, would be the owner of pre-sold property and at the end of pre-sales contract and completion of the building (apartment), with the approval of the supervisory engineer if all installments had been paid or exchange contract had been delivered, by providing evidence to comply obligations, he/she can referring to one of the offices of official documents, demand regulating (setting) official documents transfer to his/her name (Alizadeh, 2009, p. 11 and 33).

5.2 The Buyer's Obligations

The buyer in the pre-sale contract is obliged to commitments in return the seller which are as follows:

However, if the determination of the transaction price and how the Payment by installments were not in the law, the parties themselves specify this important, but the point to note is that Article 00 of pre-construction law refers to paragraphs 3 and 6 of Article 2 states in the building pre-sale the payment of the installment agreed price of the contract will be by the parties' agreement, but at least ten percent of this appointed will be achieved by setting the final document and the parties can't agree otherwise.

According to the rule stated in article 237 of the civil code, if the committed person does not act according to contract, the obligee must first apply to the court that required him/her which makes the obligee pending for a long time in the maze of Justice. According to article 04 if the seller until the expiry of the term of the contract failed to complete the project, confirmed by an engineer supervising the building progressed that only small steps to complete the project remain (less than ten is remained), the pre-seller can by accepting the completion of the rest of contract refer to the notary and official documents and ask setting the official document to his/her share (stock) amount (Katouzian, 2005, p. 127).

6. Results

The pre-construction or Istisna'a conditions, has its own rules and effects. The presale contract of construction (building) despite the fact that sales did not exist at the time of conclusion of the contract, can be considered as the same sale. Comply with the general conditions of transactions, meaning intent and consent of the parties, their qualifications, determined subject being transacted and legitimacy to trade is necessary in it. In this contract, supplying raw materials and the producing (constructing) of ordered goods is the responsibility of artificial maker (manufacturer) and the made should be determined meaning the material, type, size, attributes and characteristics must be clearly stated and death and time to deliver the goods must be determined. The determination of price also as determination of made is very important and must be delivered to the makers according to contract.

According to the principle of necessity and Article 219 of the civil code, this contract is required unless by parties consent is annulled or by a legal reason is terminated. The maker's commitment (obligation) to doing the work and making the product is commitment to results. That is, the meaning of Istesna's contract is creation of the result of committed act and in accordance with Articles 221 and 226 of civil code is obliged to create result and if does not perform it or delay in performing is responsible to compensate the damages to the promise unless he/she proves that the failure to perform or delay in performing obligation has been documented to the incident which can't be related to his or her or in the contract is corrected to her/his irresponsibility.

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