Selling An Inherited Item Before Taking Possession Of It.

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What do the scholars say regarding this issue: My father recently passed away. He used to work as a pants tailor but had left this profession in his later years. He owned two pants sewing machines. When he quit this job, he gave these machines to a friend to use for free during his lifetime. His friend took them to his factory, but my father did not transfer ownership to him—he only gave them for use.

Now that my father has passed away, I want to sell these machines to the same friend who currently has them, and he is willing to buy them.

My question is: Is it necessary for me to first take possession of these machines and then sell them to my father's friend, or can I sell them even before taking possession?

It should be noted that I am the sole heir to my father. I am an adult of sound mind. My mother passed away before my father, and I have no sisters.

بسم اللہ الرحمن الرحیم

الجواب بعون الملک الوھاب اللھم ھدایۃ الحق والصواب

When someone becomes the owner of movable or immovable property through inheritance, it is permissible for him to dispose of that property even before taking possession. Therefore, it is completely permissible for you to sell these

machines to your father's friend even before taking possession of them.

However, once you sell the machines, your father's friend's previous possession will not be able to serve as the possession required for the sale because his possession was one of trust (amanah), whereas the possession required after a sale is one of liability (daman). A possession of trust cannot serve as a possession of liability, so after the sale, the buyer will have to take new possession.

This new possession can be established if the machines are present at the location where the sale agreement is made, and the buyer is able to physically take hold of them. In such a case, the presence of machines and the buyer's ability to take immediate possession will be considered as the new possession. And if the machines are not present at the time of the sale, then the buyer must be given enough time to go to the machines and take possession of them after the sale.

It is permissible to dispose of an inherited item before taking possession of it.

It is stated in Hindiyyah:

"ولو ملک المنقول بالوصية او الميراث يجوز بيعه قبل القبض"

Translation: If someone becomes the owner of movable property through a bequest or inheritance, it is permissible for him to sell it before taking possession of it.

(Al-Fatawa-Al-Hindiyyah, Vol. 3, p. 13,
Dar-ul-Fikr, Beirut)

It is mentioned in Hashiyat-ut-Tahtawi Alad-Durr and Radd-ul-Muhtar:

”قال الكمال واما الميراث فالتصرف فيه جائز قبل القبض لان الوارث يخلف المورث فی الملک وکان للمیت ذلک التصرف فکذا للوارث وکذا الموصی له لان الوصیة اخت المیراث اھ ومثله للاتقانی وھذا کالصریح فی جواز تصرف الوارث فی الموروث وان کان عینا“

Translation: Imam Al-Kamal رحمه الله said: Disposing of inherited property before taking possession is permissible because the heir is the successor of the deceased in ownership. Since the deceased had the right to dispose of it, the heir also has this right. The same ruling applies to someone who receives property through a bequest, as a bequest is similar to inheritance in its rulings. And the same is found in Imam Itqani's book. And this statement is almost explicit in this matter that an heir can dispose of the inherited wealth even before taking possession, even if the inherited wealth is a specific item.

(Hashiyah-Tut -Tahtawi Alad-Durr, Vol. 7, p. 376,
Dar Al-Kutub Al-Ilmiyyah, Beirut)
(Radd Al-Muhtar, Vol. 7, p. 394, Quetta)

It is stated in Al-Muhit Al-Burhani:

”ولو ملک المنقول بالوصیة أو بالمیراث یجوز بیعه قبل القبض، أما في المیراث فلأن ید الورثة ید المورث لأنهم خلفا عنه فکان هذا بیع المقبوض، وأما الوصیة فلانها أخت المیراث فکان حکمها حکم المیراث“

Translation: If someone becomes the owner of movable property through a bequest or inheritance, it is permissible for him to sell it before taking possession of it. The permissibility of sale in the case of inheritance is because the heir's possession is considered an extension of the deceased's possession, as the heir is the successor of the deceased. Thus,

it is considered as if the item has already been possessed. For a bequest, possession is not necessary because it follows the same ruling as inheritance. Therefore, it will be just like inheritance.

(Al-Muhit Al-Burhani, Vol. 6, p. 277,
Dar Al-Kutub Al-Ilmiyyah, Beirut)

If the item is already in the buyer's possession as a trust, new possession is required after the sale.

It is stated in Al-Fatawa Al-Hindiyyah:

"ولو كان في يده عارية أو وديعة أو رهن لم يصر قابضا بمجرد العقد إلا أن يكون بحضرته أو يرجع إليه فيتمكن من القبض"

Translation: If the item is with the buyer as a loan (عارية), deposit (وديعة), or pledge (رهن), mere contract does not make the buyer the possessor unless the item is present with him at the time of the contract, or he goes to the item and gains the ability to take possession.

(Al-Fatawa Al-Hindiyyah, Vol. 3, p. 23, Beirut)

"مبیع پر مشتری کا قبضہ عقدِ بیع سے پہلے ہی ہو چکا ہے، اگر وہ قبضہ ایسا ہے کہ تلَف ہونے کی صورت میں تاوان دینا پڑتا ہے تو بیع کے بعد جدید قبضہ کی ضرورت نہیں مثلاً وہ چیز مشتری نے غصب کر رکھی ہے یا بیع فاسد کے ذریعہ خرید کر قبضہ کر لیا اب اسے عقد صحیح کے ساتھ خریدا تو وہی پہلا قبضہ کافی ہے کہ عقد کے بعد ابھی گھر پہنچا بھی نہ تھا کہ وہ شے ہلاک ہو گئی تو مشتری کی ہلاک ہوئی اور اگر قبضہ ایسا نہ ہو جس سے ضمان لازم آئے مثلاً مشتری کے پاس وہ چیز امانت کے طور پر تھی تو جدید قبضہ کی ضرورت ہے، یہی حکم سب جگہ ہے، دونوں قبضے ایک قسم کے ہوں یعنی دونوں قبضۂ ضمان یا قبضۂ امانت ہوں تو ایک دوسرے کے قائم مقام ہو گا اور اگر مختلف ہوں تو قبضۂ ضمان، قبضۂ امانت کے قائم مقام ہو گا مگر قبضۂ امانت، قبضۂ ضمان کے قائم مقام نہ ہو گا۔"

Translation: If the buyer had possession of the sold item before the sale contract, and that possession was such that he would be liable for damages if the item were lost, then new

possession after the sale is not required. For example, if the item was usurped by the buyer or acquired through an invalid sale, and then purchased through a valid contract, the previous possession suffices. And in this case if the sale contract has been made and the subject of sale perishes at buyer's home before he reaches home, it will perish in seller's possession (and seller will bear the loss). However, if the possession was not of a type that entails liability—such as when the item was with the buyer as a trust—new possession is necessary after the sale. This ruling applies everywhere. If both types of possession are the same -either both of liability or both of trust- they can substitute for each other. But if they are different, possession of liability can substitute for possession of trust, whereas possession of trust cannot substitute for possession of liability.

(Bahar-e-Shariat, Vol. 2, p. 645,
Maktaba Al-Madina, Karachi)

واللہ اعلم عزوجل ورسولہ اعلم صلی اللہ تعالیٰ علیہ وآلہ وسلم

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