

Aqd ul Fodooli, Its Application in Islamic Banking and Related Shariah Issues

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Abstract: Fadooli is voluntary (unpaid) agent who meddles in the affairs of others without any invitation. The sale through such agents is at the will of owner. According to sharia, if it gets approval then such sale is permissible and if get rejected by the true owner then it is not permissible. Examples of Fadooli can directly be derived from sunnah of Prophet (SAW), but there are rulings of Shari'ah regarding the sale, purchase, contract, acts and applications of it.

Keywords: Aqd ul Fodooli, Islamic Banking, Shariah, Business, Contract

Introduction

Capacity of the contracting parties:

A person can enter into the sale and purchase contract in a one of the following capacity:

(1) Owner (مالك):

According to (Najim & Ibn, 1419 - 1999) A person can execute a transaction in a capacity of Owner.

The owner is a person who has the power to execute the sale and purchase transaction without taking the permission from anyone. For example if "A" sells his car to "B" on agreed price, then it should be considered a valid and effective sale transaction and its execution cannot depend on permission of someone. In a same manner if "A" purchases something for himself, then it should be considered a valid and effective sale transaction and its execution cannot be dependent on permission of someone¹.

(2) Agent (وكيل):

According to the finding of (Haider & Scholars, 1286) A person who acts on behalf of another person or group under the contract of agency, where the Agency is defined as the act of one party delegating the other to act on its behalf in what can be a subject matter of delegation. For example “A” appoints “B” to sale his car on his behalf in market. The contract of agency can be paid and non-paid².

(3) Wali (ولي):

A person who acts on behalf of another person by virtue of shariah. For example a father can execute a contract on behalf of his minor son³(Ahmed bin Mohammed bin Ali Fayoumi then Hamwi, 2010).

(4) Fodooli (فضولي) :

Fodooli is a person who discharges the affairs of others without being an agent or having a right to do so by virtue of Shari’ah. For example “A” sold the property of “B” without the permission of “B” and without having a right to do so by virtue of Shari’ah.

In this paper we are going to discuss the matter of Fodooli in detail, which includes the (i) definition of Fodooli, (ii) shariah ruling about the contracts of Fodooli and (iii) Contracts of Fodooli and the Views of Contemporary Scholars (iv) Application of Fodooli in Islamic Banking and related Shariah issues. (v)

(i) Definition of Fodooli:

The word *Fodooli*(فضولي) is derived from the word *Fodool* (فضول) which is the plural of *fadl* (فضل). The word *fadl* literally means “increase” which gives a positive sense, but this word becomes familiar with its plural “Fodool” which mostly used in a negative connotation (المغرب في ترتيب المعرب - المطرزي). The word *Fodooli* literally stands for (المشتغل بما لا يعنيه) which means a person who gets involved in something that is none of his concern. The technical or juristic definition of *Fodooli* carries its literal meaning in it. Accordingly, *Fodooli* has been defined as “person who discharges the affairs of others without being an agent or having a right to do so by virtue of Shari’ah” (البحر الرائق، 970هـ), such as selling the property of others without his permission or without having the mandate to do so. A better and comprehensive definition is provided by the AAOIFI (Accounting and Auditing Organization for Islamic Financial Institutions): “An un commissioned agent (Fodooli) is a person who discharges (in the absence of any need or urgency) the affairs of others without being an agent or having a right to do so by virtue of Shari’ah. The deal becomes subject to the rulings on the Fodooli, even when the acts of a real owner makes him appear an agent” (AAOIFI, 2015). In short, *Fodooli* is someone “who disposes another person’s right without any legal permission.”

Historically the first example we have find for the contract of Fodooli is the contract between the Prophet Muhammad (ﷺ) and his companion hazrat Urwa bin Abi ja’ad (رضى الله عنه). The detail of this contract is mentioned in the renowned book of Hadith “Abu-Dawood”. The exact wording of Hadith along with its translation is as follows:

3388 حَدَّثَنَا مُحَمَّدُ بْنُ كَثِيرٍ الْعَدِيُّ أَخْبَرَنَا سُفْيَانُ حَدَّثَنِي أَبُو حُصَيْنٍ عَنْ شَيْخٍ مِنْ أَهْلِ الْمَدِينَةِ عَنْ حَكِيمِ بْنِ جَرَامٍ أَنَّ رَسُولَ اللَّهِ -صلى الله عليه وسلم- بَعَثَ مَعَهُ بَدِينًا يَسْتُرِي لَهُ أُنْجِيَةً فَاشْتَرَاهَا بِبَدِينَارٍ وَبَاعَهَا بِبَدِينَارَيْنِ فَرَجَعَ فَاسْتُرِيَ لَهُ أُنْجِيَةً بِبَدِينَارٍ وَجَاءَ بِبَدِينَارٍ إِلَى النَّبِيِّ -صلى الله عليه وسلم- فَتَصَدَّقَ بِهِ النَّبِيُّ -صلى الله عليه وسلم- وَدَعَا لَهُ أَنْ يُبَارَكَ لَهُ فِي تِجَارَتِهِ

“Hakim Ibn Hizam (May Allah be pleased with him) stating that the Prophet (peace be upon him) gave him one dinar so as to buy a sheep that the Prophet (peace be upon him) wanted to sacrifice. Hakim purchased the sheep for one dinar and sold it for two. Then he purchased

مجلة الأحكام العدلية²
المصباح المنير³

another sheep for the Prophet (peace be upon him) for one dinar and handed over the remaining dinar to him. The Prophet (peace be upon him) took the remaining dinar and spent it on charity and then prayed to Allah to bless Hakim's trading business⁴."

Detailed Discussion on Shariah Ruling of Fodooli

(i) Shariah ruling about the Contract of Fodooli:

According to traditional fiqh books and literature the contract executed by Fodooli can be fall in one of the following type of transaction:

- (a) Sale of Fodooli (بيع الفضولي)
- (b) Purchase of Fodooli (شراء الفضولي)

Fuqaha (classical Jurists) has difference of opinion regarding the shariah ruling about each of the following type. The summary of these opinions relating to each type is as follows:

(a) Sale of Fodooli (بيع الفضولي):

Fuqaha (classical jurists) are of two opinions regarding the shariah ruling of sale of Fodooli.

First: Hanafi, Maliki and some of the Hanbali Fuqaha (jurists) are of the opinion that the sale executed by the Fodooli is valid but suspended (موقوف) until the permission or rejection of the owner. If the owner allows the sale of Fodooli then it becomes a valid sale contract and as result the ownership of the subject matter (معقود عليه) will transfer from the owner to the buyer and if he rejects the sale of Fodooli then the subject matter (معقود عليه) will remain in his ownership and the act of Fodooli becomes void and ineffective⁵(Abdel Sattar Abu Ghada, 1983).

Second: According to Shafi'i Fuqaha (jurists) and a number of Hanbali Fuqaha (jurists), the contract becomes invalid as the Fodooli does not enter into the contract in a capacity of owner, or as someone who is authorized by the owner⁶. So as per their opinion the sale of (بيع الفضولي) Fodooli is void Even if the owner permits it.

(b) Purchase of Fodooli (شراء الفضولي):

As far as the Shariah ruling regarding the purchase of Fodooli is concern, the Fuqaha have differed to four different opinions:

First: According to Maliki scholars (Rushd, 1425 - 2004)⁷ and one of the opinions (رواية)of Imam Ahmed bin Hanbal(Aljmaeili & Hanbal, 1968)⁸ "the purchase of Fodooli (شراء الفضولي)is same as Sale of Fodooli (بيع الفضولي), i.e. the Purchase executed by the Fodooli is valid but suspended (موقوف) until the permission or rejection of the Intended person. If the Intended person allows the Purchase of Fodooli then it becomes a valid sale contract and as result the ownership of the subject matter (معقود عليه) will transfer from the seller to the Intended person and if he rejects the purchase of Fodooli then the subject matter (معقود عليه) will remain in the ownership of seller and the Purchase of Fodooli becomes void and ineffective.

Second: According to one of the opinions (qual jadeed)of Imam Shafi'I (Mutai & Najeeb, 2008)⁹ and Hanbali Fiqh(Mardaawi, Suleiman, & bin, 2010)¹⁰, the purchase of Fodooli becomes invalid as the

⁴(Abu-Dawood, Hadith Number 3388)

⁵الموسوعة الفقهية الكويتية volume 32, page 171

⁶الموسوعة الفقهية الكويتية volume 32, page 172

⁷volume 2, page 143

⁸المغني لابن قدامة volume 4, page 154

⁹المجموع شرح المذهب volume 9, page 260

¹⁰والإنصاف للمرداوي volume 4, page 283

Fodooli does not enter into the contract for himself as an Aseel (اصيل) or as someone who is authorized by the Intended person. So as per their opinion the purchase of Fodooli (بيع الفضولي) is void Even if the Intended permits it.

Third: Hanafi School of thought has differentiated between the two scenarios of the contract of Fodooli(Balkhi & Din, 2010)¹¹:

- (a) The Fodooli has executed the contract on his behalf without referring the contract to the intended person.

In this scenario, the contract will be related to Fodooli and as a result the purchased goods will be considered the Fodooli's ownership, Even if the Intended person permits it, because as per Shariah law the person is responsible for his acts. As Allah says in the holy Quran which means "every {لها ما كسبت} ¹² soul (person/نفس) have the consequence of what it done". And the purchase of something without referring it to someone is the act of Fodooli so he should have its consequences.

- (b) The Fodooli has executed the contract referring it to the intended Person; As the Fodooli said to the seller that I have purchased this item from you for the intended person.

In this scenario, the Purchase executed by the Fodooli is valid but suspended (موقوف) until the permission or rejection of the Intended person. If the Intended person allows the Purchase of Fodooli then it becomes a valid sale contract and as result the ownership of the subject matter (معقود عليه) will transfer from the seller to the Intended person and if he rejects the purchase of Fodooli then the subject matter (معقود عليه) will remain in the ownership of seller and the Purchase of Fodooli becomes void and ineffective(Masri & Najim, 2010)¹³.

Fourth: According to Shafi'i school of thought (Qual Qadeem)(Sharaf Al Nawawi, 2010)¹⁴, they have divided the purchase of Fodooli into four different scenarios:

- (a) Fodooli purchase something with principal's money and disclosure of the principal.

This scenario of purchase of Fodooli may occur when a person who is entrusted with another person's money uses the money to purchase an asset for the owner without his consent or authorisation. The Fodooli however discloses to the third party seller that the purchase is done on behalf of the owner. There are two opinions (رواية) of Imam Shafi'i regarding this scenario: (i) the Purchase executed by the Fodooli is suspended (موقوف) until the permission or rejection of the Owner. If the Owner allows the Purchase of Fodooli then it becomes a valid sale contract and as result the ownership of the subject matter (معقود عليه) will transfer from the seller to the Owner and if he rejects the purchase of Fodooli then the subject matter (معقود عليه) will remain in the ownership of seller and the Purchase of Fodooli becomes void and ineffective. (ii)The purchase of Fodooli (بيع الفضولي) is void Even if the Owner permits it.

- (b) Fodooli purchased something using his own money.

This scenario is a bit different compared to the above scenario because the Fodooli disposes his money in a purchase done for the Intended person. In this context, the Fodooli purchases an asset from a third party using his own money but the purchase is intended for another person.

According to Shafi'i, it depends on whether the Fodooli discloses the intended person or not. If the intended person is not disclosed, the purchase is enforced against the Fodooli even the Intended Person permits it or not. If the purchaser is disclosed or the purchase is attributed to the intended person, then the purchase is suspended (موقوف) until the permission or rejection of the Intended person. If the

¹¹الفتاوى الهندية volume 3, page 152

¹²سورة البقرة, ayah No:286

¹³البحر الرائق volume 6, Page 162

¹⁴روضة الطالبين volume 3, Page 353

Intended person approves the Purchase of Fodooli then it becomes a valid sale contract and as result the ownership of the subject matter (معقود عليه) will transfer from the seller to the Intended person. And If there is no approval from the Intended Person, then the purchase is enforced on the Fodooli and in another view, the purchase is void.

(c) Fodooli purchased something under liability (fi zimmah) without the permission of Creditor. Imam Shafi`i mentioned that the purchase is subject to ratification by the Creditor. Otherwise, the purchase will be affected against the Fodooli. However, if the purchase is under the Fodooli's liability but with disclosure of the principal, then the legal effect will be the same as in the context of the Fodooli purchasing using the principal's money with the disclosure of the principal (as mentioned in Scenario(a)above).

(d) Fodooli purchase something with disclosure of the Intended Person against Identified Consideration. For example the Fodooli purchased the something against the Specified asset which is neither the ownership of Intended Person nor the ownership of Fodooli.

This scenario was mentioned only In Shafi'i school of thought. They have two opinions regarding this class of Fodooli's contract. (i) The contract is void. (ii) The purchase is enforced against the Fodooli.

(ii) *Contracts of Fodooli and the Views of Contemporary Scholars*: Abdul Karim Zaidan argues that the opinion of Hanafi and Maliki scholars on *Fodooli* is preferable due to two reasons. Firstly, all contracts and dispositions have been legalized for the benefit of the people. It is most probably that the *Fodooli* acted in the interest of the party for whom he is performing a disposition for, though without his initial permission. This person who is unaware of the *Fodooli*'s disposition can later approve it if he views it to be in his best interest and, alternatively, he can nullify it if he finds it to be against his interest. Hence, the disposition of the *Fodooli* does not carry or inflict harm upon the unaware party. Therefore, it does not make sense to view the disposition of the *Fodooli* as void. Secondly, the texts regarding the permissibility and validity of dispositions are generic in nature without the disposition of *Fodooli* being exempted from them (Zaydan, 2009)¹⁵. Regarding the need of permitting *Fodooli's contracts*, Zuhayli argues that the selling of another person's property without his permission is frequently found in practical day to day life. Examples of such disposition include, one spouse selling the property of the other spouse, individuals selling the property of the government, or the sale of the property of the person who has gone missing (al-Zuhayli, 1989)¹⁶. Al-Qaradaghi expresses that the opinion of the Hanafi school of thought regarding *Fodooli* is preferable. He also adds that the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) has also adopted this opinion in its respective standards (Kamaruzaman & Ezhar, 2009)¹⁷.

(iii) Application of Fodooli in Islamic Banking and related Shariah issues:

Islamic Banks in Pakistan uses the following products on its Asset side:

- (I) Murabaha to the purchase order
- (II) Musawamah
- (III) Salam
- (IV) Istisna

¹⁵Zaydan, `Abdul Karim, *Madkhal ila al-fiqh al-Islami*, p. 349

¹⁶Al-Zuhayli, Wahbah, *al-Fiqh al-Islami wa Adillatuhu*, Dar al-Fikr, Damascus (1989), 3rd Edition, v. 4, p. 373

¹⁷Al-Qaradaghi, Muhiuddin, *al-Fadhalah wa Tatbeeqatuha*, (2009), available online at: http://www.qaradaghi.com/portal/index.php?option=com_content&view=article&id=536:2009-07-13-11-20-19&catid=84:2009-07-13-09-55-10&Itemid=13

- (V) Ijarah
- (VI) Diminishing Musharakah
- (VII) Running Musharakah

Out of these products there is no involvement of Fodooli in Ijarah, Diminishing Musharakah and Running Musharakah. Involvement of Fodooli may only be occurs only in case of Murabaha, Musawamah, Salam and Istisna. We will discuss each case separately:

Fodooli's Contract in Salam and Istisna:

Salam and Istisna are the products used by the Islamic banks to cater the working capital requirement of the customers. In Salam and Istisna transaction the Islamic Bank give an order to customer for supplying/ manufacturing of specified Goods, and upon the delivery of ordered goods, the bank appoints the customer as its agent for the selling Salam/Istisna goods in market on Bank's behalf.

Sometimes the customer delivered the ordered goods to the Bank and after the transfer of ownership to the bank; the customer sells the goods of the bank to the third party before the bank hires him as an agent. So in this scenario the customer shall be considered as a Fodooli because he sells the goods of the bank without the permission of the bank. This act of Fodooli comes under the "Sale of Fodooli" and according to majority of shariah scholars and AAOIFI shariah standard the sale executed by the Fodooli is valid but suspended (موقوف) until the permission or rejection of the owner. If the owner allows the sale of Fodooli then it becomes a valid sale contract and as result the ownership of the subject matter (معقود عليه) will transfer from the owner to the buyer and if he rejects the sale of Fodooli then the subject matter (معقود عليه) will remain in his ownership and the act of Fodooli becomes void and ineffective. Normally banks allow this type of transaction so there is no shariah issue is this case.

Fodooli's Contract in Murabaha to the purchase order and Musawamah:

Murabaha to the purchase order and Musawamah are the products offered by the Islamic Banks to cater the raw material requirement of customers. In Murabaha to purchase order and Musawamah the bank purchase the asset from the market and subsequently sale the purchased asset to the customer on the Murabaha (cost + profit) or Musawamah basis. It is the Most common practice of Murabaha and Musawamah that the bank do not purchase the required asset from market by itself rather Islamic banks hire the customer as an agent to purchase the required goods from the market on bank's behalf and subsequently the same shall be sold to customer by the bank on murabaha/ Musawamah basis.

Sometimes the customer purchases the goods from the market without being appointed as an agent by the bank (as a Fodooli) and after the purchase of such goods the customer comes to the bank and asks Murabaha/Musawamah facility against the purchased good. Now the question is arises that whether we consider the said purchase for Bank and allow the bank to provide the Murabaha/Musawamah facility or consider the said purchase enforced against the Fodooli?

Dirasat (Commentary of AAOIFI Shariah Standards) addresses the said question and says that this purchase of agent shall be considered on behalf of Islamic Bank when the following conditions are fulfilled:

- (1) The customer is new and did not aware of Murabaha conditions.
- (2) He avail the financing facility only from the particular Islamic Bank.
- (3) The customer did not come because he is short of finance.

If any one of the following Conditions is missing then the purchase shall be enforced against the Customer (Fodooli) and Islamic banks are not allowed to provide Murabaha/Musawamah facility against the purchased good. In our Pakistani Islamic Banking Industry these types of transactions are quite common that the customer purchases the goods from the market without being appointed as an agent by the bank (as a Fodooli) and after the purchase of such goods the customer comes to the bank

and asks Murabaha/Musawamah facility against the purchased good and some Islamic Banks offer them Murabaha/Musawamah without fulfilling the above mentioned conditions.

Shariah Boards of the Islamic Banks, External Shariah Audit and SBP Inspection team has to look seriously to this matter to ensure compliance in this regard.

Conclusion: Fatwas and Standards

(iv) Standard and Fatwas Related to *the Contracts of Fodooli*:

(a) AAOIFI Shariah Standard No. 23:

8. Act of an Uncommissioned Agent (Fodooli).

8/1 an uncommissioned agent (Fodooli) is a person who discharges (in the absence of any need or urgency) the affairs of others without being an agent or having a right to do so by virtue of Shari'ah. The deal becomes subject to the rulings on the Fodooli, even when the acts of a real owner makes him appear an agent.

8/2 The approval or denial of a contract concluded by an uncommissioned agent is subject to the discretion of the owner. Approval of such contract by the owner should also precede revocation of the contract by either of the two parties; otherwise, a new contract has to be initiated. If the owner of the property does not approve the act of the uncommissioned agent, the act becomes binding to the latter, if he did not declare at the time of signing the contract that he had no authority.

8/3 The rulings on the uncommissioned agent are applicable to all financial contracts, including compensatory contracts like sale, purchase, rent and hiring contracts, donations by way of gift, and investment agency contracts.

8/4 When the owner of the asset approves the act of the uncommissioned agent, the contract becomes effective, and subject to all rulings on agency. The approval shall be retroactively effective, based on the date of such an act¹⁸.

(b) Kuwait Finance House Fatwa Committee:

The Fatwa Committee of KFH has also deliberated on Fodooli's contract which was brought upon them. The text of the fatwa no. 882 is as follows:

Question:

A person sold KFH a house mortgaged to a certain entity. KFH agreed with this person to pay the price in two parts; the first part to be paid to the mortgage lender (Kuwait Savings and Credit Bank) in order to dissolve the mortgage, and the second part to be paid to the seller (the house owner) after the transfer of the house ownership to KFH. After the contract of sale was registered with the broker, KFH sold the house to another person who had promised to purchase it from KFH. However, the seller (the original owner) after receiving the first part of the price, paid it to the mortgage lender and upon dissolving the mortgage, sold the house to another party. Hence, KFH has taken legal actions against the seller. The

¹⁸ AAOIFI Shariah Standard, page No: 620

seller is currently offering reconciliation whereby KFH terminates the contract of sale registered with the broker and the seller pays back the first part of the price (the part paid to dissolve the mortgage). Prior to this incident, the practice that has been followed in the event of purchasing real estate that is mortgaged to another bank is to stipulate in the contract of sale that the buyer (KFH) pays an advance payment equivalent to the debt owed to the mortgage lender. As a security, KFH requests the seller to issue a cheque in favour of KFH having the same amount as the advance payment. In the aforementioned incident, KFH requested the seller to issue a cheque in favour of KFH having the value of the debt owed to Kuwait Savings and Credit Bank. When the seller violated the contract and sold the house to another party, KFH submitted this cheque to the public prosecutor; the seller was prevented from travelling and was brought to trial in absentia for issuing cheque on insufficient funds. Issuing a cheque as a security was the only method practised in the event of purchasing real estate that is mortgaged to another bank. However, this method has been cancelled, and in coordination with Kuwait Savings and Credit Bank, a more secure method is being followed. Is it allowed for KFH to ask for compensation for terminating the contract of sale? Is it also allowed for KFH to ask for compensation for the profit on selling the house that has been lost due to terminating the contract of sale between KFH and the purchase undertaker? Is it also allowed for KFH to ask for compensation for reserving the first part of the price throughout the period starting from the date of purchase to the date of payment to KFH?

View of the Committee:

The Fatwa Committee believes that KFH reserves the right to validate or to invalidate the sale because the previous owner sold a house not owned by him (*bay' al Fodooli*). In case KFH validates the sale, subsequent permission is then considered like a preceding agency. In this case, it is allowed for KFH to collect any profit earned because it is the owner of the house, but KFH is not allowed to ask for any compensation. From the response, it can be said that the Committee adopted the view which allows *Fodooli Contracts* to be ratified by the owner.

(c) Al Baraka Fatwa:

Al Baraka Fatwa Committee was consulted on the disposition of a customer who purchased an asset by way of *Fodooli*. The text of fatwa as follows:

Question:

Is it permissible for a customer to buy for others through a *Fodooli* transaction?

Please provide fatwa on this matter.

Answer:

In light of the report submitted by the supervisor of the operation that the finance who requested for murabaha financing has put forward the idea of buying a vehicle by way of musharakah between him and Al Baraka. In this context, after agreeing with al Baraka, the customer (finanee) approached to sign an agreement with the vehicle manufacturer with payment of 10% of the price. He then proceeded to request al Baraka to enter into the contract by paying the remaining portion of the price (90%). In view of the above, the client's action is of two capacity; one is his purchase of 10% for himself; two is his purchase for Al Baraka of the 90% on the basis of *Fodooli*. This kind of transaction/disposal is dependent on the person of which the transaction is intended for. If he consents to it, the purchase is effective. Thus, it is the right of the company to agree to the disposal of the client or to reject it. If the company approves it, it effectively owns 90% of the vehicle and thus become established partners over the vehicle. In the case of the two partners agreeing to sell the car,

they may share the profit, according to the respective equity after retrieving the amount of capital of each partner. Similarly, losses shall also be proportionate to the contributed capital. A partner may also sell off his share to the other partner by way of *murabaha*, or normal sale; or he may rent his portion through *ijarah muntahiyah bittamlak*. The selling of the portion may be of a one lump sum basis or partial disposal (*musharakah mutanaqisah*). However, this principle should only be applied in the narrowest scope and shall not constitute as a general principle given that it is based on the intention of the person which is hidden in nature and difficult to be ascertained.

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