

LEGAL AND SHARI'AH EVALUATION OF ~~MUDARABA~~ FINANCE

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

- Introduction
- Importance and significance of subject
- Objectives
- Methodology
- Statement of research
- Literature review

- Chapter #1
- Section no I
- meaning of mudarba
- various definitions
- Definition under law of Pakistan.

- Section #2 – Legitimacy of mudarba.
- 2.1 Argument
- 2.2 Al *Sunna*.
- 2.3 Mudarba as matter of consensus- conclusion.
- 2.4 Objection upon the legitimacy of mudarba.

- Section #3
- 3.1 Element of mudarba.
- 3.2 Element of mudarba in Pakistan law.
- 3.3 Characteristic of form.
- 3.3.1 Opinion of fuqaha.

- Section no.4
- 4.1 The condition of mudarba and opinion of jurist.
- 4.1.1 Second
- 4.1.2 Third

- 4.2 Parties in mudarba contract.
- 4.3 conditions related to rab-u-lmal (investor).
- 4.3.1 Status of mudarba where rab-u-lmal is minor.
- 4.3.2 Status of mudarba where rab-u-lmal is non Muslim.
- 4.3.3 Status of mudarba where rab-u-lmal l is women.
- 4.3.4 Status of mudarba where rab-u-lmal in number.

- 4.4 Condition related of *mudarib*.
- 4.4.1 First issue.
- 4.4.2 Second issue.
- 4.4.3 Third issue.

- 4.5 condition in Pakistani law.
- Section #5 Implication of mudarba.
 - 5.1 The capital invested and its conditions.
 - 5.2 Investment form.
 - 5.3 Investment of good is mudarba.
 - 5.3.2 First opinion.
 - 5.3.3 Second opinion.
 - 5.3.4 Proffered opinion.
 - 5.4 Fiduciary currency as capital.
- Section #6 Conduct of mudarba.
 - 6.1 Conduct of mudarib.
- Section #7.1 Treatment of profit and loss.
 - 7.2 Isolation of profit.
- Section #8.1 Administration of mudarba and its rules
- Section #9.1 Termination of *mudaraba*
- Conclusion

- Chapter #2
 - Section I mudarba in Pakistan
 - Introduction.
 - Mudarba in Pakistan perspective.
- Section #2 Section wise analyses of the law of mudarba compares and mudarba
 - 2.1 Structure of law.
 - 2.2 The legal frame work of mudarba.
 - 2.3 Eligibility criteria.
 - 2.4 Registration process.
- Section #3
 - 3.1 Raising of fund and mudarba operation.
 - 3.2 Authorization.
 - 3.3 Half yearly report.
 - 3.4 Liabilities.
 - 3.5 Role of religions board.
- Section #4 4.1 establishment of tribunal.
 - 4.2 Finality of order.

- 4.3 Role of advisory committee.
- 4.4 Auditor of mudarba and its role.
- 4.5 Audit

- Section #5 5.1 Winding up and conclusion.
- 5.2 Voluntary winding up.
- 5.3 Winding up by tribunal
- 5.4 Remedial measure.
- 5.5 Provision deals with punishment and penalties.
- 5.6 Application of fine.

- Chapter no.3
- Section no.I Scope of stander.
- How to frame agreement.
- Mudarba contract.
- Kind of mudarba.

- Section # 2.1 Requirement relating to capital.
- 2.2 Requirement relating to profit.

- Section no.3 Duties of mudarib
- Liquidation of mudarba.
- 1. Conclusion a
- 2. Recommendations

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Abstract

It is an accepted truth that every one in this world is in need of finance to execute his livelihood, because every dawn crops up with intense troubles like taxes inflation rising prices and currency devaluation. It has become difficult for the faith based or practicing Muslims to fulfill their hopes without indulging in interest based modes like getting homes or owing vehicle is impossible for a person of ordinary income. For that purpose most of the people resort to conventional banks which indulge them in mark-up modes which is understandable interest.

Conventional banks are providing products with diversity to attract their clientele but now we pay our gratitude to the Islamic banks and Islamic financial institutions, which are growing on day by day, and providing alternative to the Muslims to gave them safe way from *riba*. Islamic banks and Islamic financial institutions in Pakistan are presenting various modes of finance one of which is *mudarba*.

Mudaraba is the one of the finest alternatives of conventional ventures, it is a type of *musharka*, which is the one of the most beloved form of *sharia*, but regrettably this mode of Islamic finance regardless of its significance in the eye of *sharia* lacks in its proper place in financial sector in Pakistan. It is the need of the day that regime must take up efficient measures for its encouragement. It is relevant to mention here that like other Islamic provisions it is also lacking its due statutory position in Pakistan .yet we have *mudarba* laws in the form of *mudarba* ordinance 1980 & *mudarba* rules made thereunder, but it is sad to say that these are so called Islamic provision, there is a call for variation in these provisions. That's why I chose this topic for my research because it is required to be highlighted.

1.1 Introduction.

Section #1

Significance and worth of subject

Mudaraba is the most rife and valuable contract adopted by Islamic Financial institutions. This small paper attempts to record its background in *fiqh*, its conditions applications and modern version adopted under *mudaraba* ordinance 1980, and rules thereunder. Then endeavor to analyze the *shariah* validity of this contract. In doing so I make an effort to present arguments in response to those critics who question its validity, and it is hoped that this paper presents very clear picture about the nature of the contract.

The contract of *mudarba* is backbone of Islamic finance. Indeed, without this contract financing system as it is practiced today with name of Islamic banking will cave in. It is a traditional contract originally intended to help those who were not able to adopt market transactions or not vigilant to understand the cunning, deceitful guiles of traders, or having not enough capacity to invest capital. Thus this contract has balance prefer tool that can replace the modes of finance adopted by conventional banks. Consequently it gained importance in number of Islamic financial institution as a product fulfilling the basic cadet needs of the businessman, import and export and even in *sukuk* "bond" transactions.

Mudaraba financing involves a contract under which investor (رب المال) brings financing and other which is entrepreneur (*mudarib*) shows expertise, in result collectively the parties share the proportion of profit as according to pre arranged agreement – "in fact it is the most important form of equity investment in *Islam*.

Where one person contributes capital and other provide managerial push.

And in the event of loss supplier lose his money and entrepreneur loses the sweat equity time and effort, he can not be placed at risk of losing money since he has contributed jurists skills. So no one has right to make him liable for cash compensations".¹

¹ Frank E Vogel and Samuel. Kluwer Islamic law and finance P.1941 p by *Kluwer* law international p247

So in short we can say that Islamic venture should be based on two principles.

1. Return on capital can not be fixed in advance but must be a proportion of profits.
2. Capital, not labor, is liable to financial risk of the venture.

2.5 Western concept of limited partnership and *mudarba*.

Some contemporary scholar and analysts of *shariah* make resemblance b/w *mudarba* and type of partnership known as limited partnership like Frank E Vogel and Samuel Hayes,² they said "some *mudarba* arrangement closely resemble western limited partnership". They gave some arguments to make their view strengthen, they name a few examples of same transactions at work but the reality is that these are mistakenly understood identical in nature, and yet limited partnership and *mudarba* are two different things and having no resemblance, if we analyze both concepts we have reason to believe that these are two different transaction in nature.

When we study the law of partnership we find that limited partnership must consist of one or more general partners and one or more limited partners. Limited partners must make contribution to the partnership and bear liability up to the amount which they contributed. While any general partner who is like member of an ordinary partnership is also liable for all the debts and obligations of the firm along with his managerial part.

And there is another thing that any general partner also becomes limited partner at any time.³ Whilst this is not the case in *mudarba*. Firstly the *mudarib* (entrepreneur) having no liability for capital secondly if he wants to contribute there must be new contract, prior contract in such cases considered as *fasid* void able. And another most important point which fluctuates *mudarba* from limited partnership is that in case of any losses and deficiencies of capital if met, here the supposition of equality which is applicable to ordinary partnership will apply to limited partnership.⁴ While in *mudarba* no one can come after *mudarib* for cash compensation, and likewise no one can expect any

² Ibid page221

³ Ibid Page 831, page 848

⁴ Ibid Page 850

some places I will aid my suggestions also. Section I. Comprise of the meaning of *mudarba*, its definition from different aspects of *fiqh*, different views of *fuqaha*, and definition under law of Pakistan. Then in section II I endeavor to explore the facts about the legitimacy of *mudarba* and try to settle a conclusion that *mudarba* is a matter of consensus among jurists and also try to answer for those views which create confusions about its legitimacy. After that section III starts, in which it is discussed that what are the elements of *mudarba* in *fiqh*, and as well as in Pakistani law. In this section I also touched the most important issue *sigha* (صيغة) "form" with the different views of *fuqaha*. Then in section IV I discussed the conditions of *mudarba* and opinion of jurists, related to all of its elements - مضارب رب المال etc. Then I presented its comparison with conditions laid down in Pakistani law. Then section V, relates to the implication of *mudarba*, investment form, investment of goods in *mudarba* as capital, and the principle that when it should be handed over, and matter concerning fiducially currency as capital was also discussed. Then in section VI conduct of *mudarba* is discussed in relation to *mudarib* and *rabulmal*.

And in section VII treatment of profit and loss, its withdrawal or isolation with one self is explained. After that section VIII. deals administration of *mudarba* and its rules. Then in the end I closed the chapter with section XI which states the rules of the termination of *mudarba* in relation of *shariah* and law.

Second chapter of my thesis is totally linked to the conventional frame work of *mudara* applicable in Pakistan known as *mudarba* laws, in this chapter I focused on some important issues which these prolongations include. In first section I gave introduction of these laws. In second section I started analysis of its sections in relation to different issues, structure of laws its eligibility criteria and registration process and then there is third section which deals raising of funds, report, issue of liabilities and role of religious board then section four deals some other issues like establishment of tribunals, role of advisory committee and auditors and most important issue of audit and in the end section five deals the matter of winding up and provision of punishments and penalties. Then the last chapter of my thesis contains three sections which provide a brief analysis of *shariah* standers issued by AAOFFI, and in the end I will present my conclusion also..

Statement of research

What is *mudaraba* finance?

What are the basis of *mudaraba* finance in *quran* and *sunnah*?

What are the basis of *mudaraba* in *quran* and *sunnah*?

How PAK Law deals with *mudaraba* ?

What are the material difference between both concepts?

If all the details exist clearly in manual of *fuqaha* and every issue bit by bit has been explained, than why these regulations not included but just left to the discretion of religious board?

How truly spirit of *mudaraba* can be implemented?

Literature rivew

How this contract is legally enforced? Literature on the contract that forms the soul of Islamic banking is in over sufficient quantity. Much has been written on it ,the contract has been questioned by some scholar on various grounds, it has been defended by many, the AAOFI has approved it and so as the Islamic *fiqh Academy* of OIC at Jeddah, as well as in ,1980 government of Pakistan issued an ordinance and rules their under.

This is a law to regulate the *mudarba* business, but yet there are doubts about its capability, these are not comprehensive regulations as said by *justice Tanzeel* in his paper. "However, it seems to be no provision in ordinance or rules thereunder to overview the actual knowing of the *mudarba* business by the religious board."⁶but how to fix this, left unexplained ,I think we can fulfill this gap by comparing both streams, regulation enforced through ordinance in Pakistan and principles jot down in classical *fiqh*, therefore I selected this topic to explore and highlight that *Mudarba* is not the invention of this era but its laws have to be stemmed from injunction framed in *Quran* and *Sunnah* centuries ago and it must not be left un explained in these regulations .However this small paper will, therefore be a discussion of the arguments, the analysis is being taken on the assumption that some crucial points, important principles have been left unexplained in these regulations the main issue is that if all the details exist clearly in

⁶tazeel – reh –justice Mudaraba and the Pakistan perspective p 20 . <http://www.amazon.com>12 04 2008

manual of *Fuqaha* and every issue bit by bit has been explained, than why in these regulations not included but just left to the discretion of religious board .

CHAPTER # 1

Section 1

This chapter represents the concept of *mudaraba* in classical Islamic jurisprudence, opinion of Muslim jurist regarding *mudaraba* and its practical implementation in sharia. The object of this chapter is to analyze the operation of *mudaraba* practice in the light of *shariah* foundation or *shariah* background of *mudaraba* out of which this concept come into sight, this chapter covers almost every aspect of this practice in light of Islamic jurisprudence.

1.1 Meaning of mudaraba

The word *mudaraba* is based on *bab al mufa, ala* whose inherent⁷ quality is participation or correspondence, that is two parties or more, that join together in certain practice or deed. This word has been derived from its root word 'darban

" و آخرون يضربون في الأرض يبتغون من فضل الله " . Al- sarakhsi, in his famous book *Al-mabsut* explains the nature of *mudaraba* in these words,⁸

"The term *mudaraba* is derived from the expression <making a journey> and it is called this because the agent *mudarib* is entitled to the profit by virtue of his effort and work and is investor's partner in the profit and in the capital used in the journey and its disposition".

As it is evident from various books of *Fiqh*, the term *Mudarrabah* is interchangeably used with *Qiradh* and *Muqarada*, it is presumed that while the letter to originated in *Hijaz*, subsequently the difference appears to have been quoted to legal schools, the *Malikies* and *shafies* adopting the term *Qirrad* and *Muqarada* and the *Hanifies* using the term *Mudarabah*, Al-sarakhsi explain this in his famous book *Al-mabsut* .

"The people of Madeena call this Contract *Muqardha* and that is based on tradition concerning *Uthman* (RDA) who interested funds to a man in the form of *Muqarada*, this

⁷ A Muhammad mahiy ud deen, - *almukhtar siyah-ul-lugha* published by *Intesharat nasir Khusro Tehran Iran*
Almojam al waseet prepared by Majma al lugha al Arabia cairo

⁸ Alsarakhsi, , *Almabsoot Alsarakhsi*, vol 22 , P. 18 , *idaratulquran wauloom al islamiya*

is derived from Al-qard which means cutting, because in this contract investor cuts off a sum of money from himself and transfer it to the agent.”

1.2: VARIOUS DEFINITIONS OF MUDARRABA IN FIQH.

These are the different definitions of mudarrba from different schools of law.

Hanfi School

It is define by the prominent *hanfi* jurist *Al-Marghanini* in *Hidaya* as under”

“عقد يقع على الشركة بمال من أحد الجانبين و عمل من جانب الآخر”

., “ it is a contract of partnership whereby investor provides capital to another in order to undertake investment activity”⁹.

There is another definition from a *hanafi* scholar *Al-Shalbi*,

“دفع المال إلى الغير ليتجر به على أن يكون الربح الحاصل فيه بين هما على ما شرطتا”

“To provide another funds for business, on the bases that any profit accrued are shared between the two parties on pre agreed bases”¹⁰

Another scholar *Al-Zeylai* defines as, “بأنها شركة بمال من جانب و عمل من جانب” “it is form of partnership where one party provides the fund while the other provide management and expertise”¹¹

So the gist of *hanafi* school definition is that, it is a partnership for participation and profit in which one side provides funds in (capital) and other side involves his skills.

Malki School

Mudarabh define by one prominent scholar *Al-Kharshi* as under

“توكل على التجرفي نقد مضرب مسلم بجزء من ربحه إن علم قدرها” that “*Qirad* is an agency for trading in deliver cash for part of profit if there extent is known”¹²

And another scholar *Ibn-Arfa* defines that:

⁹ Al-Murghinani, *Hidaya*, , educational press Pakistan, volume II, P. 13

1. ¹⁰ Al- Shalbi, *Tibeen ul Haqaiq*, *Sharah Kanz ul Daqaiq*, Volume V, P. 52 *idaratulquran wauloom al islamiya*

¹¹ Ibn Abadeen, *Hashia Ibn Abadeen*, volume IV, P. 538 published by *Darul-Fikr*

¹² Al-Kharshi, *Al-Kharshi Al-Mukhtasar*, , volume VI, P.402 *Darul-Fikr*

"تمكين مال لمن يتجر به بجزء من ربحه لا بلفظ إجارة"

," surrender some capital to a trader for trade for part of profit not by using the term rent, *ijarrah* (independent to rent)"¹³

'There is a definition from *Ibn-Rushid* a well known scholar of *Maliki* School which is as under

"القراض صفته أن يعطى الرجل لرجل المال على أن يتجر به على جزء معلوم يأخذ العامل من ربح المال، أي جزء كان مما يتفقان عليه ثلثا أو ربعا أو نصفاً."

"*Qirad* can be practice in the manner that one party provides funds to another for business on pre agreed bases of the extent of profit, 1/3, ½ etc"¹⁴

Shafi School

In *shafi* school two very famous definitions are there first one is from *Al-ramly*, it is states that

"نكر الرملي بأن القراض و المضاربة أي موضوعهما الشرعي هو العقد المشتمل على التوكيل المالك لأخر و على أن يدفع عليه مالا يتجر فيه والربح مشترك بينهما"

"*Qirad* or *mudaraba* is partnership subject to a contract which involves agency from investor that investor provide a fund to agent for trade on basis that they will share the profit."¹⁵

Second definition is from *mughni al-mohtaj* it is stated that

"قال صاحب المغني المحتاج إن القراض والمضاربة أن يدفع إليه مالا ليتجر فيه والربح مشترك"

"The *Qirad* and *mudarrba* is an agreement whereby an owner provides fund to a worker who trade with it and profit is shared by the parties."¹⁶

Hanbli School

It is defined formal *mardavi* that

"أنها دفع بماله إلى آخر يتجر به والربح بينهما، وتسمى قراضاً"

"It is a practice in which one person provides capital to another for business and the share of profit."¹⁷

¹³ Ibid, P.403

¹⁴

¹⁵ Al-ramly nehayatulmohtaj ,volume5 p 418 published by Maktaba islamia

1. ¹⁶ Alsharbeen,al khateeb ,- mughni almohtaj. Volume2 p 310 published by maktaba Mustafa al babi al halbi Cairo.

And *ibne Qudama* defines that,

"بأنها أن يدفع رجل ماله إلى آخر يتجر له فيه على أن يحصل من الربح بينهما حسب ما يشترطانه"

"It is where a person gives capital to another for business in order to share the profit according to stipulation."¹⁸

Imamia School

They define that

"عرف الإمامية بأن يدفع مالا إلى غيره ليعمل فيه بحصة معينة من ربحه"

"It is that when one gives funds to another for investment in business activity for specific portion of profit".¹⁹

After analysis of all these definition we can draw these point, to highlight the different approaches towards *mudarba* finance.

- It has been observed from the ideas of *hanfi* school, that it is just a Partnership for participation in profit, hence they don't bother about the further details like how to deal ratio of profit or manners of business and other conditions stipulated to it.
- while *Malikies* and *Shafies* look in the scenario of agency, here we find agency as a necessary element , although agency is there but it is necessary to understand that it is not just like agency contract, we can not deal *mudarib* as like mere agent ,because *mudarba* is a creation of offer and acceptance and in case of *wakala* agency acceptance <*qbool*> is no more essential
- The next very important point highlighted from these definition, that those who defined it as <دفع المال> it means to provide capital' it shows that it should be tangible and secondly it also excludes the debt which not comes under the shadow of delivery, it should be *ain*<عين> not *dain* <دين>.

1. ¹⁷ Mardavi, al insaf, *Mardav elaow-din abu al hasan, - Al-insaf fi marefat al-rajeh min- al- khelaf,* volume v p 427 - *Dar Ehya al turass al arbi bairrut,*

1. ¹⁸ *Muhammad bin Abdullah bin Ahmed Ibn e Qudama, al mughni, volume5-.,p46 maktba al riyadh al hadith be al riyadh*

1.3 Definition under law of Pakistan

we have definition in *mudaraba* ordinance 1980 section 2 (a b) it is defined as that ,”
mudaraba means a business in which a person participates with his money and another with his efforts or skills and shall include unit trust and mutual funds by whatever name called.”

Hence this definition is not comprehensive one which we will look in bit detail in next chapter. as concluding remarks it is important to say that Islamic law likewise English law gives idea that, *mudaraba* or partnership in profit and capital and labor signifies a contract of partner ship in which one party is entitled to profit on account of its mall while the other party is entitled to profit on account of its labor.

Section#2.

LEGITIMACY OF MUDARABA

2.1 Three types of arguments are given to established the legitimacy of *mudaraba* first from *Quran* second from *sunnah* and third from *ijma* , there is a brief description of all these arguments in these following lines.

1. This context jurist mostly use these verses

- و آخرون يضربون في الأرض يبتغون من فضل الله
- فإذا قضيت الصلاة فانتشروا في الأرض فابتغوا من فضل الله
- ليس عليكم جناح أن تبتغوا فضلا من ربكم

The *quran* says: 1. “while others travel in the lands in the search of Allah’s bounty.”

2. And when the prayer ended, then disperse in the land and see of Allah’s bounty”.

3. It is not sin for u that u seek bounty of Allah.”

It is an explanation given by *Abu baker jassas* that they seek bounty of Allah through trade and disposition.²⁰ And another very known scholar *almawardy* says :

”الأصل في إحلال القراض وإباحته قوله تعالى، ليس عليكم جناح أن تبتغوا فضلا من ربكم، في القراض إبتغاء فضل”²¹

²⁰ Abu baker al jassas Ahkam al quran sura almuzammil maktba islamia Lahore& dar al fikar al arbi

“The *dalalah aamma* (دلالة عامة) generality of the meaning of all these verses approve the validity of *mudarabah*.”

2.2 *Alsunnah* : There are many sayings of prophet (SAWS) reported by different ways, evident of the claim that it is a valid practice.

1. One of them is that holy prophet (saws) appreciated three things and said that “there are great blessings from Allah in three things, the credit sale, the *mudarba* and mixing wheat and barley for domestic consumption not for sale”. So here relevant fact is that *mudarba* is recognized as valid practice it is mentioned second, most prosperous thing”.²²

2. The another very important evidence is approval of prophet (was) for he condition imposed by *Abbass* upon his agent who used to give money on *mudaraba*.

3. *Ayesha* and *Abdullah ibne umar* used to invest orphan’s money on the basis of *mudaraba*, Moreover, the impression of the companion of prophet (صلى الله عليه وسلم) about the prophet’s behavior is also an evidence for the validity of *mudaraba*.

2.3 Mudaraba as a matter of consensus

Islamic jurists are unanimous on the legitimacy of *mudaraba* with reason that in the life of prophet صلى الله عليه وسلم *mudaraba* was a common practice even after that era, companion (*sahabah*) were involved in that very transaction..

Secondly jurist are agreed that *shariah* permit it on the basis of necessity, since many people possess resources, and money but they don’t have capability to use that resources, so for this purpose they resort to *mudarba* practice.²³

Mudarba In Hanafi fiqh

As in the case of *mudarba*, the *hanafi* school justifies it. A well known scholar of *hanafi fiqh* *Alamah murghinani* stated in his book *al hidaya* “ there is no difference of opinion amongst the Muslims about the legitimacy of *Qirad*, it was an institution before the emergence of Islam, then Islam came and then Islam confirmed it, they all agreed about the nature of tis business that one party supply capital and other activate economic activity then they share profit on pre decide basis”.

²¹ *Almawardy Al-hikmt ul majmuh* pag192 volum14 published by Dar ul fikr bairrut

²² *Muhammad bin yazid al karzveeni* ,*-Sunnan ibne maja* page166 educational press Pakistan .

²³ *Alsarakhsi* volum12 page 18

Subsequently we have very specific incident of *ijma* which took place in the era of second kaliph *umar* رضي الله عنه , it is reported that sons of *Umar, Abdullah & Ubaidullah*, they met governor of Basra they gave him some money for *Bait- ul- mal*, they took that money ,and he suggested to them, you can take it on loan, purchase some commodity from here and will sell them in medina city. By taking the profit you will earned. But when this news reached to the caliph, he opposed it and he was with opinion that they should return the whole profit to government exchequer too, at this time one of the person who was there argued to caliph that you may consider it as the case of *mudaraba*, raised the point that they were collaterals of the mall if it was lost , then they were responsible for loss he said:.

"ياأمير المؤمنين لو جعلته قراضا فأخذ عمر رأس المال ونصف ربحه، وأخذ عبد الله وعبيد الله ابن عمر نصف ربح المال"²⁴

When this argument came into view to caliph this argument appealed to caliph and he allowed it.

So here our relevant point is that at that time when all the *sahabah* were present when Omar had allowed it, no one of them was against it, hence they had complete freedom to object any minor and least level mistake either mistake of law or mistake of fact , so there consensus on this point is a strongest evidence for the validity of *mudaraba*.

Alkasani also ratify it and he said in his book that, it is reported from the group of companion that they gave the cash (mal)of orphan people for investment on the biases of *mudaraba* and that group included great *sahabah* like *Umar Uthman , Ali , Abdullah ibn masood, Abdullah ibn Umar and Ayesha(RD)* there is no report of decline among them. They did not object that practice, but it was just there implied ratification of that practice ,so it is the most clear evidence for being a valid practice by that time.²⁵

CONCLUSION;

After the entire discussion and from sparse indications available, it appears that this transaction *continued* through early centuries of Islamic era as a valid practice and its legitimacy is significant,

²⁴ Al muntaqah shara muwatta imam malik volume 5 page 149 3rd edition dar alkitab alarbi

²⁵ Alkasani badaey al-sanaye volume 8 page 3587

2.4 Objections upon the legitimacy of *mudaraba* .

Some scholars especially some contemporary scholars have opinion that *mudaraba* is not a valid practice in Islam .they attaches some resemblance of *mudarba* with *riba*, they argued with different arguments, we can summarize their opinion in this way:

- In both the cases debtor and financier both received pre decided amount from creditor and *mudarib*.
- In both the cases debtor and financier do not take part in business
- Both acquire reward without any activity.
- Both debtor and financier received excess on their capital on the basis of time
- Both debtor and financier provide cash to creditor and worker respectively for specific purpose.²⁶

In both the cases debtor and financier lost the right to utilize their money temporarily. on the basis of this resemblance, it can be said that there is no difference , both are shades of one coin.

ANSWERS

In fact all these points are not real, these are fake, these resemblances are based on fiction these all arguments could be answered and we can rebut all these arguments firmly in these words.

The point raised that it is like *riba* ,benefit received is pre decided and status of *mudarib* is as same as it is debtor infect not true because it is not like the case of *riba*, in *riba* the benefits are fixed for example 1000 \$for 100000\$ per year etc. but in *mudarba* both the parties are liable for profit on the basis of PLS system, they get benefit according to *sharia* principles those are elaborated in these maxims.

These are some of *sharia* principles giving us guidance to understand the difference between the nature of *mudarba* and *riba* that what is excess in *riba* and how we assess the profit in *mudaraba*.

This is first relevant maxim which explain the rule of profit sharing in a case,:

²⁶ Farooq aziz jonoural of management and social sciences volume 4 –no 2 fall2008

"الأصل في الصفات العارضة العدم، مثلا أو إختلاف شريكا المضاربة في حصول الربح و عدمه، فالقول للمضارب والبينة على رب المال لإثبات الربح"²⁷

"As to attributes which may exist or not, the presumption which is that they don't exist ,for example in case of *mudaraba* partnership, if there is a dispute as to whether there be profit or not because its non existence is the presumption, the statement of *mudarib* is taken to be correct, the owner of partnership property has need of evidence that there was a profit. so here it is also important that in *mudaraba* business the matter of profit based on assessor's assessment it is not pre decided by parties like *riba*"²⁸. It is like that he will take 1000\$ for 100000\$ per year etc unlike in *mudaba* it is different , it is based on ratio ,like 1/3, ½ of profit gained.

Then we apply another maxim (الغرم بالغنم)²⁹ "detriment is as return for the benefit"³⁰

Damage and benefit of a thing go together, that is to say that a person who obtain the benefit of a thing , takes upon also the loss from it ."The detriment is as return for the benefit"

Another legal maxim that also has the same bearing ""الخارج بالضمان"³¹ "the benefit of thing is a return for the liability for loss of that thing"³²

In another words it is that " "the blessing of the thing are proportion to the evil thereof and vice versa"

So these rules make it clear that in *shirka* generally and in *mdaraba* specifically that one party is entitled to a share in profit only while the other party made liable to the entire loss along with his share in profit

- The second point that *rab al mal* don't take part in business like debtor, so it is not a reason to be transaction invalid , because we have different situations here

²⁷ Ibn nujaim zain alabidin alashba wanazair pp 34-35 published by published by -. Published by Dar alkitab alarbi

²⁸ Hassan zman syed anwar mehmoood the economic relevance of fiqh published on net 2007 scientific publishing center king Abdul- Azeez university

²⁹ Mujalla al ahkaam aladlia Art 87 reprinted Karachi press

³⁰ Hassan zman syed anwar mehmoood the economi relevance of fiqh published on net2007 scientific publishing center king a azeez university

³¹ Mujalla al ahkaam aladlia Art 87 reprinted Karachi press

³² Hassan zman syed anwar mehmoood the economi relevance of fiqh published on net2007 scientific

,like in case of *Muzara*, and in case of agency the only agent just take part in business ,so we may not permit not to take benefit, so in *riba* they don't bear liability of loss .

- Thirdly that they take reward without involving any business activity also rebuttable by some reasons, since benefits do depend just on activity so it is not valid. Thus we say again like it was stated earlier that mere activity is not essence of profit. There should be a liability to take risk ,we have very good example here, in case of *Qarz* it is prohibited to take opportunity cast but he has right to receive full money from creditor on expiry ,In any case he is not responsible if creditor loses it by accident or by any way , but accordingly if a person revoke his right to get back it , he surrenders his right to revoke and take risk ,therefore that risk allow him to take share from it.

And the question of excess, that it is related to time is also a fake assumption for the reason that ,in *riba* it is fixed with figure stipulated with time like 100\$ per year, but it is different in case of *mudaraba* . *Mudaraba* mostly depends upon the termination of business transaction and it is not fixed by time, and amount is not fixed and determined.

Section #3

3.1 Elements of mudaraba

Every contract must be consist of some elements, and so far as *mudaraba* is concerned it is a contract and recognized by *sharia* so it has to has some elements,. As stated earlier that it is a contract recognized in Islamic law so it must fulfill the limitations, conditions and all essential requirements, upon which the validity of contract depends , and contract can not be enforced without these conditions . These requisite conditions make an elements as a valid element. so here in this section we will discuss the matter of validity of *mudaraba* contract in subject to conditions in bit detail with opinion of different schools of thought.

HANAFI SCHOOL

The *hanfi* maintain only one element for *mudaraba* ie form (*sigha*) <offer and acceptance> as it is stated in *majallah* “ the essence of *mudaraba* is an offer and acceptance” ,however , this element also implies additional conditions as well like the

existence of the parties to the contract, and that of the subject matter because, it is understood that if there is an offer and acceptance it must be followed by parties and they should have consent upon something³³, so they don't mentioned it separately.

SHAFI SCHOOL

Shafi acknowledge six elements for *mudaraba* contract as it is stated by (*nihaya –al mohtaj*) *al-ramly*

"وأركانها ستة: عاقدان، وعمل، وربح، ومال، وصيغة"

so these are six namely

- parties to *mudaba* contract ("1-offeror 2-acceptor)
- Work, labor (*amal*)
- Profit
- Capital
- The form (offer and acceptance)
-

OPINION OF MAJORITY (*JAMhhOOR*)

In the opinion of majority of jurist ,they have just mentioned three elements for *mudaraba* contract,

1. parties to *mudaraba* (*aqidan*)
2. subject matter(*mahal*)
3. the form(offer & acceptance)³⁴

The opinion of majority is preferred and is the best in this regard . It is also a comprehensive one and covers all aspects

3.2 Elements of *mudaraba* in Pakistani law

There is no specific provision in conventional system which denotes the law in relation to elements of *mudaraba* so generally we rely upon contract laws in dealing with *mudaraba* so far the fulfillment of valid *mudaraba* contract. To understand the validity of a legal contract we should rely upon contract act 1872.

³³ Ibn abdin rad al mukhtar aladur almukhtar page 646 Darul-Fikr

³⁴ Wahaba zuhaili volume4 page839 Fiqh alislami published by Dar ul fikr beirut

Contact act ,1872 enforced in Pakistan contains law relating to contracts, it provides rules relating to commercial transactions, it establish the validity of contract so for .Therefore when we study its provisions we can end that generally there are three elements for validity of contract . A valid agreement or contract must fulfill these three elements.³⁵

- Proposal and acceptance
- Consideration
- Contractual intention

As it is concerned to a *mudarba* contract, when we apply these on *mudaraba* transaction it appears that element for *mudaraba* are the same as mentioned for contract. Whereas modern application is concern ,*mudarba* is an agreement between certificate holder and *mudarib* and this agreement needs offer and acceptance which is the first element , and it took place when certificate holder provides funds to *mudarib* with intention to start business. Hence it is important to mention here the contractual intention is also very much necessary because if a person just showing his wish to do so but he has not any intention to make legal contract so it t would not be a binding contract

3.3 CHRACTRESTIC OF FORM (SIGHA) صيغة

The *Sighatu laqd* or form the instrument or mean through which the conclusion of contract take place , these means adopted are some time expressed in words or gestures or conduct . Perhaps in the case of *mudaraba* , it is very important that how the conclusion of *mudarba* took place. Some scholars are of the opinion that forming *mudaraba* are not allowable except through specific words like *mudarba* ,*muqarada* etc, and some others permit it genially , now we have brief look of different views.

SIGHA AL MUDARABA(FORM)IN SHARIA

OPINION OF FUQAHA

Conclusion of *mudaraba* takes place by means of offer and acceptance. Offer comes by the expression of words like, *almudaraba* , *almuqarada* .or *al*

³⁵ Cotract act 1872 pld publishers , chitty on cotracts volume 1 page 23 bobmbay press 1978

muaamalah, (this transaction) ,or any other kind of word which conveys the intention of the parties.³⁶ and” *qubool* “acceptance is the statement that is made by the second party in response and give the meaning of consent to deal with”, suppose: “I accept ‘ or “I agree” or ‘has taken” etc.

The illustration of *mudaraba* when it is expressed by specific words giving the meaning of *mudarba* transaction like

“أن يقول رب المال ضربتك أو قارضتك على هذا المال على أنما رزق أو أطعمى الله من ربح فهو ما بيننا ويقول العامل أخذت أو رضيت و تسليم المال فيعمل فيه فعلى هذا يتم عقد المضاربة”³⁷

if one of the parties says : I give you 100\$ on the basis of *mudaraba*, or you invest these 100\$ in *mudaraba* investment or you start with this money on the basis of *Qiraz* , and we shall divide the profit on certain basis like 50%, 25% , 20% ,etc.

And *the mudarib* says: I accept it or I agreed ,or he take the fund and says: we will do it,. This was the first way through which a *mudarba* transaction can be concluded . Where part uses expressed words for making an offer.

And example of second way in which the what ever Conveys, the subjective intention of the party irrespective of the words being used like , when *rab ul mal* put fund on front of the *mudarib* and says: take this and invest it we will divided the gain by such and such way and he does not uses words like *mudarba* expressly but he just mentions some rules or indications which infer the meaning of *mudaraba* business , here the contract of *mudarba* concluded because object is clear by conduct and by saying because we have rule “العبرة في العقود للمعاني لا الألفاظ والمباني”³⁸

The *maliki* jurist on the other hand maintain about *mudaraba* as the rule in there view that what ever conveys the subjective intention of the parties is sufficient irrespective of meaning being used , it is possible by any mean, the mean adopted are some times expressed by words , and it may be a

³⁶ Alkasani , *bidayalsanayeh* , volume 6 page 79-80, volume 8 1rst edition , matba al imambemissr (egipt) .

³⁷ . Ibid

³⁸ Al sarakhsi , *almabsoot*, volume 22 page 21-22 , idaratulquran wauloom al islamiya

gesture or may be a physical act, (conduct) the relevant thing is that it just convey the true meaning the specific words are not necessary.³⁹

The *Hunbly* jurist don't allow of *mudaraba* just by conduct, as stated by *ibne*

Qudama:

"فإنها تنعقد بلفظ المضاربة و القراض لأنهما لفظان موضوعان لها أو بما يؤدي معناها، لأن المقصود المعنى فجاز بما يدل عليه كلفظ التمليك في البيع"

so we can say that these jurists compare *mudaraba* with (bay) sale and (*ijara* rent by not making means of specific words essential for validity of *Qiraz*.⁴⁰ But at least there should be some words to avoid ambiguity. However *Shafie* jurists⁴¹ to some extent agree with *hanafi* school in matter of *sigha* In reference to *mudaraba*.

Perhaps in my humble opinion the view point of those jurist is preferable where they concern the word, because consent without conformity is not sound enough for conclusion of contracts like *mudaraba* there must be a confirm consent without any kind of ambiguity, and can't be sought but means of words, just mere gestures are not make it clear at the level which words can make it.

Anyhow this is the view point set down by *hanfi* school ,and *shafi* school in there proffered legal opinions and this is also supported by *jafaries* that "mere acceptance by conduct is not enough but it should be strengthened by words to show the will of parties for a valid *mudaraba* agreement."⁴² although these views are contradicted by *malkies* and some of *hanbalies*

³⁹ Al dardeer , sharah asagir , volume 2 , page 245, published by matba Mustafa al babi al halbi Cairo.

⁴⁰ Ibn Qudama a,al mughni , volume 5 page 27-mansoor bin younas - kashaf al qna volume 3 page 508- maktba al nasar al hadith alriadh

⁴¹ Al sharbini , nihayat al mohtaj volume 5 , page 226 published by matba Mustafa al babi al halbi Cairo.

⁴² Alkasani , badaey al - snaeya , volume 6 page 280 Al-sharbini , niyayt almotaj volume 5 pge 226 , al aamli miftakh alkramah volume 7 page 423 published by matba Mustafa al babi al halbi Cairo.

to permit "whatever conveys subjective intention .even by any sign or token".⁴³

Section # 4

4.1 The conditions of *mudarba* and opinion of jurists

Muslim jurists have laid down certain conditions for completion of *mudaraba*, without fulfillment of these conditions *mudaraba* can not turn into an enforceable contract , these conditions are as under.

First

It is necessary that contract contains an absolute verdict which enables *mudarib* to act upon it . As according to the ordinary practice of traders, it means that offer must be confirmed and certain in all terms, if the meanings are clear possess no ambiguity then it would be considered a valid *mudaraba*, in relation to this idea we have an example in shariah books, it is stated that

"ولو إقتصر رب المال في إيجابه على لفظ الشراء كأن قال، خذ هذا المال فاشتر به أقمشة بالنصف ولم يزد على هذا شيئاً فاشترى فهو فاسد، ويكون للمشتري أجر مثل عمله وليس له أن يبيع ما اشترى إلا بإذن رب المال لأنه ذكر الشراء ولم يذكر البيع" ⁴⁴

"Here in this case mere use of words "to buy" does not clear the sense, absolutely, it causes ambiguity which renders contract voidable, but if meanings are clear and possess no ambiguity , follow the ordinary meaning it concludes a valid contract",. Supposing person A , being a *rubul mal* says to B, (*mudarib*) take this money and purchase some asset you will be entitle for 50% of profit , B , replies " I have accepted it " it is a *mudarba* transaction on the basis of *istehsan* , the *sanad* (basis of reliance) on *istehsan* here is that A, has mention profit and he can not gain it without sale and purchase , so here statement taken "to purchase" infer the meaning of both 'buy" sale and purchase.⁴⁵

⁴³ Al dardeer ,al- shara alsaghirSr , *ala(on) mukhtasar khalil* volume 2 page 245 , published by matba Mustafa al babi al halbi Cairo & mugni almotaj volume2 ,page 313

⁴⁴ Alkasani , badaey al-sanaey , volume 6 page 80

⁴⁵ Ibid volume 6 page 80

4.1.1 Second

The second condition which is necessary to be fulfilled and *sigha* must contain it, and both the parties should know it. It is settlement of profit, it is not valid to leave profit unsettled at the time of agreement, division of profit should be on proportional basis such as one half, 1/2, one third 1/3 etc. it is therefore not allowed to fix an certain amount as profit for one of the parties, or if all the profit is stipulated for *mudarib* then it is no longer *mudaraba*,⁴⁶ it is just a loan transaction, but in another situation if it is stipulated that there is a portion for *mudarib* from profit along with some portion of the portion from capital money, it is a valid *mudaraba*⁴⁷ but in another situation where all the profit is stipulated for investor, then it is not a *mudaraba* it became *ibda* and also if it is stated "take the capital" but no further proportional profit is mentioned then profit is for investor and person who consumes it given wages accordingly.⁴⁸ But some scholars are against it. In their views it remains *mudaraba* transition⁴⁹ and it would presume that profit should be shared equally. So we can conclude that any violation of proportional division rule renders the *mudaraba* invalid.

Third

It is also an essential condition that *sigha* must contain details of capital used in *mudaraba* it must be certain and known to the parties that how much is invested, as according to *hanafi school*.⁵⁰

But at the other hand *Hanbalies* and *Shafies* uphold that capital must be known by absolute description, by saying, exact figure, quality, and type of the thing, according to them mere formal information is not enough,⁵¹ because without all this

⁴⁶ Ibid page 86

⁴⁷ *Sakhnoon bi Saeed*, - *Almudawanah* volume 4 page 49, published by *matba al kheria al Sunnah*,
1. *Aafandy* .- *Taklimah rad-ul-mukhtar* volume 8, page 24 published by *Maktaba islamia pak*.

⁴⁸ *Ahmad bin Yahya*, - *Albahruzakhar*, volume 4 -page 82 - published by *matba al sunnah al muhmmadia*
(Tehran

Ibne Qudama, *almughni*, volume 5, page 24

⁴⁹ *Aibne Qudamah almughni*, volume 5, page 24

⁵⁰ *Aafandy* *Takmilah radulmukhtar*, volume 8, page 282

⁵¹ *Ibne Qudama*, *al mughni* volume 5, page 54

Al ramli Nihayt Al mutaj volume 5 ppage 219

nature of the capital remain ambiguous and ambiguity is not appreciated in contracts, same is reported in *malkies* views

“⁵²اشترطوا ان يكون قدر الأصل معلوماً لذ العامل عدداً او وزناً”

These are the conditions laid down by jurists for *sigha* without fulfillment of which *mudaraba* can not be enforced . Any violation of these conditions renders *mudaraba* invalid (*fasid*) and in such case all the profit goes to investor and *mudarib* is treated as regular hire , and he is entitled to an equitable remuneration(*ujrat al mithl*) for his work.⁵³

And the *malkies* on other hand maintain that in such cases, *aamil (consumer)* will entitle for *Qirazul mithel*, in their view *Qirazul mithel* differ from *ijara* in this way that in case of *jjara* he had to get remuneration in either case in loss on profit , but in *Qiraz* his right of *mudarb* dependent upon the profit, if gain arises in shape of profit he has to get his right otherwise has no right to get any thing.⁵⁴

4.2 Parties in Mudarabah Contract and essential conditions

The term parties denote *Rabul Mal* in *Mudarib* or their representatives like guardian etc. And *rabul mal* stand for investor in shariah, and *Mudarab* stand for a person who manage and utilize the capital on the terms of *mudaraba* agreement. In this section we will elaborate the essential conditions related to both the parties for a valid *Mudaraba* agreement

4.3 conditions related to rabulmal(investor)

As it is stated earlier that contract of *mudarabah* based on fiduciary relationship which exist between two persons one of whom *Rabul Mal* expressly or impliedly consent that another person (*mudarab*) should act on his behalf, so here in this case the one on whose

⁵² Al dardeer , sharh alkabir , volume 3 , page 456

⁵³ Aafandy Takmila radul mukhtar volume 8 page 289

Muhammad bin jawad bin muhammad , -Miftakhulkarama , volume 7 page 424 published by mattba al shurah bemissr(Egypt)

Ahmad bin Yahya Albahruzakhar volume 4 page 81

⁵⁴ Aldreer, Sharah Al Kabecr, Volume 3, P.456

behalf the act is done is called *Rabul Mal* is like principal, and he has same rights and liabilities which principal owes in case of "*Wakalah*" agency. So when we analyze the concept of *Wakalah* we find that *Fuqaha* attached same conditions to principal to fulfill for rightful course of transaction. The conditions of principle that he should possess full authority to deposing a matter which he has intended to another to act upon his behalf. He therefore, should be competent to undertake task himself for which he has appointed another to do⁵⁵. Thus an insane or minor and any other person under any kind of duress cannot enter into a contract of *Wakalah*. A discerning minor(*subi mumyyaz*) also not able to appoint agent for transaction which entail loss for that minor, *Wakalah* also not allowed from those whose legal competency is questioned, and it is forbidden for him to enter in to any transaction which is known as (*Mahjoor*), due to any reason being a silly person or foolishness. Therefore *Mudarebah* cannot be enforced by a chilled, minor, silly, foolish, lunatic, insane, How ever it is permissible for a guardian to permit any person to do *Muqaraza* transaction⁵⁶. Likewise it is not permissible for *Mahjoor* to take initiative for *Muqariz* in case of insolvency or failure but he is allowed to do himself by self investment⁵⁷.

To consummate this discussion we may lay down the opinion in certain problems.

- Status of *Mudarabah* where *Rab Al Mal* is a discerning minor(*sabi Mumayyaz*)
- Status of *Mudarabah* where *Rab Al Mal* is non Muslim
- Status of *Mudarabah* where *RAbul Al Mal* is woman
- Status of *Mudarabah* where *Rabul al Al* is apostate or deserter.
- Status of *Mudaabah* where number of *Rab al Mal*(investors) engaged

4.3.1 Status of *Mudarabah* where *Rab Al Mal* is a discerning minor(*sabi Mumayyaz*)

A child possesses complete capacity for acquisition of rights but until he attain the age of legal puberty ' he can not execute any thing , he takes the capacity for execution

⁵⁵ Alsharbini, Mughni Al Mujaj, volume 2, P.314

⁵⁶ Al Kasani, Badaye Al Sanaya, Volume 6, P.20
Al ramali Nihayat Ul Muhtaj, volume 5, P.314

⁵⁷ Al Saharbini, Mughni Al Muhtaj, volume 2, P. 314

,with respect to *mudaraba* transaction there is a detailed discussion with different view point of Muslim jurists whether he can meet this transaction or not.

The *hanafies* in their majority views they permit the transaction made by minor, and some of *malkies* with some *hunbalies* also follow them in this instance, but they also have some restrictions in this view, all of them including *hanafies* uphold that it depends upon *wali* if he allow him, so here we can treat him as an ordinary *mudaraba* and all such transactions are considered valid if *wali* ratify it⁵⁸. And some of *shafies* and *hanblies* treat this in some what different way, they said that minor possess no capacity to enter into *mudaraba* transaction until he attain the age of legal puberty,⁵⁹ so *mudaraba* of minor as according to there view not a valid *mudarba* because he has deficient capacity and deficient capacity is not subject to *khitab* in Islamic jurisprudence so have no capacity for execution. in my humble opinion it is a perfect view that *wali* can allow him to conduct transaction because it is a question of that fact if he is not competent then why the *wali* (guardian) stood or he just stop him, or just to fulfill his needs, and as concern to the minor he just limit his authority up to actions which he is authorized by *wali* he should obey him to step up. Because here in such case minor as acting as agent.⁶⁰

4.3.2 Status of Mudarabah where Rab Al Mal is non Muslim

Muslim jurists permit trade with non Muslims without any abhorrence, thus in relation to *mudaraba* it is stated in *fatwa hindia - hanafi* point of view that,

"ولابأس بأن يأخذ المسلم مالا النصراني مضاربة ولا يكره له ذلك"

⁶¹There is no objection to it if any Muslim take capital from Christian on the bases of *mudaraba* and it would not be considered disapproved act. Because *mudaraba* is also a kind of trade, it involve agency and *rabal mal* status is as principal and *mudarib* works

⁵⁸ *Ibn abdin al duralmukhtar volume 5, page 511*

Ibn Qudama almughni, volume 2 page 146

Muhammad bin ab rehman al khitab, -Mwahib al jleel, volume 5 page 41 published by maktba al nejakh

⁵⁹ *Alsharini mughni almotaj, volume 2 page 165*

Ibn Qudama almughni, volume 2 page 146

⁶⁰ *Al fatwa hindia volume 4 page 333 prepared by council of ulema of hind under supervision of amir aalamgeer, - published by educational press Pakistan*

⁶¹ *Ibdd*

as agent , this is a view point followed by hanafi and *hanmbali* jurists⁶² ,while shafies and *malikies* disapprove such transaction where capital provided by non Muslim, in there view non Muslims don't care about *halal* and *haram* while being a *Muslim* it is very important that every kind of productive activity must be based upon *halal*) valid resources , as it is stated in *nihaytul mohtaj*

"وتاجر المسلم نفسه من غير المسلم فيه إذلال له وينبغي للمسلم أن لا يبذل"⁶³

They consider it as act of humiliation and that is why they disapprove it . same is reported from *malki* school.⁶⁴

In my *humble* opinion the *hanafi* view point is stronger and better than others especially in these days when we are living in global world where our 90% benefits are attached with non Muslims countries , so to facilitate common people it should be allowed,

4. 3.3 Status of muudarba where mudarib is women

Majority of jurist uphold that woman has complete authority to initiate any kind of business , when she attain the age of majority ,she has right to consume, dispose off her property, and conduct any kind of agreement and contract, her status is same like to the status of man, so here after this all we can see she is eligible for *mudaraba*.⁶⁵

But *malki* jurists oppose this view and argued that,

"أن تصرفات المرأة المتزوجة موقوفة على إذن زوجها وهم يستدلون بقوله صلى الله عليه وسلم: ليس للمرأة أن تنفك شيئاً من مالها إلا بإذن زوجها "

They uphold that it is depended upon her husband to allow her to do so or to stop her from that .⁶⁶When we compare both the view we find that Hanfi view is better , because it is stated in quran where sharia instigate Muslims to invest property of orphans for there welfare, here kitab share is general⁶⁷ so here the generality proves the no distinction b/w men and women both are the subject of this verse , so how we can

⁶² *Alsarakhai almbsoot, volume 22 page 125*

Ibne Qdamah volume 5 page 2

⁶³ *Nihayat almohtaj volume 5 , page ,5*

⁶⁴ *Malik bin Anas Al Mowata Imam malik, volume 4, page 57 , published by educational press*

⁶⁵ *Alaklil shara mukhtasar sedi kalil , page 309*

⁶⁶ *Suleman bin al ashass bin al ishaq , - Snan abl dawood , volume 3 no 3546*

⁶⁷ *Al quran -Al nisa verse No 6*

deprive a women from hir right ,if wretched her from that it would amount injustice⁶⁸ thus in this way it is appropriate to declare that husband has no right in her own property to make any encumbrance or to seize it with out her wish.

4.3.4 Status of *mudaraba* where *rabulmal* are in number

Principle where investor are more than one deals as *rabul mal* , Muslim jurists permit the such *mudaraba* transaction , here when more than one investor give their money on bases of *mudaraba*. In this case it is allowed that they offer him equal ratio in profit or with distinct statistics, but it is necessary that investor will take there portion according to the extent of their investment, this kind⁶⁹ of transaction should be based on equity principle which enable any one not to encroach others right

4.4 Conditions related to *Mudarib*

It was explained before that *mudaraba* contract based on agency(*wakalah*) ,*mudarib* works under head of *mudarba* like the agent of investor . so he possess same rights and same liabilities which an agent have in agency contract . In result Muslim jurists consider same conditions for a *mudarib* as they consider for a *wakil*(agent) because *mudarib* is currently working on the behalf of his investor which is owner infact. For a *wakil* they stipulate that he should not be insane ,the n he must attain the age of majority , then further he must not be a slave on other person, we can apply it in these days on every such situation where a person is under influence of any authority . But hanafi jurist uphold that last two conditions are not relevant to validity of *mudaraba*. They consider that minor just be deprive from all these transactions where obligation or keeping came up to him directly , where he is personally subject to that obligation ,but here in this case primarily he has no obligation in case of any loss . because it was the choice of investor to take risk on him , he would not be obligated all the financial obligations and commitments go to owner, and he just lies an agent so he can not be obligated. That's why he can be a *mudarib*.⁷⁰

⁶⁸ Abne Qudama volume 4 , page 349

⁶⁹ *Al shar bini Mghni al motaj* , volume 2 page 315

Ibn Qdama al mughni volume 5 page 16

⁷⁰ Alkasani , *bidaya sanaya* , volume 6 pago 20 -*Dur al mokhtar* volume 5 page 511

On the other hand *malki* jurists treat this issue in some what different way, they said that minor can not participate as agent unless he seek permission of *wali*, because if *wali* is answerable for his bad deeds why should he not decide his good as well .⁷¹ These are prerequisites linked to *mudarib* and *wakeel* concerning to the nature of the agreement , but jurists further stipulate some other necessary requirements to the conduct of *mudarib*, these are mentioned in their books generally , that he can do every thing and take any action which is considered usual in commercial practices and essential part of trade like, *mudarib* has full authority to appoint agents for trade, he can hire services, he has right to hold wealth of *mudaraba*, he can deposit it as bailment, he also has right to pledge property in lieu of debt, he also accept such pledge for debt owed to the *mudaraba*, because this too is commercial practice.

But meanwhile he does not have any authority to sell or purchase on credit beyond the limits imposed by the capital. Making gifts and giving donations are also not allowed without seeking specific permission from *rabulmal*. He can mingle his own wealth with *mudaraba* property unless *rabulmall* tells him to act upon his considered opinion.

These are essential conditions for *mudarib* ,now in the light of these conditions we can draw the principle relevant to these issues.

4.4.1 First issue

This issue is related to such *mudaraba* transaction where *mudarib* is a woman, there is slight conflict exist between jurists on it. A woman is said to possess imperfect legal capacity, those who hold that view deny her participation in business like *mudarba* etc .they further argued from the verses of *Qran* , that it is stated " وقرن في بيوتكن"⁷² so it is clearly mentioned here that they should stay at their homes, secondly they say it is too a settled rule that man is liable for the *nafqa* for her, so his duty is to feed her woman

1. *Ibn alhamam , fath alqdeer volume 5 page 111- Published by Dar alkitab alarbi*

⁷¹ *Al sharbini Mughni al mohtaj , volume 2 page 218*

Mansoor bin younis Kashaf alqanah volume 3 page 232 published by maktba al nassar al hadeessa riadh

1. *Muhmmad bin ab rehman al khitab Mawahibuljaleel volume5 page 121 published by maktaba al nijah & Abu Al Qasim Najam uddeen Shara ealiislam volume 5, page 198- published by mattba al Aadab binnajaf*

⁷² *Al ahzab para 22*

then why a woman should come out and indulge herself in to such troubles, thus she only can do it on emergency bases, but as a general rule she is not allowed. So they are very strict in not to allowing her.

But on the other hand majority of jurists(jamhoor) permit that,⁷³ they don't put any sanction on woman in this regard ,they say :she has complete right to participate in daily life function side by side the man, she can buy, she can sell and she can dispose off her property but only just ,she does not have any right to violate those rules which shariaa imposed upon her she should comply them.

So according to them there is no restriction imposed by Islam which deprive woman from her right to be a part of mdaraba as mudarib.(dur al Mukhtar)

4.2.2 Second issue

Where mudarib is a non Muslim.Is it allowed in shariah to authorize any non Muslim to invest with your wealth , where as non Muslim don't care about halal (valid and haaram(not valid) .They just care about profit . to answer this issue we have two situations here,

Situation one

In such case where non muslim mudarib is a sole manager of the mudarba, he has complete control on the business , authorized by rab al mal and no co-manager o any additional supervisor available for him, where he is solely managing the affairs of business and take business decisions independently .Hanafi Shafi , Malki and zaidia disapproved such situation , and according to hanafia it is *makrooh tehreeman* , what has been called abominable or reprehensible as it is closer to the category of *haram* invalid⁷⁴ .and we find hanbali opinions similar to said opinion .the reason for this prohibition is , the non Muslims generally don't care about halal and haram. They usually don't bothere the prohibitions like riba garar etc in commercial transaction, they often indulge their selves in usage of wine and swine and it is clear that all these practices are against the objective of shariah.

⁷³ Al fatwa hindia volume 4 page 333

⁷⁴ ibid

Sakhnoon Almudawanah volume 4 , page 57

Al sharbibni Mughni almutaj volume 2 page 213

Situation two

In this case where non Muslims being not a sole manager itself, but addition to that there is a Muslim available for super vision of every thing in business matters , here both can act in same capacity. So here in this situation no question of approval arises, because reason has been resolved now here check is available, it is now the duty of Muslim participant to purify the transaction from illegality so to lend him property for mudarba is valid as it is stated in *mabsoot*⁷⁵

So here we can conclude that in modern mudaraba practices we can apply this rule when one mudarba company merge their business to other multinational company even it is owned by non Muslims or they can share their business affairs with other conventional banks on bases that they follow their terms.

4.4.4 Third issue

Where more then one persons are acting as mudarib in mudarba type partnership .Muslim jurists are agreed that rabulmal can engaged more then one mudarib for one mudarba on the bases of equal profit. That they can take equal profit on pre settled ratio ⁷⁶, like he say to mudaribs that you people may invest this capital on 1\3 of the whole of the profit which you may share with each other on equal bases, up to this limit there is no difference of opinion between jurists, but if they agreed that that profit will divided between mudaribs on different ratio, illustrating A will take 1\3 Of 50% and B will take 2\3 Of 50% and all others will take like this etc. so here conflict arises ,two opinion found there in this regard First ,Hanfi , Hanbli, and Shafi jurist permit it, and validate the different ratios of profit for them.⁷⁷

Second: while malkies dislike it and argued that here all the partner having *shirka al abdan* and *shirka al amwal*(...) so they disapprove it .in my humble thinking is that the first view is stronger enough, because they may not equal in skills.

Fourth issue

Mudaraba practices where mudarib is a fictitious personality.

⁷⁵ Al sarakhsi almabsoot volume 22 page 125

⁷⁶ Ibne Qudama volume 5 page 25-31

⁷⁷ Ibne Qudama alughni volume 5 page 35

Al sharbini Mughni al motaj volume 2 page 315

Almodawana volume 5 page 90

There is a great controversy between contemporary scholars upon the need to acknowledge the existence of fictitious personality, the group of scholar those have claimed that such a claim does exist in Islamic law, they rely for instances like waqf, bayt almal and the estate of deceased.⁷⁸ On the basis of all these arguments they permit such *mudaraba* where *mudarib* is a fictitious person.⁷⁹

But on other hand some other contemporary scholars say these arguments seems to be misplaced, Islamic law does not acknowledge it, in other words according to them *mudarba* where *mudarib* is a fictitious personality is incompatible with Islamic law as expounded by the jurists. In my worthless opinion what I understood is that this question is not a question of saying "yes" or "no". it need modification, changes, that may wreck its whole structure detail here..

4.5 CONDITION FOR MUDARIB IN PAKISTANI LAW

As it is mentioned that *mudaraba* is one of the marvel discipline of contract law, so it carry all the essentials of a contract. we have relevant law in section 11 of contract Act 1872 in this regard, which is codified law in Pakistan, it is stated that parties of contract must be competent, it is further provided they must not be insane lunatic, and his competency must not be barred by any other law enforced in Pakistan.⁸⁰

Parties of contract must attain the age of majority. Competency of age is mentioned in ward and guardians act, that he is not competent unless he attain the age of 18 years of his age,

Further provided in case of guardian if any for look after of his matters then age of majority would be considered 21 years⁸¹ these are some general conditions for a contract, further we add as it is concern to *mudaraba* that, for a valid *mudaraba* it

1. ⁷⁸ Ahmad bin idrees, - *Alafrooq* . a hashia anawar albarq, volume 3 page 230 published by dar akhya al kutab al arbia

Aljreeri alfiqh almazahib sl arba volume 2, page 198 Dar al kutab al arbi

1. ⁷⁹ Dr hadi, *usul almuzarba islamia*, page 186, 187, page 186, 187 publisher almanac caero

⁸⁰ Mullas on contract act 1872 p 29 mansoor book

⁸¹ The majority act 1857 commentry by kaja said akbar sec 3 pld

is necessary that there should be a registered company, being a mudarib party should take registration from mudarba registrar.

For registration companies ordinance 1984 would be applicable

SECTION #4

IMPLICATION OF MUDARABA

5.1 THE CAPITAL INVESTED AND ITS CONDITIONS.

The term *rab ulmal* denote the meaning of capital used in mudaraba business. It a sort of investment which rab ulmal presents to mudarib for commencement of business. there are two general considerations underlying the prerequisite for investment in mudaraba ,the first is the opposition to risk on enrichment which affect the entire Islamic law of business ,and second its corollary, is the strict requirement in Islamic law that the objective of any business be determined (معلوم) in Islamic law. There must be

clearly known and defined. Objective , further in explaining the permissibility of the mudaraba, jurists laid down some conditions for the admissibility of the capital invested. Therefore to understand the shariah concern we will discuss these issues under following heads:

1. subject matter of mudaraba (investment form).
2. it should be known(knowledge about the subject matter)
3. it should be handed over to agent

5.2 investment form.

all such capital with which other partnerships are valid admissible here in mudaraba as well. It is , however preferred that the capital be offered in absolute currencies, because mudaraba involves lot of ambiguities ,profit is not certain and it is based on just economic necessity, therefore dealing with currencies are preferred , yet some jurists disapprove goods and commodities for investment in mudaraba⁸² ,thereupon we will discuss here the different views of jurists in this regard.

⁸² *Al Muwzni abi Ibrhim Mukhtasar al muzni Hamish kitab al imam shafi vol ,3 page, 61 dar al shuab , Ibrahim bin zain al aabdin ibn nujaim .-Albehr ar rayeq shara kanz daqayq volume 7 page 263.,published by maktaba al rasheed islaama bad*

Ibn hazm al muhalla , volume 8 ,page 247,published byb manshoorat al maktub al tejari al tbaha w al nasher bairut

Ahmad bin yahya ., Al bahr alzkhar ,volume 4 page 81

Al-mardavi -Alinsaf ,volume 5 page 409

5.3 Investment of goods in mudarba as capital

As described earlier that capital should preferably be in form of absolute currency (legal tender money) because the capital in the form of commodities may lead to uncertainties and disputes , jurists having different opinions at this point.

5.3.2 First opinion

Majority of jurists (jammoor) Hanafies, malkies, and shafies and zaheries including shiah zaidia having one opinion, these jurists uphold the opinion that mudaraba with goods and commodities is not valid, they said mudarba in goods leads to uncertainty concerning the amount of the gain at the time when they divide the gain, and while sharia required that there should be no ambiguity about its value.⁸³ and in the case of goods and commodities it is not so because the value of the goods is known only by the estimation, chance and conjecture, and it will differ with the difference of those who do the estimating, which ultimately leads to dispute, and dispute leads to discord, as it is stated by al kasani:

"أن يكون رأس المال من الدراهم والديناتير عندعامة العلماء فلاتجوز المضاربة بالعروض والآن
المضاربة بالعروض تؤدي إلى جهالة الربح وقت القسمة لأن قيمة العروض تعرف بالحرز والظن وتختلف
⁸⁴ باختلاف المقومين. والجهالة تقضي إلى المنازعة والمنازعة تقضي إلى الفساد وهذا لايجوز "

5.3.3 Second opinion

The only legal school which permitted goods for mudaraba investment was that of abi Lila, they said that mudarba in goods is valid, because it is an estimateable property which is usually practiced upon in trade, as for as the matter of mudaraba is concerned ,it is same like that we practices in zakat, it is equivalent to currency , so it is permissible in mudarba too.⁸⁵

⁸³ *Muhammad bin al kharshi , Shara al kharshi mukhtasar khalil volume 2 ,page205*

Ibne qudama almughni volume5 page 13

Miftakh al karama volume 7 page 439 almabsoot,- alsarakhsi volume 22 page 33 alramali ,-nihayat almotaj volume 5 page 219

⁸⁴ *Alkasani bidaya al sanaya volume 6 page 82 educational press Karachi 1979*

⁸⁵ *Alsarakhsi Almabsoot volume22 page 33*

Rather surprisingly a similar position is attributed to malki school by alkasani in his famous book, as it is stated: "وعند مالك رحمة الله هذا ليس لشرط وتجاوز المضاربة بالعروض" ⁸⁶

And same is reported by *sarakhsi*

1. "وقال مالك رحمة الله المضاربة بالعروض صحيحة لأن العرض مال متقوم يستري عليه بالتجارة عادة فيكون كالنقد".

،،87

Hence there is an opinion from hanbli school which is not preferred amongst them the mudarba in goods permissible.⁸⁸

Preferred opinion

In my humble opinion the preferred opinion is the opinion of those who don't permit mudarba in goods, but for economic need and to withstand the pressure of market place we can modify this opinion as it is stated by *Ibrahim iudovich* in his book with reference of both hanfi and malki law developed a simple legal device to accommodate it. An investor may entrust goods to an agent and instruct him to sell them, and use the cash received from that sale as an investment in mudarba.⁸⁹ Or we can rely upon another's suggestion which is stated in *al-kahasaf* that *rab almal* can sell his goods for cash to a party whom he trusts, then hand over the income to the agent and instruct him that he immediately repurchase it for mudarba.⁹⁰

5.4 Fiduciary currency as capital

Any currency, gold silver or copper coins, or any other mode which is in circulation is acceptable as legal tender and is eligible for mudaraba as capital, it is therefore worthy of note that in spite of difference of opinion among the early jurists of Islamic fiqh, subsequent hanfi view include copper coins, with little or no intrinsic value within the category of currency.⁹¹

⁸⁶ Alkasani bidaya volume 6, page 82

⁸⁷ Alsarakhsi almasoot, volume 22, page 33

⁸⁸ Ibn Qudama al-Mughni volume 5, page 13 al-Insaf volume 5 page 410

⁸⁹ Udoovich partnership and profit page 183

Shebani al-asal volume page 55 Sakhnon al-Mdawna volume 12 page 87

⁹⁰ Malik muwata volume 3 page 353

⁹¹ Shebani asal volume page 58 al-sarakhsi mabsut volume 22 page 21

However just one thing is important that non circulating coins were excluded, essentially the same principle applied to currency note in modern age, hence other schools absolutely disqualify copper coins for *mudaraba* investment⁹², but in current market this view is not preferable to fulfill the economic need.

1. It should be known (knowledge about the subject matter)

Another condition pertaining to capital is that amount should be known to parties, in case of uncertain amount or if the capital is unknown then *mudaraba* is not valid, as this will also lead to ambiguity, and that ambiguity causes uncertainty in profit which is against the Islamic system of finance. Jurist are unanimous up to that extent that it must be known but they have difference of opinion about the explanation of the term knowledge. According to *hanafies*, *zaidias*, *imamias*, it is enough in *mudaraba* contract if investor impliedly mention the capital by giving any gesture or sign even he is not declaring the value, kind, and the necessary attribute about the nature of capital, minor ambiguities are not spoil or invalidate the agreement.⁹³

According to them for *mudaraba* situation is more flexible, if any thing prove that capital is certain and exist some where it is enough for *mudaraba* it is allowed now for transaction, there is no restriction for further specific details about the exact figure. as it is stated in *mabsut*.

But at the other hand *shafies*, *malkies* and *hanblies* are some what different, they said that mere declaration of investment without mentioning the exact value and figure is not enough for the purpose of valid *mudaraba*, in their views it must be clearly determined in terms of value, weight and quality in time of entering into *mudaraba* contract to ensure that contract is now free from any ambiguity and uncertainty about its value.⁹⁴

Then another very important issue is about joint property, "المضاربة برأس مال المشاع", where the capital of *mudaraba* is happened to a joint property of different persons,

⁹² Sakhnoon *almudawana* volume 12 page 86 *almugni al mutaj* volume 3 page 310

⁹³ Ibn aabdin *hashiah* volume 8 page 282 *alsarakhsi almabsoot* volume 22 page 27 *al bakh* *zakhar* volume 4 page 81 - *Shaheed Muhammad bin jamal* .- *Al lumah dimishqiya* volume 4 page 220-219 published by *Dar al kutab al arbi*

⁹⁴ *Al sharbini Mugni al mutaj* volume 2 page 310 *ibn qudama al mughni* volume 5 page 54

majority of jurists approve such kind of mudaraba transaction where capital found communal property ,except some malki jurists they are of the view that amalgamation of mudarba contract with any other setup is disagreeable and unpleasant .

Another very important issue is related to credit ,the precise role of credit in the context of Islamic fiqh has been subject to dispute by jurist, as it was discussed earlier as principle , it is stipulated that capital should be (عين)established and certain and it should not be (دين)debt, but there were those who viewed that credit arrangement and its use as a mean of investment in business transactions are available in developed form in earliest Islamic legal work , credit fulfilled some important functions of finance in medieval trade, it financed trade by ensuring trade for those who temporarily did not afford the sources of carrying out trade , and especially in combination with other contract ,it served as means of sharing risk of commercial ventures, one very nice justification is reported by *ibraham udovich* in his book , he said:

A very famous hanafi scholar justified the credit partnership on the grounds of usage of legal principle and by virtue of general economic function of partnership which *kasani* epitomizes as “a method for augmenting or creating capital”. “study of all these aspects shows that in mudarba partnership credit can be used as capital”⁹⁵

Jurist fix this controversy in simple way , they describe two different situations , first where credit related to mudarib ,” if mudarib is creditor himself , here mudarba on previous credit by mudarb is declared void , because it makes resemblance with riba , to avoid resemblance with riba it is not permitted”⁹⁶ ,so if any person who follows such transaction as mudarib and it results loss , “mudarib has to bear that loss, this transaction amount as personal activity for him, he remain as creditor of investor”.⁹⁷Second where creditor is a third party , debt is a liability of another person B , and investor authorizes mudarib exm: A to take that amount from creditor B and invest it in mudarba in capacity of mudarib, in this situation Hanfies

⁹⁵ Udovich ,partnership and profit in medieval islam page 78- 80

⁹⁶ Alkasani bidya volume 6 page 83 II ibnn rushd bidyt al mujthid volume 2 page335 *Dar al kutab al arbi* III ibn qdama almugni volume 5 page54

1. ⁹⁷ Alkasani bidya volume 6 page155 II *Abdul wahab hhawass almawardi almudarba page 117 II- p by dar al shuab*

and Hanbli jurist permit it, and declare it a valid mudarba while malkies and Shafies considered it as invalid mudarba, applying principle” (“لا تتبع ما ليس عندك”).

„98”

2. It should be handed over to agent

The next very important condition for mudaraba is related to delivery of capital , that it must be delivered to mudarib , and this delivery establishes at the time when rab almal handed over the capital to mudarib practically and mudarib takes the immediate possession of that property or capital, and it becomes under his occupation, perhaps it is necessary for the purpose of the aamil(عامل) , because he is not able to utilize any thing unless he establishes his complete occupancy over subject , he must have right to deal conclusively with it , and authority to dispose off.

So if rab almal stipulate that the capital will remain under his hands , it is not allowed it is disapproved according to hanfies , shafies , malkies and zaidya schools⁹⁹. But hanbli jurists approved all such kind of transactions where investor stipulates that I will take the capital under his control as it is stated in *mutalib awlan nahi*(مطالب اولى النهى) ¹⁰⁰ ولا يعتبر فى المضاربة قبضها عامل رأس المال فتصح وان كان بيد ربه لان مورد العقد العمل”

SECTION # 7

Conduct of *mudaraba*

The most important and the problematic aspects of mudarba are those which concerned with the conduct of agent with capital. because the ultimate object of mudarba(trade) , which is profit earning , depends upon this operation .Therefore we can find that largest part of legal discussion is devoted to explaining and defining the extent of

⁹⁸ Alkasani bidya volume 6 page 83 II ibnn rushd bidyt al mujthid volume 2 page335 III ibn qdama almugni volume 5 page74 III almugni al mutaj volume 2 page 10

⁹⁹ Alkasani bidaya volume 6 page84 al ramali volume 5 page 221 IV zarkani .shara al zarkani volume 6 page 214 dar al kutab al arbi

¹⁰⁰ Mustafa sauti , -matalib awlan nahi volume 3 page 424 manshoorat maktab alislami demoscies

agents liability in actions , and clarifying his relationship to the investor and to the other party .like other kinds of partnership the mudaraba is classified as a contract of fidelity(عقد الأمانة),like a partner *mudarib* is considered(أمين) trustee, faithful party , with respect to the capital entrusted to him, the relation of muadarib and investor is a fiduciary relationship and therefore he is not liable for any loss occurring in the normal course of business activity, unless he commits any violation of his fidelity(أمانة) then he will become liable for the property which is in his care.

6.1 Conduct of mudarib

The large number of considerations we have in our legal resources, determine the boundaries of the agent's freedom of action , jurists agreed that action of mudarib must be consonant with the over all purpose of the contract like to achieve profit , and the very much important, that it must fall within customary commercial practice, he must obey the commands of investor in respect of mandate he received from the investor,it is worth mentioning that his status is here as statues of wakil(وكيل) of rab ulmal he possesses all those right which any delegated authority possesses in common commercial usage. If nature of the contract demands , he can hire labor , like wise he can hire premises on rent , warehouse for hording but where nature of work demand that he must he must under take the responsibility oneself in such case he must do that other wise he is liable to pay rent by its own expenditure.¹⁰¹

Jurist agreed upon that mudarba operations could consist of trade , sale and purchase practices , but they have controversial views on the matter where mudarib administer mudarba fund in any practice other than trade like agriculture , rent , mortgage etc to seek profit from that , some jurists validate such operations while other not , we have apparently two different approaches

Shafies ,Zahiries ,and Zaidia uphold that mudarba operation is restricted to sale and purchase, it could not be extended to beyond that practice,¹⁰² if investor permit that mudarib can indulge in any other practice like mortgage manufacturing goods weaving,

1. ¹⁰¹ Al sarakhsi almabsut volume 22 page 39 II mughni al mutaj volume 2 page 311 III ibn qudama almughni volume page 40 IV Abu Qasim Najm u ddin , - sharaeh al islam volume 5 page 137 - published by makttba al aadab binnajaf

1. ¹⁰² Mugn al mutaj volume 3 page 312 II ibn hazm al mhalah volume 8 II Ibn sharaf al novi -rodha al talebin volume 55 p by al maktabal islami lettebaa wa al nashar

knitting and handicrafts etc it would amount violable, and if *mudarib* starts any transaction other than sale and purchase in such case he would be liable for any loss incurred. Al sharqavi famous jurist of shafi school says :

"الطحن وما معه من اعمال ويشترط في العم كونه تجارة فلا يصح على شراء بر يطحنه ويحبزها أو غزل ينسجه
لاتسمى تجارة بل هي اعمال مضبوطة ليستاجر عليها فلا تحتاج الى
القراض عليها"¹⁰³

While hanfi malkies and hanblies jurist don't restrict it with trade specifically , but they permit it, they say that *mudarba* is possible in any mannir with all disciplines , where he can get valid profit,¹⁰⁴ this is explicitly supported by *mudawwana*

" فإن أخذ المال قراضاً من غير شرط فزرع به أ يكون قراضاً
جائزاً (قال) لأرى به فأنما هي تجارة من التجارات "

And like wise stated by ahmad in mughni¹⁰⁵ ("روي عن أحمد فيمن دفع إلى رجل ألفاً وقال اتجر"¹⁰⁵)
فيها بما شئت فزرع زرعاً فربح فيه فالمضاربة جائزة لأنها من الوجوه التي ينبغي بها النماء"

Preferred view

So in my humble opinion second approach is better than first , by adopting this one can easily meet the challenges of modern economic needs , it is widen in scope while first approach narrows down the scope.

Like wise jurist have different views on that where the *mudarba* investor provides machines , instruments , equipments, tools and other devices .Majority of jurist including hanfies don't permit such *mudaraba*.

They said that the nature requires (*ra sulmal*) capital , but these things are not capital these are just supporting instruments, so it is a common practice that when someone uses any equipment or tool , the beneficiary must pay charges to the owner of that stuff in form of rental or wages , same rule we have to apply here ,when *mudarib* (or agent) uses some these things he will pay charges or rental to investor (provider), and the benefit or gain the out come of said activity will go to him , no question of share remain for any one else is not any kind of partner ship but it is just hire agreement. As it is stated in mabsut "

¹⁰³ Hashi al sharqavi alat tahreer volume 2 page 104

¹⁰⁴ Alkasani bidaya volume 8 page 368

¹⁰⁵ Ibn qdama mughni volume 5 page 154

"وإذا دفع إلى رجل شبكة ليصيد بها السمك على أن ماصادها منثبي فهو بينهما , فصاد بها سمكا كثيرا، فجميع ذلك للذي صاد لقوله صلى الله عليه وسلم "الصيد لمن أخذ لأن الأخذ هو المكتسب دون الآلة فيكون الكسب له فقد استعمل فيه آلة لاصياد"

106

Same is the view point of shafie jurists also preferred in malkies school , in addition they include services in this category .¹⁰⁷

But on the other hand jurist from hanbli school and imam awzahi considered it as valid mudaraba, it is stated in Mughni

" وإن دفع رجل دابته إلى آخر ليعمل عليها وما يرزق الله" بينهما لنصفين أو ثلاثا أو كيفما شرط صح ."

108

Mudaraba with Limited and Unlimited Mandate

With respect to the agent's conduct while dealing with the investment entrusted to him ,jurists divide it into two types . A limited mandate and unlimited mandate mudaraba¹⁰⁹

It is also known as absolute mudaraba and restricted mudaraba. The absolute mudarba is the one in which the rab ul mal authorizes mudarib to act completely on his own discretion . capital is handed over to him without any determination of kind of business , nothing is mentioned about time period , location , quality of work .In this case agent is full authority to buy and sell what ever he wants and sees fit , he can deal with cash and credit both, he can owes debt and has right to pledge , he has authority to hire helpers, buy animals and equipment or take on rent , he can move with capital from place to place, if he thinks fit, he can mingle his own resources in capital , he can invest it with third party , he may apply all techniques of commerce in the pursuit of profitable trade.¹¹⁰

And the restricted or limited mudarba is when the liability of actions of mudarib or agent is restricted in term , the agent's freedom of action is extended almost unto the commercial limits in which he functioned .The only criterion for measuring the legitimacy of agent's activities we have is the customary practice of traders.

¹⁰⁶ Alsarakhshi mabsut volume 22 page 35

¹⁰⁷ Abu yahya Zakriya Asnalmatalib volume 3 page 382 3 p by maktaba islamia misr(egypt).

II sakhnoon almudawna volume 4 page 48 III dardeer al shara alkbir aldardeer volume3 page 457

¹⁰⁸ Ibn qudama almugni volume 5 page 8

¹⁰⁹ Al majalah al ahkam al adlia article 1407 II alsarakhshi almabsut volume 22 page 39

¹¹⁰ ibd

Perhaps these restrictions are not the matter of agreement amongst the jurist, there are different opinions exist about the application of these restrictions for example;

If investor impose any kind of limitation upon the trading activity, which also include the object of trade, he may limit the *mudarib* up to specific commodity such as barley, wheat or any other category of merchandise such as textiles food stuff etc. this is allowed according to majority of jurists, because restricting trade to such restrictions mentioned above, meet the standard of "beneficial stipulation" (شرط المفيد), and there is valid reasoning for that, the investor might have enough knowledge about the skills of *mudarib*, he may think that this person is fit only in certain type of trade, to the exclusion of other he is acting so and wishes to confine him to his specialty.¹¹¹ However, in another situation if he confine him to deal with certain thing or specific item, like investor impose a limitation that he just deal with that such specific Honda car model such, with chases No so and so or he stipulate that he just purchase that specific house or some antique. In this case jurists of malki, shafi and zidi school uphold their view that this is not allowed, because it may not possible for him to achieve that¹¹². And *Humbli* and *imamia* jurist validate all these kind of stipulations even though if such stipulated thing is unique in nature, or is rare in existence and uncommon in market,¹¹³ but they have only one reservation, they don't allow such stipulation where *mudarib* is bound to sell his commodities to whom he purchased, it is just like buy back transaction which is dispraised in sharia. And the *Hanfi* point of view in this matter is more flexible, they agree that investor may impose restrictions on the trade policy, he may mention parties from whom the agent suppose to take goods and to whom *mudarib* can sell that goods. Hanfies considered it as "beneficial stipulation" because trustworthiness of the people differs from person to person, reliability of the people is not same all the times, and the investor has right to protect

¹¹¹ Alsarakhshi almbstut volume 22 page 41

¹¹² Shara al zarkani volume 6 page 216 II al darder shara alkabir hashia al dasooki III nihayt al mutaj volume 5 page 222 al bahr izakhar volume 4 page 82

¹¹³ Ibn qudama al mughni volume 5 page 49 ibd page 219 II sharaye al islam volume 5 page 137

his investment by choosing those to whom has confidence ¹¹⁴ same opinion we find in imamia school .

In my humble opinion, the investor right to impose restriction on mudarib , or his right to guide him with such trading policy applies only in those cases where it is beneficial and not very with the primary purpose of the mudarba , that of attainment of profit .but when his restrictions contradict with this goal, they are rejected, and rule of market place take effect, we have been prevented to adopt such instructions.

SECTION #7 .1 Treatment of profit and loss

The essence of mudaraba finance is profit sharing between mudarib and rab ul mal .both the parties in mudarba are at liberty to fix the proportion or ratio of profit sharing with mutual understanding .this ratio must be fixed at the time when contract is concluded, so that to avoid the conflict in future .As according to the view point of majority of jurists they can agree on equal share or allocate different ratio, but if they don't mention the ratio of profit ,it is not allowed,¹¹⁵ suppose investor handsover capital to mudarib and authorizes him for investment without mentioning the condition of profit sharing ,so it is not allowed . But ibn serin , and al hasan have different opinion ,they allow it on the grounds of (التراضى) mutual consent, but as mentioned earlier according to majority of fuqha he is just liable for equitable wages and profit is for investor. Then we have another view point which is of Ibn Qudama is is bit different then majority ,he said right of profit emerges from the condition which defined the profit but when no condition attached which talks about profit , this leads to ambiguity ,and it is against the essence of Islamic finance so it is not appreciated, but if it is just mentioned "ان الربح بينهما نصفين كما لو قال الربح بيننا"¹¹⁶ Malki and Shafi opinion is almost similar to them ,perhaps¹¹⁷ they further explain that alum sum amount as a profit for any of the parties can not be allowed or permissible .In other words according to them they can agree upon suppose 50% 40% 60% of profit for one party and remaining for other

¹¹⁴ Almabsut alsarakhsi volume 22 page 142 II al shebani volume page 61 muhammad jawad bin muhammad miftakh al karama vlume 7 page 449 IV Shaheed, al lumah aldmlshkla volume 4 page 213

¹¹⁵ Shara al zarkani volume 6 page 216 II al bahr alzkhar volume 4 page 84 volume 6 page 84 II

¹¹⁶ Ibn qudama al mughni volume 5 page24

¹¹⁷ Kashaf al qana volume 3 page 507 II nihayt al utj volume 5 page 224

respectively .and apparently it is preffered view of Imamia Zaidia and Zahiria schools , they also give emphases on the matter that ratio of profit must be known.¹¹⁸

Though Hanfi point of view is some what different in the sense that imam yousaf allows it and said profit should be divided equally where share is unknown but imam muhammad disagree with them as is reported in bidayeal sanay "و قال ان للمضارة شركا" في الربح جاز في قول أبي يوسف الربح بينهما نصفان وقال محمد المضاربة فاسدة (وجه) قول محمد أن الشركة هي النصيب قال الله تعالى. أم لهم شرك في السموات أي نصيب، وقال تعالى ومالهم فيها من شرك أي نصيب فقد جعل له نصيبا من الربح والنصيب مجهول فصار الربح مجهولا. وجه قول أبي يوسف أن الشرك بمعنى الشركة يقال شركة في هذا الأمر"

119

So according to *muhammad* shirka applies on share , so here share is not mentioned which leads toward ambiguity , thus it is declared void able *mudarba*, and *yousaf* applies meaning of shirka as sharing some thing (any thing) an it gives meaning of proportion share of profit so it is allowed.

After this detailed discussion we can draw Conclusion, that; both the parties having right to change the ratio of profit distribution if they want at any time , but that ratio will remain effective till the time for which it has been fixed . in case the parties did not stipulate the proportional share , they should rely upon customary usage , but if they don't find any customary practice , usage etc ,then the contract will be declare void *ab initio*, and *mudarib* will receive some wages according to common market for the service he rendered to investor.

7.2 Withdrawal or isolation of profit with one self

As we know that in *mudaraba* both parties have right to share profit on pre decided terms ,they have liberty to set any format , or make any arrangement between them with mutual consent for profit sharing , but what would be the opinion of jurist in such cases where one party of *mudarba* stipulate whole amount of *mudaraba* profit ,return of investment for himself or one party withdraw his right to share profit from gain?

For example, the financier can say to *mudarib*

¹¹⁸ Hasan bin yousaf Qwaed al alama volume 7 page 454 mattba al shoora Egypt II Ahmad bin yahya Ibn murtaza al bahr al zakhar volume 4 page 82

¹¹⁹ Alkasani bidya volume 6 page 85

' get this money and invest it and profit is for you , or in another case he says : ' get this money and whole return on investment is for me,.

So in these cases jurists laid down very interesting principle , namely in case where a person at the time when contract was concluded , he did not uttered any words which denote the meaning of mudaraba like Muqarzaa or Muamla or he did not commit any thing which gave any clue expressly or impliedly to show his intention clearly about mudaraba . in these situation s , with first case jurists agreed that it is a simple Qarz (debt) deal, and mudarib takes exclusive possession of profit, this deal monopolize for every gain which he attains from it ,¹²⁰ but he will bear ability alone in case of any erosion of capital . and with second situation in this case they consider it as abda (ابضاع) n transaction because when they stipulate, that profit is just for investor ,this context and inference prove that he intended ibda (ابضاع) just we find that mudarib here serve as volunteer and he has no right in profit , unless investor add this statement in the agreement that you will get appropriate wages for services then he will receive equitable remuneration ¹²¹

This is a view point of majority of jurists .as for as another case is concerned where investors use the title words for mudarba transaction like mudaraba or Qiraz for example , he says I give you 100\$ on mudarba basis but I will return whole of the profit gained , or he says you will attain the complete gain, profit \ return on investment . here in this case jurists have different opinions ,Majority maintain that mudaraba is not permitted ,it is void able , hence the object and the essence is to share the profit and profit sharing is infact prerequisite for mudaraba , violation of this rule render transaction void , as it is stated by ibn Qudama "وان قال خذه الربح كله لك او كله)"¹²² similarly shafi school also disapprove this transaction ,and same verdict we can find in imamia and zaidia school.¹²³ Therefore mudarib just has right to

¹²⁰ Ibn qudama almughni volume 5 page 26

¹²¹ *Al aamli miftakh al-kramah volume 7 published by matba Mustafa al babi al halbi Cairo.*
page 452 II al ramli volume 5 page 224 III ibn qudama al mugni page 26 volume 5 IV Qwaid al alama
volume 7 page 452 V shra al zarkani volume 6 page 219

¹²² ibn qudama al mugni page 26 volume 5

¹²³ Qwaid al alama volume 7 page 451 II almuhazzib volume 1 page 385 IV al bahr alzakhar volume 4
page 82 V niha yat al motaj volume 5 page 224

claim equitable remuneration.¹²⁴ However Hanfi jurist disagree with this opinion they considered first case as Qaraz (debt) transaction and second situation they considered it as ibda(ابضاع)¹²⁵. But Malki jurists deal all this in some what different way they permit mudarba in both cases , they considered it as branch of hiba هبة as it is stated by Zarkani(" وجاز الربح أو اشتراطه كله لأحدهما أن لغيرهما من رب المال والعامل لأنه من باب الهبة، ")¹²⁶ واطلاق القراض عليها فجاز فيجري على حكم الهبة"

.The occlusion: We can draw from this discussion is that the mudarba in these cases permitted by Malkies of metaphorically(مجازا) . While according to others the designation of contract as mudarba is totally opposed in case where all the profit either assigned to mudarib or to rab al mal , such arrangements are treated for what they infect really are , namely a debt or loan and ibdaa accordingly .

Similarly the assignment of some portion of profit to an outsider third party , that is some one other then the investor and agent ,is also some conflicting point amongst jurists, majority of jurists maintain such mudarba invalid ,they laid down a principle that when the agent has no vested economic interest in relation to third party concerned , the share assign to him revert to investor thus it is just valid in case of agent's slave ,but Maliki jurists differ on this point and validate such mudaraba , in their views if a portion of profit was assigned to third party namely charity purposes or as gift or some of the relative of agent , the stipulation is considered valid ,we deal it as هبة gift transaction .¹²⁷

But shafies and hanblies considered stipulation null and void and share reverts to investor according to them ,¹²⁸ and Hanblies add one more thing it reverts to investor in the absence of clear cut and direct vested interest in third party's share , but if he stipulate that portion against t any services then it is allowed .¹²⁹ Similarly is the Hanfi point of view , even it more explicit , they argued that ,the right to any share in gain is earned either by virtue of the money invested , or by virtue of services given , since

¹²⁴ Miftakh al karama volume 7 page 45

¹²⁵ Alkasani bidaya volume 6 page 86

¹²⁶ Shara al zarkani volume 6 page 214

¹²⁷ Shara al zarkani volume 6 oage 219 II almadawna volume 4 page 49

¹²⁸ Nihayat al mutaj volume5 page223

¹²⁹ Al amly volume 5 page 450

non of these reasons can be claim by any of third party engaged, the profit will not go to them , but mudaraba will remain valid and stipulation is considered null and void.¹³⁰

SECTION #8

Administration of Mudarba and its Rules (احكام المضاربة واثارها)

The purpose of studying this chapter is to analyze the conceptual part of shirka ul mudarba ,this study provide the frame work within which the administration of mudaraba finance is understood , the nature of rules is grasped ,and different aspect of operation of legal system namely prescription of valid and void mudaraba, is seen ,this discussion also highlights the role of mudarib and rab al mall with reference to their rights and liabilities and their conduct in capital , this discussion also deals the issue of termination of mudaraba partnership.

However the first issue which we will take into account is about the kinds of mudaraba based on validity and vice versa. The majority from different schools of jurisprudence divided mudaraba into two major kinds , valid "صحيح" and invalid "باطل" but the hanfi school differed with them in this issue , they add a third category of "فاسد" (vitiated also called irregular) but all of them are agreed that if all the elements required by the law are completed and the additional conditions are fulfilled , the purpose and the subject matter of the contract is legal , then this is a valid mudaraba.¹³¹ The vitiated mudarba is that whose essential ingredients are present , the elements are sound and legal but the wasf"وصف" or san external factor is not legal or some conditions are not fulfilled or prohibited , like any uncertainty in subject matter or in consideration etc, but surprisingly irrespective of this discord, majority (jamhoor) considered all such irregular contracts as invalid contracts , so at the end both the groups divide mudaraba in two kinds, valid and invalid . therefore we can say every co tract which is not fulfilling three condition is not valid mudarba namely:

1. the purpose of contract must be legal and nothing would be stipulated contradictory to the purpose of contract ,like he stipulate that controls of investor over subject remain , or don't sell the property etc.

1. ¹³⁰ *Muhammad bn Mehmood , -Shara al Anaya alal hidaya volume 7 -page 73 published by maktaba al rasheed*

¹³¹ Ibn al hamam Fath al qadeer volume 5 page 186

2. any condition which result ambiguity or uncertainty like proportion profit for parties are not clear, or their proportion is fixed in certain sum.
3. any condition is stipulated which is not in favor of mudarib or contract.

All jurists agreed ¹³² that these all conditions vitiate the mudaraba ,and the consequences of invalid mudarba are same as there are the consequences of vitiated according to *ahnaf*. they agreed that for mudarib there are two situations in case of invalid or vitiated mudaraba.

- He is usurper if he dealt with such transaction willfully .
- He would be considered as ajeer (servant) in otherwise situation.¹³³

In all mudaraba contracts if the element is sound and legal and so are the all above mentioned conditions the partnership is valid (مضاربة صحيحة) and they can share profit if there is any , but if there is no profit then he has no right to claim any gain , further, in case of any decrease in capital he can not put any liability on mudarib .¹³⁴

Although jurists have conflicting views upon the matter, like can *Rabul mal* take any profit from expected gain before its division? Hanbli Shafi , and Imamia jurist uphold their opinion that he has right to fulfill his needs from undivided stuff but with the consensus of mudarib.¹³⁵ But Hanfi and Malkies jurists argued in some what different way , they said that it is not valid to take it before formal division , they considered it as offensive act, and Hanfi view seem bit logical in sense as it is stated in bidaya: (لأن "الربح زيادة والزيادة على الشيء لا تكون إلا بعد سلامة الأصل ولأن المال إذا بقي في يد المضارب فحكم المضاربة بحالها – فلو صححنا قسمة الربح لثبتت قسمة الفرع قبل الأصل فهذا لا يجوز" ¹³⁶

This contract has several "احكام" rules with respect to the conduct of mudarib and *rubul mal* investor , when the investor delivers the money to mudarib ,then he is an amin (أمين) trustee he has to take custody of it with full fledge authority . if he enters into transaction then he gets the title of agent (وكيل) wakil , and after that if there is a profit from business he becomes partner (شريك) to rabul mal in profit . but

¹³² Ib qudam aal mugni volume 5 page 51 II miftah al karama volume 7 page 425 III takmilla rad almukhtar volume 8 page 279

¹³³ Ib qudam aal mugni volume 5 page 54 II nihayat al mutaj volume 5 page 228 III shara al zarkani volume 6 page 215 IV takmila almjmoo volume 14 page 202

¹³⁴ Alkasani bidaya volume 6 page 108 II al ramali volume 5 page 218

¹³⁵ Ibn qudama almughni volume 5 page 46 II al shirbini volume 2 page 340 III miftah alkarama volume 7 page 499 IV al bahr alzkhar volume 88 page 4 shara alzarkani volume 6 page 224

¹³⁶ Alkasani albidaya volume 6 page 107

there are some limitations upon him if he violates these limitations then he becomes usurper and gets liable to loss . It was stated that in one time he becomes trustee amin , it means that he received the permission of the owner , and he is not to be liable for any compensation in a some kind of exchange "بيع" nor as security arrangement like mortgage . Thus if capital got destroyed in his possession without there being any fault on his part , he is not stand liable .¹³⁷

When we gave him title of wakil it means that performance of contract revert to him as he is a person , who is under taking the transaction , consequently the mutalba (مطالبة) will be directed to him by the venders for the payment and delivery of goods from purchasers .He is the person who will face the claims in cases of defects, he will be defendant or plaintiff in all suits pertaining to the business of mudaraba .Accordingly rabul mal has limited right to interfere with capital of mudaraba. It is permitted istehsan (استحسانا) according to hanfi law for rabul mal to inter into any transaction with mudarib in same mudarba , like he can buy or sell to him goods ,. The reason is simple he is just like stranger with respect to the wealth of mudaraba after when mudarib had taken the possession of it. while others Shafi , hanabla , don't allow it , they said that according to strict analogy the wealth is that of the principle , that is , rabul mal , how he he can sell his own wealth to himself. As for malkies opinion , they adopted principle but when ;

1 – it would not be stipulated in contract

2 – That he did not intend accusation of part of profit in concealed manners ,so they would become sharer in profit .¹³⁸

SECTION #9

Termination of Mudarba It is a matter of consensus among the jurists that mudaraba is nafith "نافذ" (immediate) ghair lazim (non binding) contract, this non binding contract also called jaiz "جائز"(terminable). Being a lazim contract in mudarba the right

¹³⁷ Ibn aabdin hashia volume 5 page 647

¹³⁸ Al ramli nihayt al mutaj volume 5 page 231II alkasani volume 6 page 101 III ibn qudama almughni volume 5 page 172 IV al mukhtasar alkharshi volume 6 page 21 V ib aabdin hashia volume 5 page 650 VI al dardeer alshara alkabir volume 3 page 461

to resend can be exercised by ether party as we have different quotation from jurists of different schools of thoughts alkasani says:"¹³⁹

1. "وأما صفة هذا العقد فهو أنه عقد غير لازم ولكل واحد فيها أعني رب المال والمضارب الفسخ."

Another famous malki scholar al dardeer uphold¹⁴⁰

"ولكل من المتقارضين فسخه أي تركه والرجوع عن"

And great hanbli jurist ibn qudaama said ¹⁴¹ "الكل منها فسخه أي عقد القراض من غير حقور الآخر

والرضاء لأن القراض في ابتدائه وكالة وفي انتهائه إمشركة وإماكلها عقود جائزة"

And *ibn hazam* also agrees with them and said¹⁴²

"والمضاربة من العقود الجائزة تنفسخ بفسخ أحدهما أيهما كان"

Ibn murtaza also said that "¹⁴³(.. وإيها أرادا ترك...)"

And anoher scholar *al khateeb al shrbini* said"¹⁴⁴"ولكل منهما الفسخ متى شاء إذا عقدهما جائز"

Therefore we can conclude that mudaraba like any other partnership is terminable , and it can be terminable by all such actions that we have for agency contract and these are ;

- Rescission and proscriptions pertaining to said transaction.
- In case of limited mudarba , by the termination of period .
- Extinction of the capital after its possession and before it commences.

Perhaps in the legal sources attention has been paid to the manners in which the mudaraba agreement is to be concluded especially in hanfi law as it is stated by alkasani "وإما بيان ما يبطل به عقد المضاربة يبطل بالفسخ وبالنهي عند التصرف ولكن عند وجود شرط الفسخ

¹³⁹ Alkasani bidaya volume 6 page 112

¹⁴⁰ Aldardeer alshara alkbeer volume 3 page 545

¹⁴¹ Al mughni libn qudama volume 5 page 179

¹⁴² Ibnn hazm almuhala volume 8 page 249

¹⁴³ Ibn murtaza al bah rzkhar volume 4 page 87

¹⁴⁴ Shar binin Mugni almutaj volume 2 page 319

والنهي وهو علم صاحبه بالفسخ وأن يكون رأس المال عيناً وقت الفسخ والنهي إن كان متاعاً لم يصح وله أن يبيعه بالدرهم الدينار حتى ينض كما ذكرنا فيما تقدم وإن كان عيناً صح ولكن صرف الدرهم إلى الدينار إلى الدرهم¹⁴⁵ As for the explanation of acts that annul the mudaraba contract , it is annulled through rescission and proscription, restricting transaction ,however in rescission and proscription the conditions to inform other party must be bothered . Further, the (entire) must be in the shape of ayn(عين) liquid assets at this time. If it is in the shape of goods that are not acceptable , then it should be changed into dirham and dinars so they get the shape of cash assets .

This statement shows that dissolution will take effect when the following conditions have been met.

1- Notice of dissolution should be served to other party. 2- The asset of .1 mudaraba should be converted into cash or change into fungible. Hanbli jurist also have same views that it is necessary to make known other party about subject of dissolution .¹⁴⁶But on the other hand majority including shafies *malkies* , *imamimia and zahiria* don't considered it necessary , according to .¹⁴⁷"them it does not matter whether the *mudarib* has knowledge or not, as it is reported from *khateeb al sharbeeni* من غير حضور الآخر والرضاء لأن القراض في ابتدائه وكالة وفي انتهائه إما شركة وإما حفالة."

”

Though it is not necessary in mudarba to give notice of dissolution because it is a terminable contract by nature . And amongst them Malki jurist stipulated liquidation of assets for dissolution .¹⁴⁸ but some other said that parties can dissolve the mudaraba whether the capital is in the shape of liquid asset or not it does not effect .¹⁴⁹

Further other than by means of its natural conclusion , there are some other occurrences which automatically put an end of mudarba partnership. Among these insanity of either party or apostasy from Islam of one of them ,then other case is

¹⁴⁵ Alkasani bidya volume 6 page 112

¹⁴⁶ Al insaf volume 5 page449

¹⁴⁷ Mugni al mutaj volume 2 page 319 nihayt almutaj volume 5 page237

¹⁴⁹ Alalama al halbi volume 7 page 501 II al insaf volume 5 page 449 III almahala ibn hazm volume 8 page 249 IV al bahr al zakhar volume 4 page 87

related to the death of *mudarrib* or *rabul mal*, then a case when one of them join *dar alharb* in these cases aside from apostasy and last one which is categorized as an enemy partnership, the *mudarba* is to be dissolved by converting all its assets into cash form by restring the wealth of *mudarba* to heirs of *rabul mal* and dividing the remainder between the parties.

As a result we can say ; In ordinary circumstances if all went well , the agent and investor would settle their accounts , divide their profit if any and in case of conflict the statement of *mudarib* would be prefer , and presumably in case of conflict upon profit or loss , the situation govern as according to *maxim*.

And it would presume that there is no profit emerged . other wise in case of profit they divide profit happily and conclude their contract according to their settled arrangements .in case of unsuccessful venture the *mudarib* will return entire capital to investor or what ever portion of it, that were not lost ,and in case of dissolution where *rabul mal* dissolved it on his own desecration , he is liable to give appropriate wages to *mudarib* if there is no profit emerged from such business or let him complete his efforts.¹⁵⁰

CONCLUSION ; It has been observed from the ideas of *hanafi* school, that it is just a

Partnership for participation in profit, hence they don't bother about the further details like how to deal ratio of profit or manners of business and other conditions stipulated to it.

while *Malikies* and *Shafies* look in the scenario of agency, here we find agency as an necessary element , although agency is there but it s necessary to understand that it is not just like agency contract, we can not deal *mudarrib* as like mere agent ,because *mudarba* is a creation of offer and acceptance and in case of *wakala* agency acceptance <*qubool*> is no more essential

the next very important point highlighted from these definition, that those who defined it as <دفع المال> it means to provide capital' it shows that it should be tangible and secondly it also exclude the debt which not comes under the shadow of delivery, it should be ain <عين> not dain <دين>.

¹⁵⁰ This view is taken from *imamia school miftakh al karama volume7 page 506*

After the entire discussion and from sparse indications available, it appears that this transaction *continued* through early centuries of Islamic era as a valid practice and its legitimacy is significant.

And we can conclude that we have a complete code for governing mudarba business in the form of principles synthesized by Islamic jurist .

Chapter# 3

Section #1

Introduction:

Till the thirteenth century *mudarba* remained and was expected as dominant form of financing business in the Muslim world, However to continue with the expansion of the Muslim's rule and eventual colonization of their lands by western imperialists the scenario of business underwent drastic changes and *mudarba* lost its real importance as Islamic mode of finance in trade.

However ,it is an established fact that among all corporate concepts, which are translated into legislation, the *mudarba* law is really wonderfull.

In this chapter we will study the law of *mudarba* as embodied in the *Mudarba Companies and Mudarba or (Flotation and Control) Ordinance, 1980* (hereinafter in this chapter referred to as the/*this Ordinance*) and rules made thereunder titled *Mudarba Rules, 1981* (hereinafter in this chapter referred to as the/*these Rules*). It is one of the legislations of recent years, which have a great effect on business in this country, as a step towards Islamization of Business/Mercantile Law in Pakistan.

The sections of the ordinance have been shown with the Abbreviation 'S' and for rule Abbreviation 'R' has been used for relevancy the references of relevant sections/rules are arranged in footnotes.

Section#1

1.1Mudaraba in Pakistan Perspective

In June 1980, Federal Government in Pakistan introduced an Islamic manner of investments, as a first Step towards Islamizing the current financial scheme. Government promulgated the Ordinance and the Rules, made under section 41 of the Ordinance. Same was aimed at providing an alternate to *riba*¹⁵¹.

¹⁵¹ *Mudarba Companies and Mudarba or (Flotation and Control) Ordinance, 1980 and rules made thereunder titled Mudarba Rules, 1981 published in Gazette of Pakistan*

Hence, section 42 of the Ordinance provides that provisions of this Ordinance shall take priority over all other laws for the time being in force and shall have same effect for relevant provisions of Companies' Ordinance, 1884.

When we have a glance on different provision of the Ordinance and the Rules made thereunder, it appears that it is procedural in nature.

This Ordinance set forth the conditions for the incorporation of *mudaraba* raising from *mudaraba* fund. The operations of *mudarba* are also a subject of the Ordinance. It also deals maintenance of the statutory books of accounts and grounding of returns, distribution of profit, settlement of reserves, issue of securities and borrowing power, administration and legal control, affairs of winding up and cancellation of registration, punishments and penalties in result of fraudulent trading and for negligence in keeping proper accounts.

In addition to all these things, one separate chapter has been introduced to the Ordinance providing for *inter alia* capitalization of profits increasing fund, exemption from tax and indemnity etc. In *mudarba*, the person who subscribes to the *mudaraba* fund is share holders or the owner of *mudaraba*. Then *mudaraba* has its own separate legal status in legal framework and recognized as separate entity in the law.

The share certificate holders, although considered owners of *mudaraba* and admitted to the list of *mudarba* fund's subscribers, are not allowed to become its members; hence, it is not like a company or a corporate body. In short, we can say that the status of an association of persons engaged in a business are not fit for that as law does not make available any meeting, ordinary or extra ordinary, of the share holders.

They can not elect directors or have any right to appoint Auditors for Approval of accounts, even they have right to declare the profits or dividends.

Whereas in company or in a corporate body a share holder has such rights, he is free to perform and participate in business matters of company or corporate body, while the certificate holders of *mudaraba* are not authorized to proceed accordingly .

However the *mudaraba* is enforced in Pakistan by fiction of law, it represents two legal personalities, it grants them legal entities,

The *mudaraba* company and the *mudaraba* business, it recognizes the share holders as two classes of owners; hence there is a distinction technically in both the classes, company's shareholders have the right of association, whereas. the certificate holder of *mudaraba* having no such right in this case, Each one is distinct under the law.

Rather very important issue adherence of Islamic injunction is under taken in case of *mudaraba*, in order to afford an Islamic color to *mudaraba* it has been provided in law that any business which is opposed to the injunction of Islam , shall not be allowed in relation to *mudaraba* .Therefore *mudaraba* registrar has power not to issue permission for flotation unless religious board certified it, so as to *mudaraba* applied for as according to the injunction of Islam.

The Federal Govt appoints a religious board. It consists of three members, one of them is the chairman .The criterion for the chairman is the same like the criterion for the judge of the high court, the other two members shall be religious scholars. Each member has fixed term of office, which is 3 years. It can be removed earlier or may give resignation ,however ,it is a reality, that there is no provision provided in the ordinance or in the rules to overview the actual functioning of *mudaraba* by the religious board.

And it is also an undeniable fact that one important and vital alternate or substitutes to *riba*, *mudaraba* has been found to play major role to attract Islamic banks and financial institutes but , since 3 decades the response has been too poor, at least In Pakistani perspective.

Three are certain justified reasons for it, namely:

Lack of mutual trust between parties and leakage of trade secrets, it is also a major problem that banks have discretionary power in case of winding up of the companies. Short term arrangement and risk of disclosure of the high rate of profits also effects its advancement . Political maneuvering and pressure over financial institutions also a reason for that failure.

Due to all these reasons and rigorous mentioned above, a customer prefers to make use of loan from conventional banks on the agreed ratio of *riba*.

It may be pointed out that the Islamic banks and Islamic financial institutions have failed to bring in any visible modification, or change in financial network of Islamic world where they have been in operation during the last about three decades.

The foremost cause seems to be that this system is just a side track, without effecting the main stream of existing interest based economic system following the western concept in these countries. However , some steps taken by some Muslim governments in direction of positive system has proved , in fact are not enough to suppress the upsurge of interest based system in these countries. Practically governments of the countries are not serious to provide the necessary concessions and relief particularly in matters related to taxation, for Islamic Financial system.

The financial recourses of Islamic banks or financial institutions are limited and struggling for their co existence side by side with current banking system of existing society. They are not in position therefore to create any impact on the conventional system of banking and finance.

Any how, in some of the cases, it has been judged that the mode of *mudaraba* financing, is just worked as fund raising instruments.

Section #2

Analysis of the salient features law of *mudaraba* companies and *mudaraba*.(its essential out lines)

This study presents the *mudaraba* law in its essential outlines, and responds the fundamental requirements of the students and of the practicing lawyers and professionals .this is basically a study of the law of *mudarba* companies and *mudarbas*. Embodied in the *mudaraba* companies and *mudaraba* (flotation and control) ordinance,1980 and the *mudaraba* companies and *mudaraba* rules,1981 made under the ordinance. In this study I have, therefore made an attempt to explore, as for as I am able , the uncharted territory of the *mudaraba* law.

2.1 Structure of Laws

As it was discussed earlier that this ordinance was made by the president of Pakistan on 26 June 1980, and the rules were formed by the Govt by exercising its powers conferred under the sec 41 of the said ordinance. This legislation applies to the entire territory of Islamic democratic of Pakistan and it come into fore at once like any other law.

This law shall prevail any thing contrary to it contained in companies ordinance or any other law enforced in Pakistan.¹⁵²

Normally in our country, the large business entities are joint stock companies incorporated under the company law or the state enterprises, being corporate bodies formed under other corporate laws and owed by government either federal or provincial, such as investment corporation of Pakistan. Such entities are called corporations. These corporate bodies can carry on any kind of business which law of land permits, the relevant law for this purpose is companies ordinance, 1984 under which their bodies have been formed. There is a possibility that such business are no doubt lawfull if it is permitted by said ordinance or by the relevant Corporate law, but they might same time oppose the shariah injunctions, like earning interest or dealing with alcoholic drinks etc. while the case of *mudaraba* companies is totally different, these companies only can carry on such business which is not only lawfull in said sense but are also lawful in the sense of *shariah* or not opposing in also enshrined in the ordinance.¹⁵³

This calls for a dual control of company and its business.

¹⁵² sec 1 see A -I Page 1

¹⁵³ Sec 10, sec A -I Page 4

It is therefore controlled by the law authority under the company law or any other authority. If it is appointed by the relevant corporate law, as well as by registrar of *mudaraba* appointed by Govt headquartered in Islamabad. This appointment is made under the *mudarba C and M ordinance 1980, sect 31* and notified in official gazette (OR-S)

2.2 The legal framework of *mudarba*

When we discussed the scheme of the *mudaraba* law we find that this law is thus a mixture or a joint combination of the two sets of laws mentioned above. As explained above, the word *mudaraba* shall be taken to mean a framework or business which must be law full, and does not breach any provision related to injunction of Islam.¹⁵⁴

Thus if there is any company or corporation who wishes of floating and managing a *mudaraba* or *mudarbas* it must already follows the existing corporate law and owned by the federal or provincial Govt as it is mentioned in section 5(a).¹⁵⁵ After when it complies these two things then it has to have minimum share capital qualifications.

- (a) The company must have a least amount of paid up capital of Rs 2,500,000 , in case where the company is desirous to engage solely in the flotation and management of one *mudarba*.¹⁵⁶(sec 5 –r 7)
- (b) The company must have a minimum paid up capital of Rs 2,500,000 in respect of each of the *mudaraba* where company wishes to engage in more than one *mudaraba*.
- (c) But where company also wants to continue business or to operate any activity other than *mudaraba* or *mudarbas* in such cases company must have a minimum paid up capital of Rs:5000,000 for every one of the *mudarbas*.

It is the power given to registrar to register any company under the relevant section of the *mudaraba* companies and *mudaraba* (Floatation and control) ordinance 1980. This application is made in form No. IX.

However, It is the duty of the registrar to satisfy himself about two things, First that the applicant company or corporation is eligible for registration and full

¹⁵⁴ Ibd sec 10

¹⁵⁵

¹⁵⁶ rule-7

filling. The pre-requisites, secondly that it is in public interest to do so, the registrar shall grant permission to company as *mudaraba*. Company subject to these conditions: so thus we can say *mudaraba* companies came into being .(s-6) The certificate of registration can be obtained, detail as it is given in form X.

2.3 Eligibility Criteria

Any company or in corporate body is fit for registration as *mudarba* company, if it fullfill some conditions under section -5 of the *mudaraba* companies and *mudarba* (floatation control) ordinance 1980.¹⁵⁷We can explain these conditions as under:-¹⁵⁸

- A) It must be a corporate body, which is already incorporative. accordance with the companies ordinance 1999 and that body owned or controlled by Govt. either federal or provincial.
- B) It has to have least share capital qualifications mentioned above.
- C) It is necessary for its director that have not been involved ever in offence and morally wrong attitude, if any person convicted of fraud or breach of trust, he is not eligible to be a director or employer of the *mudaraba* company.
- D) Another qualification for director or employees is that they were never adjudged insolvent not they suspend payment of compound with creditors.
- E) It is also necessary for its promoters that they must be person of means and integrity and who shall be well aware of matters dealt by with *mudarba* in the opinion of the registrar.

¹⁵⁷ Section 5(a)(b)(c) (d)(e)(f)

¹⁵⁸ -Section (6)
Restrictions and transfer of share by promoters, sponsors, or persons holding controlling interest

2.4 Registration process

Any company who fulfills the conditions of eligibility and wants to mention *mudaraba* shall apply for registration to the registrar on prescribed form IX duly accompanied by these documents.¹⁵⁹

- a) Five copies of its memorandum and articles
- b) Five copies of its certificates of incorporation
- c) In case where companies incorporated body is already in business, attaches five copies of its latest audited accounts.
- d) In case of any business other than *mudaraba* attach a precise description of the business being done.
- e) Receipted treasury Chalan for payment of the fee of registration.

However, the registrar of *mudaraba* companies may require from the applicant to revise its memorandum and articles and make change in it and the applicant company shall do it and comply with the requirements of company law which is company ordinance 1984.

Along with all these conditions of registration shall deem fit to impose, he may grant registration, subject to certain conditions in respect of following matters.

- a) Investment to be made properly
- b) They must furnish information and returns.
- c) They must undertake business and
- d) Restriction on transfer of share

Section 3

3.1 Raising of Funds and *mudaraba* operations

In this section I intended to present the issues related to prospectus, permission, allotment, as it was stated that after completion of registration process as such, the

¹⁵⁹ Rule 4, Registration of *mudaraba* company

mudaraba company shall apply for permission to maintain *mudaraba*. The application for floatation of *mudaraba* shall be accompanied by its prospectus, the prospectus shall contain the provisions to be specified in forth schedule and reports and matter required to be supplied by the following said schedule.

The prospectus also should contain the name and the type of *mudaraba* either it is a multipurpose *mudaraba* or it is for a fixed period or for indefinite time, the amount of *mudaraba* to be floated and division thereof for purpose of certificates ¹⁶⁰ the unit for subscription by the public.

The following further information shall, among other things, be rendered in prospectus .

It clearly states about amount which the company will subscribe to *mudaraba*, and it would be at least 10% for the *mudaraba* fund. The evidence of ability to fulfill the commitment should be produced thereof, the form of *mudaraba* certificates is proposed to be issued.

Information about the matter and reports specified in schedule I and II respectively and part are and two will take effects . Subject to the provision of part-I of that schedule.¹⁶¹

3.2 Authorization

Where there application is in order, the registrar of *mudaraba* companies after obtaining from a religious board a certificate to effect mentioned in section 10 about Shariah Complains, and not opposing the public interest shall issue a certificate of authorization to applicant authorizing them floatation of *mudaraba*.

When *mudaraba* company obtained authorization, company shall issue the prospectus dated and duly signed by directors or proposed director or by their authorized agents. The date shall be taken at the date of publication of prospectus. Unless contrary is proved. a copy thereof shall be filled with the registrar of *mudaraba* company for registration. The registrar is bound not to register said company of prospectus unless

¹⁶⁰ Ibd sec 8

¹⁶¹ Ibd sec 8(2)

it is dated and signed in required manners and it should be stated on the face of every prospectus that a copy thereof has been filled for registration.

Where there is any irregularity or misconduct found, likely prospectus has been issued without filling the copy thereof, the *mudaraba* company, and every person who is knowingly involve in issuing of said prospectus shall be punished, and will face a penalty for sum up to Rupees one hundred thousand and incase of further default further sum be added at the rate not exceeding Rs. 1000 for every day after pronouncement of penalty order by registrar.

This is the right of applicant company to take note of conditions if any laid down in certificate of authorization, specially in relation to business to be undertaken, about expenses of management of *mudaraba* fund, way of agreements, about assets and about provision of profit etc.¹⁶²

Next step is a submission of application money, the *mudarba* company shall open a separate account for this purpose in a scheduled bank, where they deposits all application money received for the certificates, however, it is required that prospectus must disclose the minimum subscription which must deal business operation and expenses. After when it happens, the *mudarba* company shall submit a report which state facts to registrar, he may after due verification issue the certificate that minimum subscription has been raised.

If however by the specified date they failed to submit minimum subscription, all the money received from the applicant, within 15 days of such date shall be refunded to them; if these have not been refunded in 15 days required the MC and Director thereof shall be jointly liable to repay money¹⁶³. But if the applicant received the certificate of minimum subscription then *mudaraba* company shall issue the letter of allotment to successful applicant, After that *mudaraba* company is bound to issue *mudaraba* certificates to be allotted within thirty days of allotment of such letter.¹⁶⁴

¹⁶² *Ibd*- Section 8 (2)(3), section 11, rule 20 (1)(2)(3)(4)(5)(6)
Section 32

¹⁶³ Sec 13(1)(2) (3)

¹⁶⁴ 13(1) - 13 (3) - 13(4)- 13 (2)

After this if a *mudaraba* company wants to float a *mudaraba* or when afterwards the *mudaraba* is required to issue a bonus certificates here there is a need of *mudarba* certificates *mudaraba* company shall file with the registrar a return of allotment, showing the nominal amount and number of the certificates, within one month period of such allotment. It also states the name and addresses of the allottees and the amount paid of or if any amount is due or payable on each certificate.¹⁶⁵

If *mudarba* company makes allotment fully or partly paid up otherwise than for cash. It must furnish the contract in writing ensuring the title of allottee together with the contract for sale or service or other consideration for the allotment, for examination by the registrar of *mudaraba* companies.

Such contract needs to be duly stamped at the same time, verified copy of the contract shall be filled with the registrar of *mudaraba* companies with the returns stating everything like number, nominal amount of certificates so allotted, and the consideration for such allotment and where the allotment of such certificates in case of oral control, the *mudarba* company is required to file the particulars of contract, Stamped with same stamp duty as if to contract is in writing and registrar of *mudaraba* companies have power to require that the stamp duty payable be adjudicated under section 31 of stamp Act 1899.¹⁶⁶

Registrar of *mudaraba* company also has power to extend the period as he thinks fit, if he is satisfied that in particular case the period of one month is not sufficient to fulfill the formalities and process of submission of such return.

And in case of default in filing the return within the other adjusted specified period, any person liable for such default may seek relief by applying to federal Govt for relief, If Govt thinks fit that it is just equitable to grant relief, they do extension.

The certificates in a *mudaraba* are the personal estate of the certificate holders and it is the duty of *mudarba* company to maintain a register of certificate holders in the form used for the registrar of members mentioned in the companies ord-1984.R—
22(1)13 (5)

¹⁶⁵ R 26(1)(A)

¹⁶⁶ R-26(2)

Transfer of *mudaraba* certificates.

As it is mentioned earlier that the certificates in *mudaraba* are the personal estate of holders. So they may transfer them. there are certain rules, we shall apply that rules in respect of the registration of transfer of *mudarba* certificates.sec13(8) 22(2)

- a) Both transferor or transferee can submit application one of them shall submit the application to the *mudaraba* company for the registration of transfer of certificates.
- b) When transferor, made such application, the *mudarba* company shall issue to transferee notice regarding the receipt of the said application.
- c) Transferee can submit objections within two weeks after the date of notice to transferee, otherwise if there is no objection submitted by him *mudaraba* company shall register the transfer in register of transfers.
- d) For a lawful transfer, only a prepared instrument duly executed by both parties should be delivered to *mudaraba* company along with the relative *mudarba* certificates.
- e) Where the duly executed deed has been lost, if directors are satisfied about such case they may on the application of the transferee bearing required transfer stamps, register the transfer and furnish notice to transferor but they will first obtain indemnity from transferee if considered necessary.
- f) where it is decided by the directors of *mudaraba* company to refuse registration of transfer, they may give notice with in two months from the date of receipt of the lodgment of transfer deed, to the transfer and transferee indicating the reason for such refusal thereof.

Succession.

In the case of the death of certificate holder we shall apply rules as given under section 22 under ¹⁶⁷

- a) Only the legal heirs of deceased shall be recognized as having title to the certificates.

¹⁶⁷ Sec22(4)(r25)

- b) The legal heirs shall produce the evidence for such title thereof and the certificates should be registered in favor of legal heir.
- c) a person entitled for registration for being holder of certificate instead of himself may elect some other person to be registered as the holder of certificate. He will testify it by executing document in favor of him.

Checking of register.

Mudarba company may on giving one week prior notice by advertisement in the news paper close the register of certificates holders for any time not exceeding given limits. This register and the index thereof be kept at the registered office of the *mudaraba* company any certificate holder, or any other person on payment of 5 Rs, may require, for each inspection, subject to such reasonable restriction laid down in prospectus.¹⁶⁸

If certificate holder or any other person wants a copy of such register or any list and summary, by these rules, or any other part thereof the mudarba company shall furnish the copy thereof on payment of one rupee for limited words or fraction thereof within 10 days when the books remain closed.

If the inspection is refused or copy did not furnished or required, the registrar of mudarba companies may, by on order compel law inspection or give direction to deliver required copy¹⁶⁹.

Section # 4

Accounts and Liabilities

As it was discussed earlier that the *mudaraba* company shall keep separate bank account, funds , assets and liabilities in respect of each *mudaraba*. No mudarba would take any liability for the liabilities , or to take any benefits from the assets of any other mudarba.

¹⁷⁰

It is provided that every *mudaraba* company shall maintain proper books of accounts for each mudarba with respect to:

All money received and expended , on matter to which it relates there of.

¹⁶⁸ R-24(1)

¹⁶⁹ R-24 (3)

¹⁷⁰ Sec-13(6)(7)

All sell or purchase transaction by *mudarba* and the assets and liabilities concerning to *mudaraba*. Its objective to give a fair view of state , affairs of *mudaraba* that explains its all transactions and activities the books of accounts shell be kept at the registered office of company and not other place . ¹⁷¹

The *mudaraba* company would have some branch office to enhance customers and to spread business in such case the branch office shall prepare the accounts of all transactions and furnish to the registered office of *mudarba* company summarized return thereof, made up to date at intervals of not more then one month. The *mudaraba* company shall maintain the annual balance sheet for profit and loss accounts, at the expiry of every financial year, as well as the statement of changes in financial position. ¹⁷² Which gives a true and fair view of *mudarba*'s state of affairs and of the out came of operations.

The next very important issue related to account is audit. The necessary check to judge the accountability of organization.

The auditor shall be appointed by the *mudarba* company bye the approval of registrar of *mudarba* company , who will audit the accounts of *mudarba* company , he must be a chartered accountant with in the meaning of chartered accounts Ordinance 961 and he has some powers, duties and liabilities as given to an auditor under the companies ordinance 1984. ¹⁷³

The auditor will submit his report stating his opinion about business conducted investment made, expenditures incurred etc. either all these things are in accordance with objectives, terms and condition of the *mudarba* or not ¹⁷⁴ .

Reports: (Annual)

The *mudaraba* company shall prepare in respect of every *mudarba* the annual balance sheet, profit and loss for whole year along with that statement about any change

¹⁷¹ R-8(2)

¹⁷² R-8(3)(4)

¹⁷³ R19(1) sec (15)(1)

¹⁷⁴ R-19 (3) sec(2)

in the financial position of the *mudaraba* . It would be in prescribed form and must comply. *Mudaraba* company is required to prepare¹⁷⁵ it within month after floatation of *mudaraba* and thereafter before expiry of 6 months from the closure of accounting year, and such accounting year adopted for *mudaraba* shall not be changed , unless with prior approval of the registrar of *mudarbaa* companies.¹⁷⁶

After that the audited accounts shall be circulated to the certificate holders , along with the report on the balance sheet and profit and loss made by auditor, and a report of *mudaraba* company on the state of affairs, and business activities and other prospects of *mudaraba*¹⁷⁷ To be distributed to certificate holders

This report shall be in accordance with the prescribed form xi in the first schedule to the *mudaraba* companies rules ,1981 .¹⁷⁸

Simultaneously its 5 copies would be submitted to the registrar of *mudaraba* companies.

Where registrar requires the *mudaraba* company to provide any further respective, or any further information go him or to holder of certificates, the *mudaraba* company is bound to fulfill that requirement .¹⁷⁹

A *mudaraba* company shall also circulate along with such annual report information about the pattern of holding of the certificates by the certificate holders in prescribed form given.¹⁸⁰

3.3 Half Yearly.

Mudaraba company also prepare within 2 months of the closing of the first half of financial year same report stating the profit and loss accounts, a statement of changes in financial position at the end of half year in respect of each *mudaraba*. And circulate the

¹⁷⁵ R-9(2)

¹⁷⁶ R-11(2)

¹⁷⁷ Sec 14(1) R 11(1)

¹⁷⁸ R- 9 (3)

¹⁷⁹ Sec 14(1)(2)

¹⁸⁰ R14

same to the certificates holders and registrar. There is one major difference that the half yearly report may or may not , be audited .¹⁸¹

These documents are provided to holders and registrar under certificate of posting and under registered cover accordingly.

These reports shall be authenticated by the chief executive and 2 Directors of company . If the directors where signatures are required are absent from Pakistan in such case the signatories shall endorse a statement explaining reason for non-compliance of requirement.¹⁸²

Provisions for profit and reserves

Distribution of profit and reserves is another very important issue in *mudaraba*. Distribution of profit includes distribution in cash or bonus certificates or any other security. It is the board of *Mudaraba Company* who may distribution the profit bonus certificates. The board shall not make any distribution otherwise than out of profit of the year, previous undistributed profit or realized capital gains.

Board has power to make an interim distribution at its own discretion it is considered justifiable. They may , before making any distribution of profit , set aside out of the profit for a year such sum as may be thing fit as reserves at if board considered it justifiable , for Applying in contingencies or equalizing distribution of profit , or for any other purpose to which profit may be applied.¹⁸³ .

They shall serve notice of profit distribution to the registered addressed as certificate holders. The final distribution of profit regarding any accounting period shall be made within 6 weeks after the depending of registration of certificates holders. In another situation where more than one person is registered as joint holders of certificates the receipt of any of them for the purpose of profit distribution shall be valid. And this notice shall be sent by post he has registered address in Pakistan or he has supplied another

¹⁸¹ R-10

¹⁸² R12(1)(2)

¹⁸³ R-18(1) (2)(3)(4)

address in Pakistan by prepaid servers but if the Certificates holder has not registered address for Service of notice the notice will be advertised in newspaper should be considered to be notice given to him on the date of advertisement.¹⁸⁴

It is obligatory for every *mudaraba* that they will make an annual list of certificate holder's of *mudaraba*. They will make it within the period of 18 months form its floatation and thereafter at least in very calendar year. Particulars of each certificate holder shall be shown on the register on the date of reopening of the register after the declaration of the final divided or as on the 31st December of the calendar year, where there is new. Such date the list shall also show the particulars of the certificate holders who have ceased to be on the register¹⁸⁵.

The summary of distinction b/w certificate issued for cash and certificate issued as fully paid up or partly paid up bonus certificate or fully or partly other wise than for cash shall also contain in annual list this certificate holders list shall consist of particulars about present as well as passed certificate holders as to be:

First of all the name, address, number of certificates held with amount.

Is also include the number of certificates transferred since the date of last annual list.

The number of Certificate taken from first day up to the date of present list.

It also shows the amount called up in each certificates.

The Total amount of Call unpaid, receiver the total amount of sum, any commission paid or discount allowed etc.

The names and addresses of the directors and other concerned officers of the *mudaraba* company also necessary to include.¹⁸⁶

It also shows the total amount of all liabilities and charges in subject to.

3.4 Liabilities:

¹⁸⁴ R-18 (5,6,7,8,9,_)

¹⁸⁵ R-23 (1)

¹⁸⁶ R-23(1)

When a *mudaraba* company needs more money, it compete business realities or some times company wants to expand business or when it needs to have more property which it can not pay for it because it is out of its liquid assets, in all these case where they need more money than it has . It usually resort go borrow money or acquires the property, through mortgage or creating a charge on its assets as security.

Such mortgage or charge, if it is one of these kinds shall be registered with the registrar of *mudaraba* companies.

Is such charge as mortgage created for securing any issue of participation term certificates (ptc)

If it is on any immovable property of *mudaraba*

Mortgage or charge related to any books debts of the *mudaraba*

A mortgage or charge not being a pledge, on any moveable property of the *mudaraba* except stock in-trade.

A floating charge on undertaking of property of *mudaraba*.¹⁸⁷

It is obligatory on *mudaraba* company to provide within 21 Days of the creation of mortgage or charge its required particulars together with the instrument creating and evidencing mortgage or charge or verified copy there of. It is not delivered to registrar within specified time, it will be considered void against creditor or liquidator of *mudaraba*' but such omission having no such effects to prejudice the contract it is still obligation of *mudaraba* to repay the money secured by such mortgage or charge.¹⁸⁸

Now here we have different situations if the mortgage or charge is created outside Pakistan, the period of 21 days shall count from that day when the particulars of mortgage in instrument required or verified copy thereof, received by registrar in Pakistan in due course of post.

It would be assumed that they have been dispatched with due diligence.¹⁸⁹

But in another situation when mortgage or charge is created in Pakistan but property mortgaged or charged is situate out side Pakistan, here all the requirements, particular of mortgage or charge and required instrument or its verified copy shall be filed in its

¹⁸⁷ R27

¹⁸⁸ R-27(a to c)

¹⁸⁹ Proviso 1 to rule 27

required manners, even though some proceedings yet to be carried out to make arrangements valid according to law of the country where property situates.¹⁹⁰

We should mention this here that any negotiable instrument, such as promissory note, if it is given as security for against any debt in *mudaraba* , shall not dealt as mortgage or charge for the purpose of this rule.¹⁹¹

Increasing *mudaraba* fund:

In such a case where *mudaraba* has to increase the *mudaraba* fund, for this purpose *mudaraba* company shall take authorization from its directors. The directors of *mudaraba* company pass a resolution authorizing the *mudaraba* company to take that steps and they will take approval of registrar of *mudaraba* companies to make attraction in the prospectus of *mudaraba* mudarba to make increase in *mudaraba* fund by issue of a new *mudaraba* certificates. The registrar , however, first to elicit the view of the certificate holders of *mudaraba* as well as any other person concerned with the matter. To achieve this goal he issues in at least one issue each of on English or Urdu news papers , calculating in the province of domicile of the stock exchange, if the *mudaraba* is listed other wise in the province of the domicile of *mudaraba* company.

The notice allow them 14 days time to furnish their opinion. The *mudaraba* will bear the expense. it is the discretion of mudarba to give his approval, subjected to conditions as he deems fit to impose.

The new *mudaraba* certificate shall rank *pari. paso* with the existing certificate in all matters, however, the registrar may allow an exception to an extent specifying the reason in writing.

Then next step is filing a notice of implementation of resolution with the registrar by *mudaraba* company. *Mudaraba* company pay the request fee on authorization of the additional amount of *mudaraba* fund within 15 days from the implementation thereof.¹⁹²

Section 4 Administration

4.1 Registrar of *mudaraba* companies.

The Federal Govt shall by notification in the official gazette appoint a registrar of the *mudaraba* companies. And registrar sits in headquarter situated in Islamabad.¹⁹³

¹⁹⁰ Proviso II R-27

¹⁹¹ Proviso II I R-27

¹⁹² R 20-A

The Law confers extensive powers to the registrar of *mudaraba* companies. As well as registrar has some responsibilities a part from that the registrar is supposed to fullfill some ordinary duties like.¹⁹⁴

- a) TO receive application from parties for the purpose of registration as *mudaraba* companies.
- b) Every *mudaraba* company needs the certificate of registration, which registrar can issue with the official seal a fixed thereon.
- c) TO give secretarial service to the religious board.
- d) To obtain the certificate from the religious board through application representing *mudaraba* company that the *mudaraba* is not a business opposed to the injunction of Islam.
- e) Registrar is forum for receiving application for the certificate of authorization, and he grant such authorization imposing such conditions as he may deem fit for flotation of *mudaraba*
- f) To receive and examine the prescribed reports, accounts and other necessary documents, he also can call for additional reports as he deem fit.
- g) On the declaration of the *mudaraba* company about the minimum subscription to receive a certificate and to allow issue of *mudaraba* certificate at premium or at discounts.

In addition he has some other important functions to do, some of them are discussed below:-

He shall examine all kind of document pertaining to ratify any document, filed for registration, he shall examine the filling and recording which found defective, incomplete or mutilated.

He may return such document or may allow to representative of *mudaraba* company to come and correct the documents.

After filing or rerecording of registration when document is accepted, he shall then issue acknowledgment in the furnished form.¹⁹⁵

¹⁹³ (Sec-3) R-(3) (1)

¹⁹⁴ R-3(3)

¹⁹⁵ R-3(3)(5)

He shall make endorsement on each document accepted thereof giving the serial No, Name of *mudaraba* company and of the *mudaraba*, brief description of each document thereof and date of filling, recording, registration, after all such process he shall sign and affix the official seal¹⁹⁶. His job is to maintain a register of *mudaraba* companies and a register of *mudarabas*, the particulars of the *mudaraba* companies and of *mudarabas* shall be entered in order, in which they are registered or authorized to float *mudarabas* along with that in register thereof, a separate page shall be allotted where it shall be mentioned in a note of each document filed, recorded or registered. In register thereof alphabetic index be mentioned about each *mudaraba* and *mudaraba* company.¹⁹⁷

Members of the public shall take permission to inspect the record, documents and registers, and he can also issue copies thereof during office hours to any person who applies for them, on payment of prescribed fee.

He has power to take notice of omission to file or register documents on

Due date or any other lapse, irregularity or deviation from the law and he is empowered to institute such enquiries as he thinks fit to seek information about such irregularity and deviation from the law by *mudaraba* company or *mudaraba* or any promoter, officer, employer, liquidator or receiver.

He shall keep ready a seal for authorization in related matters and he shall delegate assign his power and duties to any officer or official subordinate to him.¹⁹⁸

At present the registrar of joint stock companies has been appointed as registrar of *mudaraba* companies¹⁹⁹.

Registrar has special power on (made intentionally) willful contravention from any person if he is satisfied, after hearing that this is willful contravention of any provision of the law, if somebody refused to furnish required document return or information, or failed to comply conditions imposed by law, he may impose as penalty prescribed in sec32.

¹⁹⁶ R-3(6)

¹⁹⁷ R-3(8)(9)(10)

¹⁹⁸ R-3(11,13,14,15,16,17)

¹⁹⁹ R-3(1)

However, in proceeding of such case he has the same power as are vested in court under cpc 1908, in enforcing attendance of person and examining him on oath or affirmation and compelling discovery of documents.

4.2 Role of Religious board:

This is the federal Govt who appoints a religious board, by notification in the official gazette, to control the affair related to conformity with *shariah* regulations for Islamic finance. The board comprises of three members, one of them is chairman, the chairman shall be a person who qualifies the qualification for being a judge of high court. The other two members shall be religious scholars. The term of office of each member is fixed for three years, unless he left earlier for reasons or removed from his office by federal Govt.

The meeting called by chairman should be held by religious board as and when necessary, in every two months there be at least one meeting, unless there is no business to be transacted. Before arriving at any decision, the board has power to obtain clarification or additional information from *mudaraba* company, or offer a personal hearing thereof.

The board is bound to give its decision within the period of 30 days from the date of closure of its last hearing. Decision shall bear official seal of board and all orders and decision made by board shall be authenticated by the chairman or any other officer especially given authority on behalf of the board to do so.²⁰⁰

The board shall record the proceedings of each meeting, the chairman shall sign the proceedings and in case of his absence by the member presiding over the meeting.

These meeting shall be held at Islamabad, but it may be held in such places in the country as it may be, from time to time decided.²⁰¹

4.3 Establishment of tribunal

The federal Govt for the purpose of the disposal of judicial matters shall constitute one or more tribunals under the ordinance 1980, by a notification in official gazette.

The tribunal shall be a person who is has been or is full filling the qualification to be a

²⁰⁰ Sec-9 R -6(1)(2)(8)

²⁰¹ R-6(5,6,7,11)

judge of high court. It shall be specified in the notification the area and the class of cases in respect of which each tribunal shall exercise jurisdiction.²⁰²

The tribunal in exercise of its civil jurisdiction shall dispose of claims filed by certificate holders against the *mudaraba* company claims by *mudaraba* company against any other party in respect of business matter related to *mudaraba* funds and application from registrar of *mudaraba* companies for winding up of *mudaraba*.

A tribunal in exercise of its criminal jurisdiction shall award punishments in all offences punishable under the ordinance of 1980 with powers of court of a session judge. He can take cognizance of the offences on the complaint in writing by registrar or by any other officer authorized by registrar in respect of such offences there of.

This tribunal is authorized to exercise any other power, or functions, assigned to it , by virtue of ordinance of 1980.²⁰³ The tribunal shall be considered empowered to be a court for the purpose of section 480 and 482 of the court of criminal procedure 1899, and all proceeding which tribunal suppose to proceed shall be deemed to be judicial proceedings within the meaning of sec 193 and 228 of ppc 1860. In all matters to which the jurisdiction of the tribunal extend it jurisdiction superseed the jurisdiction of any other court.²⁰⁴

In ordinary cases, the tribunal shall hear the proceeding in public, however ,if the tribunal is not doing so, it may record the reasons for that and hold the proceeding in private or impose any kinds of restriction, or give direction to audience(person, present thereat) about the publication of the matter or evidence.²⁰⁵ The term of office of tribunal shall expire after three years but he may leave before this time or may be removed by federal government.

The tribunal shall hear all legal matters by day to day proceedings, except where extra ordinary circumstances do not permit it, Tribunal records in writing these grounds and shall follow the summary procedure with order XXX VII of the first schedule to

²⁰² Sec 24(1)(2)

²⁰³ Sec -25(1)(a,b,c)

²⁰⁴ Sec-25(2)(3)

²⁰⁵ R-5(3)

CPC 1908 in exercise of its civil jurisdiction, In all matters including suits for recovery of money.²⁰⁶

4.4 Finality of Order

After the hearing and completion of proceedings the tribunal shall pronounce judgment and decree shall follow at once on judgment there of. The tribunal shall order the execution of decree after the application of the decree holder at once. In such cases where decree awarded for money, it shall be recovered as arrears of land revenue.²⁰⁷ Of course it is a vested right of aggrieved party to go for appeal to the high court,. Nevertheless , No court or authority shall call in question any order, judgment or sentence passed by tribunal, not shall it permit any other authority to do so , likewise no court or authority shall call in question the legality or propriety of any thing done or intended to be done by tribunal under this ordinance. So he just have appellate forum for alternate remedy.²⁰⁸

So aggrieved party may within 20 days thereof, raise an appeal to the high court in whose Jurisdiction it is passed, but it is worth mentioning that on appeal lie against as interim order such appeal shall be heard by a bench but only On certain grounds namely.

If the decision made by tribunal appears contrary to law or to usage having the force of law, or the decision is not determining any material issue or not establishing right of parties.²⁰⁹

There is an error apparent in procedure and leads to an error in decision.

4.5 Role of advisory Committee:

The federal Govt appoints a Advisory Committee for the purpose of obtaining advices, assistance in carrying out the objects and out come of the mudarba companies and *mudaraba* (Floatation and Control) ordinance, 1980 and rules of 1981 made thereunder. The committee shall comprise of nominated chairman from federal Govt, the registrar, a nominee of the institute of chartered accounts of Pak. The

²⁰⁶ Sec-26(2)

²⁰⁷ Sec 38(1)(2)

²⁰⁸ Sec 29

²⁰⁹ Sec 30(3)

president of Federation of Pakistan chamber of Commerce, the president of Karachi or Lahore Stock exchange, The managing director of Bankers Equity Limited or national investment (Unit) Trust or the investment corporation of Pakistan as the federal Govt may specify and not more than five other persons to be appointed by the Federal Govt.

The Persons referred in Clause (e) the President of Stock exchange shall be appointed on rotation and so will be the person referred in clause (F) the managing director of Banking Equity limited and National Investment (Unit) trust and Investment Corporation of Pakistan.

Every member shall serve for the tenure of three years unless Federal Govt directs other wise he shall be eligible for reappointment for member ship. ²¹⁰

4.6 Role of Auditor of Mudaraba:

The accounts of the *mudaraba* shall be audited such audit shall be conducted by an auditor, who is a chartered accountant.

Prospectus includes the name and shall state the name and address thereof. He shall have prior approval of registrar.

4.7 Audit

Every *mudaraba* shall have separate auditor and it is important that he shall not be the auditor of *mudaraba* company . ²¹¹

The term of appointment of an auditor, shall be renewed every year, and it would be with the approval of registrar of *mudaraba* companies, he who fixes next term period, if the *mudaraba* company wishes to replace existing auditor, it shall inform about report in writing giving the reason for such replacement with a copy to registrar. Such kind of alteration or replacement may be for the next account period. The registrar of *mudaraba* company may demand any kind of information in respect of proposed replacement from the auditor or from the *mudaraba* company or from both. On being demanded, the respected party shall deliver the required information to

²¹⁰ R-32

²¹¹ R-19(1)

registrar. The auditor may on his own present his submission to registrar in relation with change. The decision made by the registrar or *mudaraba* companies on the proposed replacement shall be final and in different case where the auditor of *mudaraba* companies desire to resign from his appointment, he will be required to get approval of registrar before taking such step.²¹²

The auditor of a *mudaraba* shall have full access to all documents, even to the minute books of the *mudaraba* company in general meetings and also have full access to the minutes books of the meetings of the board of directors of the *mudaraba* company. In Such case where *mudaraba* company is engaged in other business, it shall furnish the auditor all authenticated copies of the minutes of the company meeting as well as board of director's meetings and also of all kind of decisions and steps taken from the company concerning the affairs of *mudaraba*.

Some times *mudaraba* company windup *mudaraba* at once in either cases where *mudaraba* is for fixed term or for certain purpose, and purpose has been accomplished or time period has expired. In such winding up. As the case may be, the following conditions may be fulfilled accordingly.

All the directors of the company shall make a declaration, such declaration shall be verified by an affidavit stating about the full enquiry of the affairs of *mudaraba* that they have found that *mudaraba* is in a position to make discharge of its liabilities, pay the certificate holders their subscribed amounts and their dues in full with a specified time frame not exceeding prescribed period, where *mudaraba* is for fixed time period, shall windup the *mudaraba* voluntary or where the *mudaraba* is an objective based transaction and the purpose or objective has been accomplished the winding up of *mudaraba* take place.

Sometime *mudaraba* company wind up *mudaraba* at once in either case where *mudaraba* is for fix term or for certain purpose and purpose has been accomplished or

²¹² -19 (2to 7)

time period has been expired, in such winding up as the case may be the following conditions may be fulfilled accordingly:

a) All the directors of the company shall make a declaration, such declaration shall be verified by an affidavit, stating about the full enquiry of the affairs of *mudaraba* that they have found that *mudaraba* is in a position to make discharge of its liabilities, pay the subscribed amounts and their dues in full within specified time from not exceeding limits.

Section #5

5.1 Winding up and Conclusion

Annulment and the windup is the most important features of *mudaraba* business the *mudaraba* company can winding up voluntarily of *mudaraba* was for specific purpose or it was settled for fixed time, but in some extra ordinary circumstances when the *mudaraba* company failed to comply existing law or contravenes any provision or ordinance of 1980, Then they may face annulment of *mudaraba*. So here we have different process to end up *mudaraba* transactions where in the opinion of registrar any *mudaraba* company contravened to legal requirements or violate any rules directions given by concerned authorities if any . In such cases where registrar thinks fit, that it is in public interest he may can take these steps. I) either cancel the registration of *mudaraba* company (ii) or remove the *mudaraba* *mudaraba* company from the management of *mudaraba*.

He must in writing convey his opinion if he is going to take any of these steps but it is very important to mention that the well settled rule of law, no one can condemn unheard, will apply here *mudaraba* company has to avail an opportunity of being heard .²¹³

5.2 Voluntary winding up

The *mudaraba* company after the expiry of time of 12 Months from expiry of the fixed period or accomplishment of specific purpose of the *mudaraba*
see 22 (i) a

²¹³ Sec 19 (11)

b) The auditor of *mudaraba* shall furnish a report which support the declaration thereof.

c) Both the said documents declaration and auditor's report shall be filed by *mudaraba* company with the registrar and registrar shall approve these documents within 90 days of the date of expiry of fixed period or accomplishment of specified purpose, as the case may be (s-22-pb) other wise declaration shall have no effect in consequence the case shall not be considered as one of voluntary winding up.

In case of disapproval thereof the aggrieved party resorts to appeal to the federal GovT within 30 days from the date on which the decision is given by the registrar. The Federal Govt shall dispose of the appeal after proper hearing.

5.2 Winding up by Tribunal

There are certain circumstances define in law where the registrar of *mudaraba* companies may make an application to the tribunal for the winding up of *mudaraba*.

i) The period fixed for the *mudaraba* has been expired but directors have not filed the declaration thereof with the registrar or the have filed the declaration of solvency of *mudaraba* but they failed to seek the approval by the registrar and they were not invoked by the appellant as right against such decision of the registrar.

ii) When the purpose of the *mudaraba* has finished but the directors of *mudaraba* yet not filed with the registrar the declaration of solvency of *mudaraba*, or they have filed the declaration of solvency but they have not sough the approval of registrar and there is no appeal to the federal Govt against such decision.

iii) When it was declared by registrar that *mudaraba* is unable to discharge its liabilities.

iv) in any case of it was declared by registrar that accumulated losses of the business are more than 50% of the total amount which was subscribed by the certificate holders.

v) If the purpose of *mudaraba* conducted was fraudulent or there was intention of fraud has been involved.

vi) When in the opinion of tribunal it is just equitable that *mudaraba* shall be wound up. It is right of *mudaraba* company to get an opportunity of being heard by giving an application to tribunal through registrar.

Section (23) i

Besides these provision of the law registrar may proceed an application to the tribunal for winding up of *mudaraba* 's of such certificate holder having certificate of the value being not less than 10% of the total subscribed amount of the *mudaraba* furnish an application under 8.21 (i) for the purpose of an enquiry. *Mudaraba* Company shall be given a opportunity of being heard. S-25 (3)

Law empower the registrar for any kinds of enquiries. He may get the affairs of *mudaraba*, or any business transaction thereof enquired into by any person, if he reason to believe that such step has to be taken or if any such certificate holder who passes not less than 10% of its subscribed amount process an application for such purpose. In response he will make an appointment of a person by an order must be in writing for the purpose of enquiry, and report. S.21 (1)

The person appointed for such enquiry may issue a written notice to require any information or documents. And every concerning person with the affair of *mudaraba* including directors, managers, all officers of *mudaraba* company etc shall provide him such information for every document required from their custody and knowledge. s-21(2) And he shall have power to enter into any premises belonging to the *mudaraba* company or any other building which belongs to such person to whom the enquiry relates.

He may inspect seize books of account and documents of *mudaraba* company, or from the possession of its directors, managers or any other employee. S21 (3)

After when registrar receives the report he may take action as he thinks fit. 2 sec (5)

If after hearing such application from registrar, when the tribunal take decision to wind up tribunal shall appoint a liquidator in consultation with registrar for approving a general scheme of winding up. 8.21 (1)

The liquidator shall take the charge of *mudaraba* company at once, upon the winding up order and *mudaraba* company shall provided him such statements, records, information and all kind of material as he may require, the liquidator shall conduct all proceeding under the directions of the tribunal and he must finish it within a specified period of one year from the date when he was appointed in special cases tribunal has right to extend the time period. sec 27 (3) (2) (a)

In some cases during the proceeding of winding up tribunal may allow administrator to continue his function if he is appointed by registrar or tribunal may appoint any administration to manage the *mudaraba* till the end of proceeding 2 {sec 20, sec 21 (5)}

5.3 Remedial Measures

The law protects the interest of *mudaraba* and certificates holder in various situations by way of remedial measures.

In some situation where the *mudaraba* company is performing in a manner which is harmful to the company or for any person who is holder of certificates and to some how practice is a un law full or fraudulent in terms of law or where the *mudaraba* company failed to comply with the law of the rules or a direction. There under or a condition of *mudaraba*.

Yet another situation also exists where another *mudaraba* under the management of same *mudaraba* company has been wound up by tribunal. And a 3rd application may exist where the *mudaraba* company faced the cancellation of registration.

In any of these situations mentioned earlier the registrar of *mudaraba* companies may make an order in writing, to appoint any person to act as administrator for the purpose of the management of *mudaraba* or he may he thinks fit, appoint another *mudaraba* company to manage the affairs of *mudaraba* in place of *mudaraba* company or he may demand from the *mudaraba* company to bring about such changes in its management as may he be pointed out in the order. However, the registrar before issuing the order gives an opportunity of being heard and obtain the approval of the federal Govt. see (20)

5.5 Provisions for Punishment and Penalties:

The section 31 & 32 of the ordinance deals with the issue of punishment and penalties, the section 31 envisage the law of punishment in case of the contravention of the provisions of section 4, 10, 13, 14, 16 and 17 of the ordinance,1980.Accordingly any accused if found guilty for this contravention shall be sentenced with impressments which may be simple or rigorous not exceeding 3 years and fine not exceeding Rs . 500,000/-. Sec 31 (1)

The provision related to the section of the ordinance can be discussed in this way likely.

1. Registrartion under *mudaraba* law as *mudaraba* company is necessary, no company or body corporate shall be allowed to operate a *mudaraba* without its registration thereof sec 4
2. *Mudaraba* company can carry out only such kind of business which is not opposed to the injunction of Islam. Sec 10
3. Allotment of *mudaraba* certificates can be made after issuing the approved prospectus stating the minimum subscription limit there in. sec 31-1
4. There shall be a separate account in a scheduled bank, where application money shall be deposited. If is refundable, so that the many be refunded, if needed and shall be refunded to applicant before expiry of 15 days, if the minimum subscription is not received by the specified date. Sec 13(2) 13(3)
5. After the date of allotment *mudaraba* certificates shall be issued within 30 days time period from Allotment date . Sec (2-4)
The *mudaraba* company shall prepare a register of certificate holders in a prescribed formate sec 13 (5)
6. For the purpose of each *mudaraba* its is necessary that *mudaraba* company shall maintain a separate bank account, funds, assists and liabilities of each *mudaraba*. (S-13 (6))
7. The holder can convey *mudaraba* certificates by filling the manners provided in prospectus. sec 13(8)
8. *Mudaraba* shall stand liable for its personal liabilities of any other *mudaraba* or *mudaraba* company, like wise entitlement for benefits restricted to the assets of its own. Sec (13-(2))
9. The *mudaraba* company shall prepare and circulate the annual accounts reports, as per sec 14 of the ordinance, 1980 within the period of 6 months from the day when accounting year was ended.
10. It is not allowed for any director, officer, employee, agents or auditor of the *mudaraba* company to prepare a false statement in any document, prospectus reports returns, account, information or any explanation required by the ordinance, 1980 believing that it is false and incorrect. S (10)

11. The *mudaraba* company shall start any business which is of the same nature as the *mudaraba* and to engage in any competition with the business of *mudaraba* controlled by it. Sec 11(1)

12. No body from officials of *mudaraba* company shall take loan from *mudaraba* fund on the security of the assets of *mudaraba* fund.

13. The *mudaraba* company shall subscribe in each *mudaraba* floated, that it must not less than 10% of the total amount of *mudaraba* certificate offered for subscription.

In case of contravention of the provision of any of the section they impose a further fine to the extent of the loss.

Penalty

The registrar of *mudaraba* a company is empowered to impose penalty on a person ordering him to pay a fine not more than one hundred thousand. But again it is important to provide him opportunity being heard that such person is fraudulent quality of the commission of the following offences namely:

- a) He has refused or failed to surrender those documents, returns or information which law requires from him that it should be provided.
- b) He has contravened any of the direction or condition imposed or made by the federal Govt or any direction made under said laws (except those mentioned in Sec (31) sec (32).

The registrar may also put some further fine on such person which will not exceed for one thousand for every day that the default continues. Sec (32).

5.6 Application of Fine

When a tribunal decides about fine, it may give directions that the whole or any part of the fine may be applied in (i) the payment of costs of the proceeding (ii) the payment of compensation to the affected part for any caused by the offence, and (ii) the payment of compensation to the *mudaraba* or any other person for any loss due to the contravention of sec 4, 10, 13, 14, 15, 16 or 17.

Liabilities of the directors, managers or officers of a company ²¹⁴)

As it was discussed in previous topic that the punishments of imprisonment and fine as for those offences which prejudicing the community and of criminal in nature and

²¹⁴ (section -35

for that matter the state and we also have discussed that the penalty of fine or compensation is prescribed for civil offences prejudicing private right the penalty has been provided in the section 32 of the ordinance 1980. Now important here is that who shall be punished when a company or body corporate is guilty of an offence mentioned in section 31 or 32.

Every Director, manger officer responsible for the business, affairs of company, shall be deemed to be guilty of the offence and face consequences.²¹⁵ Unless he provides reasonable justifications and any amount payable as penalty under the law shall be recoverable, and it would be deemed arrears of land revenue.

If a tribunal who is dealing with the winding up of *mudaraba* thinks that any director manager of member of *mudaraba* company presently working or has been member of *mudaraba* found guilty of an offence for which he is criminally liable the tribunal may give direction to liquidator to prosecute such person or he may suggest him to refer the matter to registrar for same action. Tribunal may take such steps so motoin any person.²¹⁶

Having interest with the mater, may furnish application for this and a liquidator dealing with such winding up thinking that any past or present members director is found involve in offences of criminal nature he shall at once report to registrar , registrar if thinks necessary shall conduct an enquiry and for this purpose liquidator shall provide him required information and make possible his access to all documents in his possession if the case is so where it is not suitable for registrar to conduct proceedings against the offender .²¹⁷

In all said situation under these rules it shall be the duty of liquidator ever officer or agent of *mudaraba* company to provide full assistance in connection with prosecution as he can in reasonable way. If any such person neglects to do so, the registrar shall

²¹⁵ Sec 31

²¹⁶ Sec23(2)

²¹⁷ R-29(1,2,3,4)

inform tribunal by application, and tribunal shall direct such person to do serve accordingly in this regard if such person is a liquidator the tribunal may order him to bear the cost of application unless he satisfies him that this failure was due to not having in his hand sufficient assets of the company to enable to do so.²¹⁸

In any case where in the course of winding up or inquiry the concerned person found mollified they have considered on the *mudaraba* business with malicious intention, he intended to defraud creditors or certificate holders or he carried on the business thereof for any frequently purpose, the registrar or the creditors or the liquidator may apply to the tribunal²¹⁹

The tribunal if consider adequate declare that those who knowingly commit the malicious activity and involved in fraudulent trading shall be personally liable without any limitation of liability for all debts and liabilities of *mudaraba* as the tribunal may decide.

As well as every Director and officer of a *mudaraba* company who is default, not having kept proper books of account for the *mudaraba* shall be stand liable for criminal liability however if he give valid justification like he shows that the circumstances in which the business was initiated such default was excusable, he may be given favor; he may be excused.²²⁰

Proper books of account shall include such books as comprising of material entries about.

(a) Cash received and Cash paid ; and

(b) Statement of annual stock taking and of all goods sold or bought, showing the detail of goods the description of buyer and sellers.

²¹⁸ R 29(8)

²¹⁹ R-30

²²⁰ R-15

And over view

- In a *mudaraba* the person who subscribe in the *mudaraba* fund are the owner of *mudaraba* and has evidence of their ownership in the shape of certificates of *mudaraba* they have right to share the profit and loss of *mudaraba* it is necessary to mention here that *mudaraba* recognized in law as a separate legal entity from the certificate holders.
- And we can conclude that we have a complete code for governing *mudaraba* business in the form of principles synthesized by Islamic jurist but all these concepts are not envisaged in this legislation and not observed .
- It may be pointed out that the Islamic banks and Islamic financial institutions have failed to bring in any visible modification, or change in financial network of Islamic world where they have been in operation during the last about three decades.

Chapter 4

Section# 1

This chapter is a brief study of *mudaraba* regulations embodied in the 13th standard prepared by a counting and auditing organization for Islamic financial institutions (AAOIFI), which was registered on 11 *ramdan* 1441 H corresponding to 27 march, 1991 in the state of Bahrain (بحرين) as an international autonomous non profit organization or corporate body.

A meeting of *shariah* board of AAOIFI was held in *madina al-munawara* on 11-16 may 2002, this *shariah* standard on *mudaraba* was adopted in this meeting no (8). This meeting was chaired by *shaikh Muhmad Taqi usmani*, the boards consisted of 12 member, those were well known scholars of time from different sites of Muslim worlds. Before its sanction and taking up a public hearing was held on 3-2-2002, it was attended by more the 30 *shariah* scholars representing central institutions, an accounting firm etc. After that hearing *shariah* board in its meeting no 8 on 11-10 may adopted it as full-fledged standard.

This standard comprise of 11 sections and 3 appendices. Appendices (A) discussed the brief history of the preparation of the standard and in appendices (B) basis of *shariah* ruling has been given, and at the end in appendices (C) definitions are laid down.

Section# 2.

Section one of this stander discusses the scope of this standard , it is given that this stander applicable just up to the extent of *mudaraba* contracts, either between the institution and the other entities or other individuals. Secondly it also includes the joint investment accounts and special purpose investment account but one consideration must be taken that when these accounts are administered on *mudarba* basis. So this stander make limits for the *mudaraba* transaction, and excludes other types like *mudaraba sukuk* and any other kind of partnership. In effect of this limitation no one either institution or individual is allowed to govern any other transaction with this standard on the basis of resemblance with *mudaraba* like limited partnership etc. Because the scope of this stander is only limited to *mudaraba* contract. In next section the definition of *mudaraba*

is given that “*mudaraba* is a partnership in profit whereby one party provides capital (*Rab-almal*) and other party provides labors (*mudarib*)”. After that section 3 and 4 discuss about the agreement of *mudaraba* financing and the nature of *mudaraba* contract. It is given that there would be a memorandum of understanding which provides basis for the conclusion of *mudaraba* contract. Which also defines a particular sum of money, duration of transaction and this memorandum of understanding later on will be in line with specific or consecutive *mudaraba* transaction.

It is also mentioned in this particular section that MOU also determine the general contractual frame work which exposes the intention of parties about the use of *mudaraba* financing instrument either in case of restricted or non-restricted *mudaraba*. And also refine and determine the profit ratio, and as well as gives solution for some extraordinary cases where *mudarib* commits any negligence or misconduct or any other contravene of contract, so there must be some guarantees which cover situation thereof .

After when on the basis of MOU, parties conclude their contract, that MOU become the integral part of nay future contract but on the option of parties.²²¹

Then it is provided in next section that the parties may conclude their contract by using authorized terms those are mentioned in different manuals of jurists like *mudaraba Qiraz* or *muamla*.....²²²

The very important element of the valid contract which is related to capacity of the parties also adhered, that parties must be competent, and along with that it is also mentioned that parties must posses’ legal capacity to appoint agents or to act as principle. So in short in absence of concerned parties if authorized agent or not available we can’t consider such a contract as valid contract.²²³

It is also provided that *mudaraba* contract is not binding, each party has equal right to terminat it unilaterally , but where *mudarib* has already started the operation of business,

²²¹ 3/1. 3/2. 3/3

²²² 4-1

²²³ 4-2

in this case contract became binding up to the constructive liquidation or in another case where time frame for the business operation is fixed, they should full fill such limit.²²⁴

The essence of *mudaraba* contract is a trust, it is fully trust based transaction, so in case of any less *mudrib* does not stand liable, but if any kind of misconduct of *mudarib* or negligence is proved the *mudarib* becomes liable for the amount up to the limit of *mudaraba* capital.²²⁵

Then next section deals with the types of *mudaraba* in respect of restrictions, if the *Rab-u-lmal* restricts the actions of *mudarib* to any particular area or attached condition for specific type of investment it is called restricted *mudaraba* in other case if *Rab-u-lmal* gives him unrestricted range of investment and not impose any restriction it is called unrestricted *mudaraba*.²²⁶

Section #2.

In next section which is section (6) another rule is given which in my humble opinion contradictory to the previous section 4/4, this section authorize *rab-u-lmal* to take guaranties from *mudarib* that are adequate and enforceable, while in previous section it is stated that it is a trust based contract, so in breach of contract he is liable, so if we involves guarantee matters then it is not fit to say than it is a trust based contract, thus even it is not against *shariah* principles but hence it is contradictory statement.

Section #(2)

Section #(2) deals with the requirements, some related to capital, some related to profit. It is provided that capital must be in the shape of cash; however the form of tangible assets where its value is certain to the *mudaraba* capital is also permitted.²²⁷ The capital should be clearly known to both *mudarib* and *rab-u-lmal*, in terms of quality quantity, purpose is to negate any chance of uncertainty and ambiguity.²²⁸

²²⁴ 4/3

²²⁵ 4/4

²²⁶ 5/1, 5/2

²²⁷ 7/1

²²⁸ 7/2

It is also stated that debt owed by any party could not be a capital; its use is not permitted. It is also provided that *mudarib* must have necessary access to capital, he has to take possession of capital to conduct *mudaraba* with free access, his control is necessary to the *mudaraba* to a valid contract.²²⁹

Rulings Related to profit:

It is provided that mechanism for the distribution of profit must be settled on the basis of an agreed percentage, and if it is on lump sum basis that it is not allowed.²³⁰

In next subsection very important principle is given that it is not allowed to accumulate share of profit with fee in *mudaraba*, but if they agreed for fee for such activity which is separate to custom part of *mudaraba* operation then it is allowed, because it will not affect the contract of *mudaraba*²³¹

This ratio of profit should be settled when the contract is concluded, but one relaxation is also furnished here that they can change the ratio of profit any time and they define the duration for which the agreement will stand valid.

If parties did not settled the ratio thereof, in such case matter should be referred to customary practice, if any, but in absence of such practice thereof, the contract stands void ab initio.²³²

If *rab-u-lmal* provides two separate amounts to *mudrib* and stipulates that the profit of amount I for you, and profit of amount II is for me it is not valid likewise if he stipulates that some specific transaction relates to me and another is for *mudarib*, similarly it is also not permissible to confined profit of some specific financial period to one of them.²³³

²²⁹ 7/4

²³⁰ 8/1

²³¹ 8/2

²³² 5/4

²³³ 8/6

The profit can only be recognized where capital of *mudaraba* is maintained unbroken , where operation results losses it can be compensate from future operations, and such cases where losses cover the whole amount of capital *mudirb* will not stand liable for it because it is a trust based transaction.²³⁴

The *mudarib* will be entitled for profit when operations of *mudaraba* have led to realization of profit thereof. After when evaluation take place, he will take his share, the final distribution should be awarded on the basis of the selling price of assists.²³⁵

In such a case where *mudarib* mingles his own wealth with general capital so in this case he gets two capacities, one being as a *mudarib* in respect of his own contributions. So he will take first profit earned on his wealth then the profit of *mudaraba* will be distributed accordingly on agreed terms.

Section #3.

Duties and power.

It is the duty of *mudarib* to employ his full vigilance and best of skills to achieve the goals of *mudaraba*. He should confirm than the money of *mudaraba* is in good hands. He will show his effort in perfect ways to invest the money in permitted manners.²³⁶ It is provided that in unrestricted *mudaraba* *mudarib* is allowed to do in general what an ordinary prudence man can do, including:-

He can attend all permitted trading fields where he thinks and believe that his expertise and professional skill will support him to perform accurately.²³⁷ He also can appoint his representative to work with him or to perform some part of business like marketing agent.

He is absolutely free to find out appropriate markets to his investment. He also has right to deposit it where he thinks fit for safe custody. Along with that he has power to make transaction on differed payments , most important he can mix funds with others irrespective of that he invest on *shirka* basis or on the *mudaraba* bases bar he assures

²³⁴ 8/7

²³⁵ 8/4

²³⁶ 1/2, 3/4, 5/6

²³⁷ 1/2, 3/4, 5/6

only one thing that it must not affect his responsibility in respect of first *mudaraba* contract. And in case of restricted *mudaraba*, *rabulmal* has right to restrict the actions of *mudarib* and to limit him up to specific location or market etc.

save for one condition that such commodities must be obtainable easily from market. And he is just not allowed to impose such restrictions those prevent *mudrib* from objective of the *mudaraba*. It must not be restricted in term that it refers to a season or confined it with very limited supply or it causes to narrow down the scope etc.²³⁸

Rab-u-lmal is not allowed to stipulate that he also has right to physical interface with *mudaraba* practices however he has right to have full information about the all activities of *mudaraba* like, demand, supply and buying selling etc. *mudarib* has to consult him. He can not enforce him to make partnerships with others.²³⁹

The *mudarib* must carry out all responsibility which in customary practice he ought to do, or he can not hire agent for these practices from *mudaraba* fund as well as he must be careful in buying or selling items about market price other wise he should be liable for difference save if he proves that he had taken such action in best interest of the *mudaraba*. He has no right to make charitable donations on his own wish. He just has right to save for him traveling expenses if it is customary practice.

Liquidation:

The process of liquidation for *mudaraba* is prescribe in the end of this standard, that, being a non binding contract they can terminate it unilaterally, or with the agreement of both the parties, or it could be on the maturity of the date, in case of time limit *mudaraba* or where funds of *mudaraba* exhausted due to losses. And in a case whether *mudarib* dies or being a juristic personality were acting as *mudarib* liquidated.

²³⁸ 9/2

²³⁹ 9/3

Conclusion

From the above discussion we can draw following points.

1. *Mudaraba* is a valid financial device in *shariah* and it is permitted in shariah because the people have need for this contract, in permitting this contract another goal public welfare is also achieved.
2. It has been observed from the ideas of different schools of thoughts of Shariah that it is just a Partnership for participation in profit, by occupying status of agent although agency is there but it is necessary to understand that it is not just like a mere agency contract.
3. It appears that this transaction continued through early centuries of Islamic era as a valid practice and its legitimacy is significant. It is approved by *shariah*, and justified by *Qur'an Sunnah Ijma'* and *Qiyas*. it is a contract between two parties where one produce capital while other supply skills and effort and they share the profit. So it is different then *riba*.
4. Form (صيغة) of *mudaraba* consists of *ijab* and *qabuol*. When parties agreed up to some thing be rendered capital by investor to *mudarib*.
5. It is also essential for valid *mudaraba* that capital should be certain and known before the commencement of transaction. Jurists allow the case of *mudaraba* when the capital is in debt.
6. The main objective of *mudaraba* is to gain profit by employing the money and skills where some body has expertise in one of the sides, it has been observed that generally people are not found enough qualified in both fields so they should trust and must rely on each other and concept of *mudaraba* is the best of all the solutions. Further more the concept of juristic personality is also involved in this very transaction which is another beauty of this mode.
7. That *mudaraba* legislation practiced in Pakistan has not included all the concepts mentioned by Muslim jurists, so we have in need to amend these laws for its true Islamization.

Recommendations

1. During analyses of laws applicable in Pakistan. I realized that these laws have not been able to bring in any evolution in financial structure of Pakistan as there is no provision in the ordinance or rule made there under to deal with the actual working and practices of *mudaraba* as it is prescribed in the manuals of Islamic jurists, it is just a frame work which envisages laws for incorporation of *mudaraba* fund and is more procedural then operational. Meanwhile in some

provisions it has contradiction with the injunctions of Islam discussed earlier like issue of reserves and profit sharing. It is an undeniable fact that being a vital alternate and substitute to *riba* there is a dire need of real and practicable legislation based on Islamic principles and concept mentioned by Islamic jurists to operate perfect *mudaaba* business in the light of *shariah*

2. The model presented in *Shariah* standard issued by AAOFI in my humble opinion is a perfect model of *mudaraba* with certain amendments, it covers almost all aspects of *mudaraba* in brief manners and gives a complete mechanism which fulfill all requirements in prospective of *shariah*. *It must be observed in this context*
3. With reference to above cited points I may conclude that *mudaraba* laws as enforced in Pakistan should be amended by making AAOFI's standard as integral part of these laws in order to give it a real Islamic color which results growth of investment companies in Pakistan, particularly it will attract practicing Muslims.

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