

Assignment On

**The provisions of Transfer of Property Act
1882, Relating to Mortgage: Critical
Appreciations.**

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Course: Law of Transfer of Property (205)



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1.0 Introduction:

Property is very important thing for people. Property means `` that which is peculiar or proper to any person; that which belongs exclusively to one; in the strict legal sense, an aggregate of under black`s law dictionary. Under Article 152 of the constitutions of Bangladesh, `Property" includes e property of every description movable or immovable corporeal or incorporeal, and commercial and industrial undertakings, and any right or interest in any such property or undertaking. Property may be moveable or immoveable property. Moveable property means tangible items that can be physically moved from one location to another without changes in shape and substance and includes tangible things such as goods and intangible things such as documents of title, accounts, securities, instruments, copyrights, trademarks and patents. Immoveable property means tangible items that cannot be moved from one location to another without change in shape and substance. Land, homes and buildings are Immovable Property. The Transfer of Property Act, 1882 contains the general principles of transfer of property and detailed rules with respect to specific transfer of immovable property. Under section 3 of the transfer of property act 1882, immovable property does not include standing timber, growing crops or grass. maximum people can face problem for transfer of property .For this problem can solve to constitute the transfer of property act 1882.The property can transfer by five under the transfer of property act 1882 .such as sale, mortgage, lease, exchange and gift. Now discuss of mortgage, mortgagor`s rights and liabilities, mortgagee`s rights and liabilities.

2.0 Mortgage:

Mortgage is a loan taken by buyer from the loan giver against his or her property. Generally, a mortgage is the transfer of an interest in property to a lender as a security for a debt “usually a loan of money”. While a mortgage in itself is not a debt, it is the lender's security for a debt. It is a transfer of an interest in property from the buyer to the mortgage lender, on the condition that this interest of property will be returned to the giver/buyer when the terms of the mortgage have been satisfied or performed. Section 58(a) of The Transfer of Property Act, 1882 defines, “A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage- money, and the instrument by which the transfer is affected is called a mortgage- deed”. Therefore, it means that the following essential attributes should be confirmed to make a valid mortgage:

1. There must be a transfer of an interest.
2. Transfer of interest on specific immoveable property
3. Consideration
4. Security either to pay loan advanced/ to be advanced
5. Must be a debt created at present or will be in future,
6. Give rise to a pecuniary liability

Mr Linley, `a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given.` [santly vs wilde 1899 2ch 474](#).

`The adequacy or inadequacy of the price is a list which must be cautiously applied .in deciding a question whether a transaction is a sale or a mortgage the court must find the substance be find the form .` [4 DLR 126](#).

Mere inadequacy of consideration is to ground to treat a document to be a mortgage. { [Somedullah vs Mahmud Ali 44 DLR\(AD\) 83](#) }

According to Dictionary of Banking Terms and Phrases, mortgage means a debt instrument used in a real estate transaction where the property is the collateral for the loan. A mortgage gives the lender a right to take possession of the property if the borrower fails to pay off the loan.
. <http://www.helpwithmybank.gov/dictionary/index-dictionary.htm>

` Mortgage is an estate created by a conveyance absolute in its form, but intended to secure the performance of some act, such as the payment of money, and the like, by the grantor or some other person, and to become void if the act is performed agreeably to the terms prescribed at the time of making such conveyance`, [under black`s law dictionary](#).

Mortgage” means a registered charge against Immovable Property allowed by a Mortgagor to secure Debt. Under article three 6 of **Law for Mortgage on Immovable Property in Banking Transactions**.

Mortgagor” means the Person that owns Mortgaged Property and, most of the time, owes Debt subject to a Mortgage. When these are different Persons, the term

Mortgagor means the one that owns the Mortgaged Property and the Debtor means the one that owes the Debt. Under article three 7 of **Law for Mortgage on Immovable Property in Banking Transactions**.

Mortgagee” means a Lender in whose favour a Mortgage is created. Under article three 8 of **Law for Mortgage on Immovable Property in Banking Transactions**.

Mortgaged Property” means Immovable Property charged to secure Debt Under article three 11 of **Law for Mortgage on Immovable Property in Banking Transactions**.

Mortgage Money: The principal money and interest of which payment is secured for the time being are called the mortgage money.

Mortgage deed” means the written document signed by the Mortgagor and Mortgagee that describes the Mortgaged Property, the terms of a Mortgage, and the duties and obligations of the parties. Under article three 13 of **Law for Mortgage on Immovable Property in Banking Transactions**

Illustration:

Asha owed Brajesh taka Two lakhs. She secured the loan by creating an interest in her house in favour of Brajesh. Here, the interest is a mortgage. TK Two lakhs is the mortgage money. Asha is the mortgagor and Brajesh is the mortgagee. The instrument by which the loan is secured is the mortgage deed.

2.1.0 Essentials of a Mortgage:

2.1.1 Transfer of Interest: The first thing to note is that a mortgage is a transfer of interest in the specific immovable property. The mortgagor as an owner of the property possesses all the interests in it, and when he mortgages the property to secure a loan, he only parts with a part of the interest in that property in favour of the mortgagee. After mortgage, the interest of the mortgagor is reduced by the interest which has been transferred to the mortgagee. His ownership has become less for the time being by the interest which he has parted with in favour of the mortgagee. If the mortgagor transfers this property, the transferee gets it subject to the right of the mortgagee to recover from it what is due to him i.e., the principal plus interest.

A mortgage is a transfer of interest which come into existence, when the contract of mortgage is entered into not necessarily when the consideration is paid. {Salehon vs Muhammad PLD 1958 (WP) Lah 1023}

2.1.2 Specific Immovable Property: The second point is that the property must be specifically mentioned in the mortgage deed. Where, for instance, the mortgagor stated “all of my property” in the mortgage deed, it was held by the Court that this was not a mortgage. The reason why the immovable property must be distinctly and specifically mentioned in the mortgage deed is that, in case the mortgagor fails to repay the loan the Court is in a position to grant a decree for the sale of any particular property on a suit by the mortgagee.

2.1.3 To Secure the Payment of a Loan: Another characteristic of a mortgage is that the transaction is for the purpose of securing the payment of a loan or the performance of an obligation which may give rise to pecuniary liability. It may be for the purpose of obtaining a loan, or if a loan has already been granted to secure the repayment of such loan. There is thus a debt and the relationship

between the mortgagor and the mortgagee is that of debtor and creditor. When A borrows 100 bags of paddy from B on a mortgage and agrees to return an equal quantity of paddy and a further quantity by way of interest, it is a mortgage transaction for the performance of an obligation.

2.1.4 Parties: The person who transfers an interest in the property is called the mortgagor, the person to whom the interest is transferred is called the mortgagee. The mortgagor must be competent to transfer. Thus a minor cannot be a mortgagor but a minor can be a mortgagee.

Where, however, a person borrows money and agrees with the creditor that till the debt is repaid he will not alienate his property, the transaction does not amount to a mortgage. Here the person merely says that he will not transfer his property till he has repaid the debt; he does not transfer any interest in the property to the creditor. In a sale, as distinguished from a mortgage, all the interests or rights or ownership are transferred to the purchaser. In a mortgage, as stated earlier, only part of the interest is transferred to the mortgagee, some of them remains vested in the mortgagor.

To sum up, it may be stated that there are three outstanding characteristics of a mortgage:

- a. The mortgagee's interest in the property mortgaged terminates upon the performance of the obligation secured by the mortgage.
- b. The mortgagee has a right of foreclosure upon the mortgagor's failure to perform.

The mortgagor has a right to redeem or regain the property on repayment of the debt or performance.

Illustration:

Aisha mortgages her house to Brajesh against a loan of Rupees Five lakhs. Brajesh has an interest in the property and is entitled to foreclose and recover the mortgage money by selling the property, if Aisha fails to repay the amount. However, Aisha continues to remain the owner of the property. She also retains possession of the property and she is entitled to redeem the property on payment of the loan amount.

3.0 Kinds of Mortgages:

There are a variety of ways in which a mortgage may be structured. Six different kinds of mortgages that are recognised by under section 58(b-g) of the Transfer of Property Act 1882 are:

1. Simple mortgage.
2. Mortgage by conditional sale.
3. Usufructuary mortgage.
4. English mortgage.
5. Mortgage by deposit of title-deeds or equitable mortgage.
6. Anomalous mortgage.

Now discuss that mortgage below:

3.1 .0 Simple Mortgages:

Here, without delivering the possession of the property, the mortgagor binds himself personally to pay the mortgage money. The mortgagor also agrees that in the event that he should fail to pay the amount, the mortgagee will have the right to have the mortgaged property sold and use the proceeds from the sale as repayment of the debt. Note that a personal covenant is implied and forms an essential part of the simple mortgage. This means that the mortgagor's obligation is two-fold — personal and proprietary — and the mortgagee has the option to proceed against either the person or the property. The right of sale in the event of default is the interest in the property that is transferred by a simple mortgage. *Dalip Singh v. Bahadur Ram, (1912) 34 All 445.*

3.1.0 Essential elements of simple mortgage:

- a. There must be personal undertaking.
- b. The mortgagee must be given the right of to have the mortgaged property sold.
- c. No delivery of possession.

Illustration:

Aisha mortgages her house to Brajesh against a loan of taka Ten lakhs. Under the terms of the mortgage, Aisha remains the owner of the property. She retains possession of the property and she is entitled to redeem the property on payment of the loan amount. On the other hand, should she fail to repay the loan amount, Brajesh has the right to sell off the property to recover his money. This is instance of a simple mortgage.

3.2.0 Mortgage by Conditional Sale :

In such a mortgage, the condition that on the default of payment of the mortgage money on a mortgagor sells the mortgaged property on the certain date, the sale will become absolute. It may also be on the condition that on the payment being so made, the sale will become void, or, that on such payment, the buyer will transfer the property back to the seller. Here, the sale is ostensible. In other words, it appears to be a sale, but in reality, it is not unless the mortgagor defaults.

The term 'certain date' here refers to payment on or before such a date, and is an essential ingredient of such a mortgage. Unlike a simple mortgage, there is no personal liability on the part of the mortgagor here. The mortgagee can only proceed against the property by making the sale absolute. This condition must be embodied in the document that purports to make the sale. *Simrathmull v. Nanja Langiah*, AIR 1963 SC 1182.

3.2.1 Essential elements of a mortgage by Conditional Sale :

- I. The mortgagor must ostensibly sell the immoveable property.
- II. There must be a condition either ,
 - a. On the repayment of the money due under the mortgage on a certain date , the sale shall become void or the buyer shall retransfer the property to the seller, or
 - b. In the default of money on that date the sale shall become absolute.
- III. The condition must be embodied in the document which effects or purports to effect the sale.

`In mortgage by conditional sale, there must be a condition that in default of payment money of the mortgage money on a certain date the sale shall become absolute.` (*Chandra kanta howlader vs Rama Prasanna ganguly* 5 DLR 29)

`A sale with condition of a repurchase is not a mortgage , for the relationship of debtor and creditor does not subsist and there is no debt for which the transfer is security . it is not a partial transfer but a transfer of all rights in perpetuity reserving only the personal right of repurchase or pre –emption which is lost if not exercised within the stipulated time.`(Abdul hafiz chowdhury vs Aziz ur Rahman 4DLR 162)

Illustration:

Continuing from our previous illustration, say, that for the same loan, Aisha mortgages her house to Brajesh. However, in this case, under the terms of the mortgage, the house actually stands sold or transferred to Brajesh. Note, that the sale is conditional on the non payment of the loan amount. If the loan amount is paid within one year of the date of the mortgage, the sale is void, and the ownership of the house transfers back to Aisha. If, however, the loan amount is not paid within that time, then sale becomes absolute, and Brajesh permanently becomes the owner of the house. This is an instance of mortgage by conditional sale.

3.3.0 Usufructuary Mortgage:

This is also referred to as a possessory mortgage. Here, the mortgagor transfers or binds himself to transfer the possession of the property mortgaged to the mortgagee. Such an obligation may be express or implied. The mortgagee here is authorised to enjoy the possession and to receive the rents, profits, and other usufructs or advantages of the property in lieu of the interest, the principal money, or part interest and part principal money, until the debt is repaid. Here again, there is no personal liability on the part of the mortgagor and the

mortgagee has no right to sell the property to recover the money. *Lachman vs Naina*, AIR 1940 Lah 401.

3.3.1 Essential elements of usufructuary mortgage :

1. Possession of the property is delivered to the mortgagee.
2. The mortgagee is to get rents and profits in lieu of interest or principal or both.
3. No personal liability is incurred by the mortgagor.
4. The mortgagee cannot foreclose or sue for sale.

According to section 58(d) of the Transfer of Property Act, where the mortgagor delivers possession of the mortgaged property to the mortgagee and authorizes him to retain such possession until payment of the mortgage money and to receive the rents and profits accruing from the property in lieu of interest or in payment of mortgage money, or partly in lieu of interest and partly in lieu of mortgage money, the transaction is called a usufructuary mortgage and the mortgagee a usufructuary mortgagee. The very definition of the expression "usufructuary mortgage" as given in section 58(d) of the Transfer of Property Act indicates that the mortgagor is personally liable for payment of the mortgage debt. If such an obligation exists in a transaction of mortgage, the mortgage would be either a simple mortgage, an English mortgage, a mortgage by deposit of title deeds or an anomalous mortgage. In all such cases, there must be an obligation by the mortgagor to pay the mortgage debt personally; but if no obligation is created, the mortgage, without any doubt, would be a usufructuary mortgage. [*Khushi Mohd. vs. Sultan Ali* PLD 1962 (WP) 961]

The legislature in section 95 provided that the raiyat shall not enter into any form of usufructuary mortgage other than the complete usufructuary mortgage. The legislature also prohibited a contract of out and out sale with a clause of

reconveyance and by a deeming clause had made such transaction as complete usufructuary mortgage. In other words, in Bangladesh a raiyat cannot enter into any other transaction of his raiyat holding except a complete usufructuary mortgage. **[Bangladesh vs. Him Abdul Gani Biswas (1980) 32 DLR (AD) 233**

See Sections 95, 95A of the State Acquisition and Tenancy Act, 1950 (E.B. Act XXII of 1951).

Illustration:

Once again, assume Aisha owes Brajesh taka Five lakhs. But this time, she mortgages an apartment of hers, which has been leased out and receives Rupees Three lakhs per year as rent. Under the terms of the mortgage, Brajesh is entitled to take possession of the property and receive the rent from it against the repayment of the loan with interest. This is an instance of usufructuary mortgage.

3.4.0 English Mortgage:

‘There is an absolute transfer of property in favour of the mortgagee, against the loan taken. However this transfer is subject to a condition that the mortgagee would return the property to the mortgagor on the repayment of the money by a certain date. The payment is to be made on a date fixed in advance. The mortgagee acquires a right to take possession as soon as the mortgage is executed’ *Latchmiput Singh v. Land Mortgage Bank, (1887) ILR 14 Cal 464.* and for all practical purposes, he is the owner of the property. The only right that remains with the mortgagor is the right to redeem the property if he repays the money by ascertain date. On failing to do so, he loses the right of redemption.

3.4.1 The three essential of an English Mortgage are :

1. That the mortgagor should bind himself to repay the mortgage money on a certain .
2. That the property mortgaged should be transferred absolutely to the mortgagee.
3. That such absolute transfer should be made subject to a provision that the mortgagee will reconvey the property to the mortgagor upon payment by him of the mortgage money on the day on which the mortgagor bound himself to repay the same

Illustration:

Aisha mortgages her house to Brajesh. Under the terms of the mortgage, the house stands transferred to Brajesh absolutely. However, if Aisha were to repay the amount with interest within a year from the date of the execution of the mortgage, she will be entitled to redeem the property back from Brajesh and regain ownership of the property. Unlike in a conditional sale, Brajesh is the permanent owner of the property here and is entitled to enjoy it as such. This is an instance of an English mortgage. However, if Aisha repaid the loan with interest in less than a year, she has the right to redeem her house from Brajesh.

3.5.0 Mortgage by Deposit of Title Deeds: Also known as an equitable mortgage, the distinctive feature of this kind of mortgage is that it can be a purely oral transaction that comes into effect simply when the mortgagor deposits the title deeds to a creditor with the intention of creating a security on them. There is no formal conveyance of the property. The delivery of title deeds may be actual or constructive. The other essential ingredient is that there must be an intention that the property should stand as security for the repayment of

the loan to the mortgagee. So, mere possession of title deeds and the existence of a debate not enough to raise a presumption of the existence of such a debt. *Jethibai v. Putlibai*, (1912) 14 Bom LR 1020

It may be important to note that this kind of mortgage can only be affected in Kolkata, Chennai, and Mumbai or in any other place where the State Government allows this form of mortgage by way of notification in the Official Gazette.

3.5.1 Essential elements of mortgage deposit of Title deeds :

1. A debt
2. Deposit of title deeds
3. An intention that the deeds shall be security for debt.

(*K.J. Nathan v. Muruthi Rao* AIR 1965 SC 430)

‘If the mortgage debt is paid ,or a tender thereof is made ,by any person interested in the equity of redemption , a mortgage suit can be instituted by any other person who has a right to the equity of redemption.’(*Nabin Chandra Moral vs lati Mohan Das* 19 DLR 338)

Illustration:

Here, Aisha does not execute a proper mortgage deed for mortgaging her house in favour of Brajesh. Instead, she simply deposits the title deeds of her house in Mumbai with Brajesh with the clear intention of mortgaging the property and recovering the title deeds on repayment of the loan amount. This is an instance of a mortgage by deposit of title deed.

3.6 Anomalous Mortgage:

This is a residuary provision and includes any mortgage that does not fall within the scope any of the kinds of mortgages mentioned above. So, an anomalous mortgage can be a combination of any of the above mortgages. For instance, a possessory mortgage with a personal covenant to repay would fall within this provision. A customary mortgage would also be included within this provision.

Illustration:

Once again, Aisha mortgages her property in favour of Brajesh. However, this time she retains possession of the property while paying him all of the rents and profits accruing on the property as repayment for the loan amount with interest. As you may have realised, this mortgage combines elements from a simple and a usufructuary.

4.0 Other types of Mortgage and Hypothecation/Charge:

Legal

Mortgage Involves the conveyance or assignment of the whole of the legal ownership in the property subject to the right to redemption (i.e. the mortgagee will have to return the mortgaged property to the mortgagor upon the mortgagor discharging the debt).

It can even secure movable property

4.1 Equitable Mortgage:

Equitable Mortgage is a legal document that restrains the property but is not technically a Mortgage Overview because of the existence of some legal error. An Equitable Mortgage can arise in two different ways either as a legal mortgage which was never perfected by conveying the underlying assets, or by specifically creating a mortgage as an Equitable Mortgage. A mortgage over equitable rights such as a beneficiary's interests under a trust will necessarily

exist in equity only in any event. According to the laws of some jurisdictions, a mere deposit of title documents can give rise to an Equitable Mortgage. It has been abolished in England with respect to land, although in many jurisdictions company shares can still be mortgaged by deposit of share certificates.

- Equitable Mortgage (or mortgage by deposit of title deeds)
 - no specific form
 - the contract may be express or implied with the key element being the intention to create mortgage, whether or not evidenced by a written memorandum
 - Section 58(f)- debtor delivers to the creditor or his agents documents to title to the immovable property with an “intent to create security”
 - there is no transfer of property in law
- Equitable Charge or Hypothecation
 - is created by a contract and exists and enforceable only in equity
 - neither possession nor interest in the property is transferred
 - charge has the right of realization in the event of default through a judicial process whether for order of sale or appointment of a receiver.

5.0 Creation of a mortgage:

- Preparatory steps
- Documentation
- Stamp duty and Registration
- Perfection

5.1 Preparatory steps:

- Identification of Specific Property
- Title Search and search to determine whether a prior charge exists
- Restrictive covenants in existing contracts

- Capacity and authorization
 - Power to borrow money and create security under the articles of association of the company.
 - Shareholder's approval under Section 293(1)(a) of the Companies Act, 1956- required for transfer of an undertaking which is relevant in case of a charge/ mortgage over substantial part of the property of the
 - Section 77(2) of the Companies Act- prohibition on creation of security to assist purchase of the shares of the company
- Consent under Section 281(i) of the Income Tax Act, 1961
 - Under Section 281 of the IT Act any transfer of property by a company against whom income tax claims are pending can be invalidated or reversed by the Income Tax authorities
 - Since mortgage amounts to a transfer of property, a certificate is required from income tax authorities permitting the creation of mortgage
- In case of creation of mortgage for the benefit of foreign lenders, approval is required from an Authorised Dealer Bank

5.2 Documentation:

- Loan Agreement
- Indenture of mortgage/ deposit of title deeds
 - English or legal mortgage is recorded in an indenture of mortgage which is executed by both parties
 - Deposit of title deeds
 - No specific form or requirement for contract in writing- key is the intention to create mortgage
 - KJ Nathan v Maruthi Rao, AIR 1965 SC 430

- Supreme Court held that whether there is an intention that the deeds shall be security for a debt is a question of fact and in each case the facts will have to be decided on the basis of oral, documentary or circumstantial evidence
 - Memorandum of Entry and Directors Declaration-evidences the deposit of title deeds
 - Stamp duty efficient
- Security Trustee Agreement
 - Why has a security trustee?
 - Syndication and participation in loans
 - Creation of security for future debt.

5.3 Stamp Duty:

- Most structuring in security documentation is to deal with stamp duty
- Stamp duty is a tax which the State Governments apply on transactions taking place within the state- serves as an additional source of revenue for the Government-
- Rates of stamp duty vary from state to state
- Stamp duty is payable on the “instrument” and not a transaction
- What is important is the substance of the “instrument” not the form
- In most States the stamp duty payable is ad-valorem (i.e. as a percentage of the total transaction value without a cap) and can have a significant financial impact
- Forum shopping is common to find the most stamp efficient manner of doing a transaction
- Memorandum of Entry and Directors Declaration are not instruments and therefore no stamp duty is payable on the same. Only agreement related to deposit of title deeds are stamp able

- However, certain states such as Maharashtra have added explanations which impose stamp duty on any written document which evidences a deposit of title deeds .

5.4 Perfection- Registration of Charges:

- The priority of proprietary interests against all adverse third party claims depends on completion of perfection of all actions necessary to assert that priority
- Section 125 of the Companies Act, 1956 provides for a statutory registration process for charges
 - It specifies that every charge created by a company is required to be registered. Unless such a charge is registered the charge shall be void against a liquidator or any subsequent charge
 - Principles
 - An unregistered interest is deemed to be void against a subsequent interest
 - Priority depends on the order of registration of charges
- The priority of proprietary interests against all adverse third party claims depends on completion of perfection of all actions necessary to assert that priority
- Section 125 of the Companies Act, 1956 provides for a statutory registration process for charges
 - It specifies that every charge created by a company is required to be registered. Unless such a charge is registered the charge shall be void against a liquidator or any subsequent charge
 - Principles
 - An unregistered interest is deemed to be void against a subsequent interest
 - Priority depends on the order of registration of charges

- A statutory registration process has two advantages for the secured creditor
 - He can verify that no prior charge exists
 - He can protect himself from subsequent charges gaining priority
- **Wilde v Australian Trade Equipment, (1980) 145 CLR 590 at 596**
 - “the requirement that a charge shall be registered is intended to enable persons who are minded to deal with companies, to be able, by searching the register, to find out whether the company has encumbered the property or not”

6.0 Registration under Registration Act:

- Under the Indian Registration Act, 1908, a mortgage is required to be registered with office of the sub-registrar of the area within whose jurisdiction the property is situated
- Purpose of the Registration Act is to record transactions in relation to immovable property so that accurate land records can be maintained.
- Documents required to be registered within 4 months of registration
- The effect of non-registration is that the document is not considered as evidence of the transaction in question and is void in all practical respects
- Separate registration fees are required to be paid at the time of registration
- In case the property lies across the jurisdiction of more than one sub-registrar, the document is required to be registered with each of the relevant sub-registrars.

7.0 Charge:

1. Nature of security interest:

- Charge is a mode of creating security interest over immovable as well as
- Movable assets and can be (i) a fixed charge, or (ii) a floating charge. A charge
- over immoveable property envisages that the immoveable property of one
- person is, by the act of the parties or by the operation of law, made security for
- the payment of money to another and the transaction does not amount to a
- Mortgage.
- A fixed charge can be created only over an asset that is ascertainable, whether
- Present or in future. A floating charge is usually created on all the assets of the
- debtor, whether in existence or in the future, ascertainable or not, and
- crystallises (i.e. becomes fixed) on such assets as are in existence at the time of
- Occurrence of an event of crystallisation. The document creating the charge
- would typically set out the events of crystallisation but a failure to repay the debt
- or any other event of default with respect to the debt or the debtor would
- Invariably constitute a crystallisation event. From the time of creation of charge
- until crystallisation, the debtor usually has the right to use the assets and deal
- With them in the ordinary course of business as if such assets are unencumbered.

2. Nature of Assets:

- A charge may be created over immoveable property such as real estate, plant,
- movable property, machinery/equipment, changing assets such inventory,
- stocks etc. financial receivables, bank accounts and monies lying therein,
- Trademarks, copyrights, patents.

8.0 Difference between Mortgage and Charge:

1. A mortgage is created by the act of the parties whereas a charge may be created either through the act of parties or by operation of law.
2. A charge created by operation of law does not require the registration as prescribed for mortgage under the Transfer of Property Act. But a charge created by act of parties requires registration.
3. A mortgage is for a fixed term whereas the charge may be in perpetuity.
4. A simple mortgage carries personal liability unless excluded by express contract. But in case of charge, no personal liability is created. But where a charge is the result of a contract, there may be a personal remedy.
5. A charge only gives a right to receive payment out of a particular property, a mortgage is a transfer of an interest in specific immovable property.
6. A mortgage is a transfer of an interest in a specific immovable property, but there is no such transfer of interest in the case of a charge. Charge does not operate as transfer of an interest in the property and a transferee of the property gets the property free

from the charge provided he purchases it for value without notice of the charge.

7. A mortgage is good against subsequent transferees, but a charge is good against subsequent transferees with notice.

<http://www.lawyersclubindia.com/forum/Types-of-Mort>

National P&V Bank v Charney 1924 (1) KB 431

- “where in a transaction for value, both parties evidence an intention that property, existing or future shall be made available in security for the payment of a debt and that the creditors shall have the present right to have it made available, there is a charge... (1) **the creditor gets no legal right of property**, either (2) **absolute or special or any legal right to possession**, but (3) **only gets the right to have the security made available by an order of the Court.**”

Hypothecation/ Charge

- right of a creditor over goods belonging to another, which includes the power to cause the goods to be sold in order to be paid his claim out of the proceeds, in case of a default with respect to repayment
- merely creates a notional or equitable charge
- rights governed by the contract
- both ownership and possession remains with the debtor

9.0 Difference between simple and usufructuary mortgage:

Delivery of possession being an essential condition in the case of usufructuary mortgage subsequent delivery of possession where the mortgage is a simple mortgage will not convert it into usufructuary mortgage. (8 DLR 599)

Under section 58(d) the transfer of property act a usufructuary mortgage creates a liability. (2 DLR 55

10.0 Difference between sale and mortgage:

Under section 54 the transfer of property act 1882 „Sale” is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

The essential elements of sale are

1. The parties
2. The subject matter to sale
3. The price or consideration
4. The transfer or conveyance.

Whereas under section 58(a) the transfer of property act 1882 A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

Essentials of a Mortgage are

1. There must be a transfer of an interest .
2. Transfer of interest on specific immoveable property
3. Consideration
4. Security either to pay loan advanced/ to be advanced
5. Must be a debt created at present or will be in future,
6. Give rise to a pecuniary liability.

The following tests have been devised to determine whether the intention was to mortgage or sale:

- a. the existence of a debt,
- b. the period of repayment –a short period being indicative of a sale or a long period of a mortgage
- c. The possession of property, the continuance of the possession indicating a property.
- d. the existence or otherwise of a stipulation for interest on repayment indicating a property
- e. Presence or otherwise of a stipulation ,as inadequate price indicating a property.
- f. presence or otherwise of a stipulation reconveyance in the document itself , the stipulation of reconveyance embodied in the deed being prime facie an indication that a transaction is a mortgage and,
- g. Purchase of stamps and payment of registration costs of the same ,if done by the transferee ,being indicative of sale. (**Tazal Hussain vs Md.Affan 17 DLR 613**)

11.0 Difference between Simple and English mortgage:

Like simple mortgage, an English mortgage can also be enforced by sale, but it bears certain additional features as well. An important consequence resulting from the creation of an English mortgage is the validity of the power of extra judicial sale in certain circumstances. In default of money a mortgagee has the right to sell the mortgaged property without the intervention of the Court and it has been enumerated in section 69 of the Transfer of Property Act, 1882.

The legislature desired to create a dividing line between mortgages by Conditional Sale and English Mortgages. The former was meant primarily for those traditional mortgages, which were framed as ostensible transfer of ownership. The latter was meant for non-traditional mortgages framed as absolute transfers of ownership. Section 58(e) of the Transfer of Property Act speaks of an absolute transfer of ownership to the mortgagee in the case of English mortgage whereas the definition states that the mortgage is a transfer of interest in the specific immovable property. Thus, the relevance of this particular mode of mortgage has to be looked into as its very nature has made it a redundant method of mortgage. The sole purpose of this article is to find out validity of English Transfer in present time and a study of this method of transfer as a whole..

<http://www.legalserviceindia.com/articles/tauvs.htm>

12.0 Distinction between Mortgage by conditional sale and sale with a condition of repurchase:

The condition of repurchase embodied in the document itself is not a decisive test to determine the nature of the transaction . the effect of the proviso to clause (c) added by the amending act 20 of 1929 is that if the condition of repurchase is not embodied in the document which effect or

purports to effect the sale , the transaction will not be regarded as a mortgage but it does not follow that if the condition is embodied in the same condition it must necessarily be a mortgage . prima facie it would be a mortgage .it is open to other side to show that it was intended to be out an our sale.

`A sale with condition of a repurchase is not a mortgage, for the relationship of debtor and creditor does not subsist and there is no debt for which the transfer is security . it is not a partial transfer but a transfer of all rights in perpetuity reserving only the personal right of repurchase or pre –emption which is lost if not exercised within the stipulated time.`(Abdul hafiz chowdhury vs Aziz ur Rahman 4DLR 162).

13.0 Difference between loan and rent/ premium:

Loan is used in mortgage for security of both parties whereas rent is used in lease for consideration of both parties.

14.0 What is security?

- Security is a charge or interest creation for the benefit of a creditor (a person who advances money) by a debtor (the person who receives the advance) over property belonging to the debtor- commercially security creates more certainty in relation to discharge of the debt
- Complex interaction of contract law, statutory law and common law principles
- Security is more than a contractual right and creates “personal” (in personum”) as well as general rights (“in rem”).
- Major advantage- in case of an insolvency or winding up, secured creditors stand outside the winding up process- i.e. secured creditors will

receive their dues irrespective of the dues of unsecured and other creditors

- “Personal” and “Proprietary” rights- personal rights governed by contracts, whereas proprietary right creates an interest against third parties.
 - The personal rights (for e.g., instances of event of default, rights in case of an event of default are exercisable by the creditor against the debtor. Depends on the actual terms and conditions of the contract between the debtor and the creditor
 - The proprietary rights can be exercised by the creditor against third parties, without further reference to the debtor

14.1 Types of security:

- Security can be of various types
 - Contractual (mortgage, hypothecation, charge) v. Operation of law (unpaid vendor’s lien)
 - Possessory (pledge) v. non-possessory [hypothecation]- in possessory security the possession of the security is transferred to the creditor. Mortgage can be both possessory or non-possessory depending on the terms of the mortgage
 - Fixed v Floating
 - Fixed Charges- specific property is identified and the charge attaches to such property- restricts the ability of the debtor to deal with the property
 - Floating Charge- The charge “floats” over the property but does not fasten or attach itself to particular property till the occurrence of particular events, e.g. a failure to pay an amount due at which point it “crystallizes” and affixes itself to specific property.

- Major types of security- mortgage, charge/ hypothecation, pledge, lien.

15.0 Priority of Claims:

15.1 What is priority of claims?

- Priority denotes the order in which different persons with interest in a particular property can have recourse against the property
- Security rights are relative and not absolute
- “First Charge”- merely a description of the nature of the security which the charge gives
- Priority in non-contentious case generally means that the proceeds of realization of the charged asset will be applied for the satisfaction of subsequent secured debts in the order of their priority

16.0 How is priority created?

- *memo dat quad non habet* - a man cannot grant what he does not have- therefore once security is created for the benefit of one party it cannot be created for the benefit of a subsequent party
- Priority therefore depends of the order in which the charge is created
- General order of priority
- Sharing and ceding of priority
 - Creditors can expressly agree to allow another creditor to have the same level (*pari passu*) priority or even cede priority to a subsequent charge- this is achieved through a charge ceding letter

- Enforcement and priority
 - The remedy of enforcement follows the priority right- i.e. the right of a mortgagor to foreclose is subject to that of prior mortgagees.
 - Any sale by a first charge holder can be made without the consent of subsequent charge holder
 - Any attempted sale by a subsequent charge holder will depend on and be subject to the prior charges.
 - A prior mortgagee can require a subsequent mortgagee to “step-down” in favour of the prior mortgagee exercising its own rights
 - A prior mortgagee may intervene to displace the possession of a subsequent mortgagee.

17.0 Enforcement:

- Enforcement without intervention of court (in case of English Mortgage)
 - Enforcement could be through sale of the property concerned or by appointment of a receiver
 - Section 69 – foreclosure without intervention of Court is permitted in case of English Mortgage or when the power of sale is expressly specified in the contract forming the mortgage
 - Section 69(2) – power of private sale or appointment of receiver can be exercised only after a period of 3 months from (i) sending of notice in writing requiring payment of the outstanding debt; and (ii) the amount pending is in excess of Rs 5000.
 - Enforcement without intervention of Court not possible for equitable mortgage (deposit of title deeds)
- Appointment of Receiver- Section 69A- the Receiver is empowered to deal with the property and recover the amounts through income from the property
- Enforcement through court process

- Court appointed receiver
- Enforcement is governed by the provisions of the Code of Civil Procedure, 1908
- Order 34 of the CPC provides for suits related to mortgages over immovable property
- Specialized legislation
 - Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (DRT Act)
 - Securitization and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002 (SARFAESI)
- Use of Proceeds- Section 69(4)
 - The proceeds recovered from the sale of the secured property shall first be applied to the discharge of prior encumbrances to which the property is subject
 - The remaining amount shall be held in trust for application in the following manner:
 - Payment of costs and expenses of enforcement
 - Discharge of the debt due
 - Payment to the other claimants, i.e. other encumbrances
 - Residual amount to be paid to the debtor.

18.0 Execution of a Mortgage :

The next major issue is: what is the manner in which a mortgage may be executed? Section 59 of the Transfer of Property Act 1882 provides us assistance in this regard. Under section 17(1) of The Registration Act 1908 , It provides that when the principal money sought to be secured is over Rupees One hundred, then every mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument signed by the mortgagor and attested to by two other witness at least.

If the principal money is below taka one hundred, then it may be effected either by a registered instrument as above or, except in the case of a simple mortgage, by delivery of the property. Remember, that the point of determination of value here is not the property mortgaged but the p considered in determining the value. *Kunhi Amma v. Ahmed*, (1900) ILR 23 Mad 105. Any registered instrument must meet three requirements:

- It must be in writing;
- It must be signed by the mortgagor; and
- It must be attested to by at least two witnesses.

`It is imperative to note that without such a registered instruments where the law requires one, there is no transfer of property. You must remember that only on registration does the mortgage become complete and enforceable` *Muthiah Chettiar v. Official Receiver Tinnevelly*, AIR 1933 Mad 185. Once registered, it takes effect from the date of the execution of the document. *Nabadweepchandra Das v. Lokenath Roy*, AIR 1933 Cal 212.

19.0 Transfer when complete:

`In the absence of a contract to the contrary the complete of the mortgage does not depend upon the payment of consideration .the transfer takes effect on the execution of the deed of mortgage ,` or where there is no deed, when possession of delivery .(*Raghunath vs Amir Baksh* 1922 ILR)

20.0 RIGHTS AND LIABILITIES OF MORTGAGOR:

The rights and liabilities of a mortgagor under a mortgage are as under:

20.1 Right of mortgagor to redeem:

Section 60, Transfer of Property Act provides that at any time after the principal money has become due, the mortgagor has right on payment or tender, at a proper time and place, of the mortgage money, to require the mortgagee

- i. to deliver to the mortgagor the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee;
- ii. where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor; and
- iii. at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and where the mortgage has been effected by a registered instrument to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgage has been extinguished:

Provided that the right conferred by this section has not been extinguished by the act of the parties or by decree of court.

If there is provision to the effect that if the time for payment of principal money has been allowed to pass or no such time has been fixed, the mortgagee will be entitled to reasonable notice before payment of the principal money, and then it will not be invalidated by Section 60 of the Transfer of Property Act.

Further, the property is indivisible and no part of the property can be redeemed by paying part of the money, unless the mortgagee has acquired the share of the mortgagor in whole or in part. Thus, the right to redeem arises when the principal money becomes due and is paid. It cannot be defeated or taken away by an agreement to the contrary between the parties. (*Seth Gangadhar v. Shankerlal*, AIR 1958 SC 770)

Illustration:

Soha executes a usufructuary mortgage on her house in favour of Kareena for a loan of Rupees Ten lakhs with interest at twelve per cent per annum. Over two years, she repays the entire amount to Kareena. On the repayment of money, Soha is entitled to ask Kareena to return all the documents related to the mortgage along with the possession of the property and execute a registered acknowledgement that Kareena no longer has any interest in property after the mortgage has been extinguished. This is the right of redemption that Soha enjoys

In *Balakrishana vs Ranganath* AIR 1951 Nag 171, the court held that the right of redeem can only be extinguished by-

1. act of parties or
2. a decree of court .

`The disappearance of mortgage with the payment of mortgage money by mortgagor can in no way affect the tenancy right inasmuch as the tenancy right is an independent transaction which has no relationship with the part transaction` [*Noor Ahmed vs Md Safi* 22DLR (WP) 39]

`Any condition imposed in the deed of mortgage itself which places any restrictions on the right of redeeming the mortgage is a clog in the equity of redemption and as much repugnant to law and void. ` (Mir Zaman vs Ashraf Khan PLD 1959)

20 .1.0 The doctrine of clog on the right of redemption:

The *doctrine of clog on the right of redemption* provides that if there is any clog or obstruction or condition that is inserted in the mortgage agreement to prevent the mortgagor from exercising his right to redeem on payment of the debt or obligation, then such a clog or fetter is void. Remember that a mortgage is always redeemable and the mortgagor's right to redeem cannot be taken away or limited by any contract between the parties` *Stanley v. Wilde*, (1899) 2 Ch 474; *Murarilal v. Dev Karan*, AIR 1965 SC 225.

`Such a limitation is tantamount to exploitation of the adversity of the mortgagor by the mortgagee who loans the Money` *U. Nilan v. Kannayyan*, AIR 1999 SC 3750 Even if a condition gives a collateral benefit to the mortgagee in lieu of the mortgage instead of depriving the mortgagor of his right of redemption directly, such a condition is void and unenforceable.

Illustration:

Under the terms of the mortgage, the mortgagor, Deepika agrees to forgo her right of redemption in exchange for a monthly payment of Rupees Five thousand by the mortgagee, Sonam. This provision is invalid since Deepika's right to redeem on pre-payment is an absolute right and even the payment of consideration does not validate a bar on the right of redemption.

20.1.2 Doctrine of clog on the equity :

Peter Butt [1831] refers to the “time honoured brocard of equity”, “once a mortgage, always a mortgage”. This means that once a transaction is categorised as a mortgage any provision that is inconsistent with the mortgagor’s right to have a reconveyance of the property upon payment of the mortgage sum is invalid. Any attempt to prevent a reconveyance is said to be a “clog on the equity of redemption”.

Butt refers to many cases where the courts have ruled on attempts to clog the equity of redemption. He makes the point that the cases are not always easy to reconcile.

The basic principle is that a “mortgage cannot be made irredeemable”. Equity will not allow any provisions or devices that allow this to occur.

The long established rule is that a mortgagee cannot as part of the mortgage transaction take an option to purchase the mortgaged property as this would give the mortgagee the “power to extinguish the equity of redemption”.

The rule will only be applied where the right to acquire the equity of redemption is granted as part and parcel of the mortgage transaction.

In **Kreglinger v New Patagonia Meat & Cold Storage Co** [1914] AC 25 the New Patagonia Meat & Cold Storage Co Ltd carried on a business of preserving meat. Kreglinger carried on business as wool brokers and agreed to lend to New Patagonia the sum of £10,000.00 for a period of 5 years with a proviso that New Patagonia could repay the loan at any time upon giving one month’s notice. Notice was given and the loan was repaid in full in January 1913, well before the repayment date of 30 September 1915.

In addition to the provisions concerning the payment of interest and the repayment of the principal sum, the mortgage document provided that during a period of 5 years from 24 August 1910 New Patagonia would not sell sheep skins to any person, firm or company “other than the lenders so long as the lenders are willing to purchase the same at a price equal to the best price (c.i.f. London) offered for the same by any such other person, firm or company.”

20.2 Obligation to transfer to third party instead of re-transference to mortgagor:

Section 60 A, Transfer of Property Act provides that where a mortgagor is entitled to redemption, then on the fulfilment of any conditions on the fulfilment of which he would be entitled to require a retransfer, he may require the mortgagee, instead of retransferring the property, to assign the mortgage debt and transfer the mortgaged property to such third person as the mortgagor may direct the mortgagee and the mortgagee shall be bound to assign and transfer accordingly.

The provisions of this section do not apply in the case of mortgagee, who is or has been in possession.

20.3 Rights to inspection and production of documents:

Section 60 B, Transfer of Property Act provides that a mortgagor as long as his right of redemption subsists, shall be entitled at all reasonable times at his request and at his own cost, and on payment of the mortgagee cost and expenses in this behalf, to inspect and make copies or abstracts of or extracts from documents of title relating to the mortgaged property which are in the custody or power of the mortgagee.

In the case where the mortgagor deposits the price of redemption fixed by the

court , the mortgage comes to an end . sec 60 of the act which provides for the right of mortgagor to redeem has a proviso which is to the effect that such a right is subsisting provided the said right has not been extinguished by the act of parties or by a decree of a court . there is no dispute over this proposition .` (Paily vs K. Augusty AIR 1967 Ker 247)

20.4 Rights to redeem separately or simultaneously :

Section 61, Transfer of Property Act provides that a mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately or any two or more of such mortgages together.

Illustrations :

1) A, the owner of farms Z and Y, mortgages Z to B for TK 1000 and afterwards mortgages Y to B for 1000 .A may instate a suit for the redemption of the mortgage of Z alone ,B, the mortgagee , cannot compel A to redeem both Z and Y together .

2) A, the owner of farm Z, mortgages Z to B for TK 5000 .Later ,A mortgages Z again to B for TK 3000 .When the principal money becomes due, A may redeem either the prior mortgage of TK 5000 or latter mortgage of TK 3000 or both.

20.5 Right of usufructuary mortgagor to recover possession:

Section 62, Transfer of Property Act provides that in the case of usufructuary mortgage, the mortgagor has a right to recover possession of the property together with the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee.

(a) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property, when such money is paid;

(b) where the mortgagee is authorized to pay himself from such rents and profits the interest of the principal money, when the term (if any) prescribed for the payment of the mortgage money has expired and the mortgagor pays or tenders to the mortgagee the principal money or deposits it in Court as hereinafter provided.

Illustration:

A borrowed TK 5500 from B, and in the July 1881, executed a usufructuary mortgage of his village to B for a period 15 years. In November 1881, A borrowed a further sum of TK 2500 from B executed another document promise to repay the sum with interest within 15 years. The deed then provided I shall first pay of this debt, including the principal and interest, and thereafter I can redeem the mortgaged village, having paid up the mortgaged money. Without the payment of the debt, I cannot redeem the mortgaged village held that this subsequent deed created a further charge on the village and that he was entitled to remain in possession until both debts and discharges.

20.6 Accession to mortgaged property:

Section 63, Transfer of Property Act provides that where mortgage property in possession of the mortgagee has during the continuance of the mortgage received any accession, the mortgagor upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

Different ways of accession :

- 1) Natural causes.
- 2) Acquired by the mortgagee at his own expense.

20.6.1 Natural causes: The general rule is that such accession mortgaged property are subject to redemption .for instance , where the area of a village mortgaged without specification of boundaries was increased at a survey settlement , the mortgagor was held to the increase .[Sadashiv Anant vs Vithal (1874) 11 Bomb]

20.6 .2 Acquired by the mortgagee at his own expense: There are two ways of acquired accession-

- A. acquired accessions which are separable.
- B. acquired accessions which are inseparable.

`Mortgagor liable to pay cost for improvement when any of the tests under the section fulfilled.` (State Bank of Pakistan vs Khaledar Ma 14 DLR 735)

` Where a usufructuary mortgagee takes upon himself the burden of paying of the rent of the property under mortgage and makes the stipulation that if for the any default in payment of rent the mortgage property is lost on account of sale

for arrears of rent and purchased by the mortgagee or his successor in interest ,that purchase will ensure to the benefit of the mortgagor ,specially where the purchase take place in relation to a decree for arrears of rent for the period under mortgage.`(Mvi.Safayet Ali Shah vs Annada Prosad Roy 7 DLR 222)

20.7 Improvements to mortgaged property:

Section 63A (1), Transfer of Property Act provides that where mortgaged property in possession of the mortgagee has during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement and the mortgagor shall save only in cases provided for in sub-section (2) be liable to pay the cost thereof.

Exceptions :

Sub – section 2 of 63A ,lays down that the mortgagor shall be liable to the cost of improvement in the following cases only-

- a. if improvement was necessary to preserve the property from the destruction of or deterioration or
- b. was necessary to prevent the security from becoming insufficient or
- c. was made in compliance with the lawful order of any public servant or public authority.

20.8 Renewal of mortgaged lease:

Where the mortgaged property is a lease, and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall in absence of a contract by him have the benefit of the new lease.

`Contract of sale does not pass title to the property.` (Ashutosh Mali vs Shamsunnaha 33 DLR 254)

20.9 Mortgagor power to lease:

Section 65A(1), Transfer of Property Act provides that a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

20.9.1 Conditions:

- a. The lease shall be such as would be made in the ordinary course of management of the property and in the accordance with any local law, custom or usage.
- b. The lease shall reserve the best rent that can reasonably be obtained and no premium shall be paid or promised by the lessee and no rent shall be payable in advance.
- c. The lease shall operate from a date not later than six months from the date on which it is made.
- d. In the mortgaged property be a building ,the duration of the lease shall in no case be more than three years , and the lease shall contain a covenant for payment of the rent and a condition of re entry on the rent not being paid within a time therein specified.

20.9.2 Legal position before enactment of this section 65A:

``A mortgagor in possession may grant a lease conformable to usage in the ordinary course of management ,for instance , he may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses.but he is not competent to grant a lease-

- a. On unusual terms
- b. To alter the character of the land
- c. To authorise its use in a manner or for a purpose different from the mode in which he had himself used before he granted the mortgage.`` (Madan Mahon Singh vs Raj Kishore AIR 1917 Cal 222)

20.10. Waste by mortgagor in possession:

Section 66, Transfer of Property Act provides that a mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act, which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

A security is insufficient, unless the value of the mortgaged property exceeds by one-third or, if consisting of buildings, exceeds by one-half the amount for the time being due on the mortgage.

`A mortgagor in a simple can permanently lease out mortgaged property provided by such act the mortgage security is not rendered insufficient.` (Kali Prasad Chakravarty vs Jitendra Narayan Chowdhury 4 DLR 15)

21.0 RIGHTS AND LIABILITIES OF A MORTGAGEE:

21.1 .0 The Rights of mortgagee:

The rights of a mortgagee are as under:

21.1.1 Right to foreclosure for sale:

Section 67 is the counterpart of section 60 , gives the mortgagee a right of foreclosure or sale in default of redemption by the mortgagor .if the mortgagor has paid or deposited the mortgaged money ,there is no occasion for exercise of the right of foreclosure or sale. If a decree for redemption is made ,a suit for foreclosure or sale would be infructuous ,especially as a redemption decree itself provides sale or foreclosure in default of payment.

A simple mortgage cannot foreclosure .his remedy is to a suit for sale of the mortgaged property in order to realise the mortgage debt.

``If the mortgage is not foreclosed and the mortgagor`s right to redemption is not debarred .so far as the right of redeem is concerned .a mortgage by a conditional sale like other mortgages will be governed by provision the transfer of property act.`` (Hasina Begum vs Haji Md Ekramullah 34 DLR 116).

``Stipulation that if money is not paid within years the purchase shall have right to foreclose.``(Moulovi Rahul Amin vs Bazal Huq 31 DLR 165)

21.1.1.0 Partial of foreclosure or sale:

The last paragraph of section 67 is an illustration of the rule indivisibility of mortgage. The rule is that one of the several mortgages cannot foreclosure or sell in respect of his share unless of several mortgages have ,with consent of of the mortgagor ,severed their interests under his mortgage. The reason for the rule is to protect the mortgagor from being harassed by a multiplicity of a suit where the severance of interests of the mortgagees has taken place without consent of mortgagor. Accordingly, all the co-mortgagees must join together and file on suit is respect of the whole mortgage- money.

21.1.2 Right to sue for mortgage money:

Section 68, Transfer of Property Act state that the mortgagee has a right to sue for the mortgage money in the following cases and no others, namely:

- i. Where the mortgagor binds himself to repay the same;
- ii. Where, by any cause other than the wrongful act or default of the mortgagor, or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of section 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so;
- iii. Where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor;
- iv. Where the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the

possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor;

Provided that, in the case referred to in clause (a), a transferee from the mortgagor from his legal representative shall not be liable to be sued for the mortgage money.

21.1.3 Right of power of sale of mortgaged property, if any

Section 69(1), Transfer of Property Act provides that the mortgagee, or any person acting on his behalf, subject to the provision of this section, have power to sell or concur in selling the mortgaged property, or any part thereof in default of payment of the mortgage money, without the intervention of the Court, in the following cases and in no others, namely:

- i. Where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Mohammedan or Buddhist, or a member of any other race, sect, tribe or class from time to time specified in this behalf, by the State Government in the Official Gazette;
- ii. Where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage deed, and the mortgagee is the Government;
- iii. Where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage deed, and the mortgaged property or any part thereof, was on the date of the execution of the mortgage deed, situate within the towns of Calcutta, Madras, Bombay, or in any other town or area which the State Government may by notification in the Official Gazette, specify in this behalf.

No such power shall be exercised unless and until

- i. notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money or of part thereof, for three months after such service or;
- ii. Some interest under the mortgage amounting at least to five hundred rupees, is in arrear and unpaid for three months after becoming due.

21.1.4 Right to appoint a receiver:

Section 69A, Transfer of Property Act provides that a mortgagee having the right to exercise a power of sale under section 69 shall, subject to the provisions of sub-section (2), be entitled to appoint by writing signed by him or on his behalf, a receiver of the income of the mortgaged property or any part thereof.

21.1.5 Right to accession to mortgaged property:

Section 70, Transfer of Property Act state that if after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall for the purposes of the security, be entitled to such accession.

Illustrations:

- a) A mortgages to B a certain field bordering on a river . the field is increased by alluvion . for the purposes of his security , B is entitled to this increase .
- b) A mortgages a certain plot of building land to B and afterwards erects a house on the plot . for the purposes of his security , B is entitled to the house as well as the plot.

``This section is not limited to physical or natural accretions but also embraces an increase or enlargement of interest .thus ,if the mortgagor discharges a prior mortgage existing at the date of the mortgage ,the increase in value of the state is for benefit of the mortgagee.``([Shyma Charm vs Anand Candra 1898 3 Cal wn 323](#))

21.1.6 Right to the benefit of the renewed lease:

Section 71, Transfer of Property Act state that where the mortgaged property is a lease, and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall for the purposes of the security be entitled to the new lease.

21.1.7 Right of mortgagee in possession:

Section 72, Transfer of Property Act state that a mortgagee may spend such money as is necessary.

- i. for the preservation of the mortgaged property from destruction, forfeiture or sale;
- ii. for supporting the mortgagor title to the property;
- iii. for making his own title thereto good against the mortgagor; and
- iv. when the mortgaged property is a renewable leasehold, for the renewal of the lease,

And may, in the absence of a contract to the contrary, add such money to the principal money at the rate of interest payable on the principal, and, where no such rate is fixed, at the rate of nine percent per annum.

21.1.8 Right to proceeds of revenue sale or compensation on acquisition :

Section 73, Transfer of Property Act state that (1) Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of any surplus of the sale proceeds remaining after payment of the arrears and of all charges and deductions directed by law.

(2) Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894, or any other enactment for the time being in force providing for the compulsory acquisition of immoveable property, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of the amount due to the mortgagor as compensation.

(3) Such claims shall prevail against all other claims except those of prior encumbrances, and may be enforced notwithstanding that the principal money on the mortgage has not become due.

21.2.0 Liabilities of mortgagee :

The liabilities of a mortgagee are as under:

21.2.1 Liabilities of mortgagee in possession:

Section 76, Transfer of property Act provides that when, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property:

- i. he must manage the property as a person of ordinary prudence would manage it if it were his own;
- ii. he must use his best endeavours to collect the rents and profits thereof;
- iii. he must, in the absence of a contract to the contrary, out of the income to the property, pay the Government revenue, all other charges of a public nature and all rent accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold;
- iv. he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rent and profits thereof after deduction from such rents and profits the payments mentioned in clause (c) and the interest on the principal money;
- v. he must not commit any act which is destructive or permanently injurious to the property;
- vi. where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy, or so much thereof as may be necessary in re-instating the property, or, if the mortgagor so directs, in reduction of discharge of the mortgage

money;

- vii. he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported;
- viii. his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation rent in respect thereof, shall after deducting the expenses properly incurred for the management of the property and the collection of rents and profits and the other expenses mentioned in clauses (c) and (d) and interest thereon, be debited against him in reduction of the amount (if any), from time to time due to him on account of interest and , so far as such receipts exceed any interest due, in reduction or discharge of the mortgage money; the surplus, if any, shall be paid to the mortgagor;
- ix. when the mortgagor tenders or deposits in a manner hereinafter provided, the amount for the time being due to on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his receipts from the mortgaged property from the date of the tender, or from the earliest time when he could take such amount out of the Court, as the case may be, and shall not be entitled to deduct any amount there from on account of any expenses incurred after such date or time in connection with the mortgage.

``When the deed is admitted to be a mortgage deed by both the parties , the mortgagor ,the plaintiff in the redemption suit ,is certainty entitled to accounts under section 76 the transfer of property act.``(Eshad Ullah Haji vs Muhammad

Hussain 3 DLR 480)

``If the mortgage of a leasehold property amounts to an assignment or transfer , the mortgage would be liable for the rent to the landlord.``(Haraden Der vs Moazin Hussain 6 DLR 220)

21.2.2 Loss occasioned by his default:

The last paragraph of Section 76, Transfer of property Act provides that if the mortgagee fails to perform any of the duties imposed upon him by this section, he may, when accounts are taken in pursuance of a decree made under this Chapter, be debited with the loss, if any, occasioned by such failure.

21.2.3 Liability to bring one suit on several mortgages:

Section 67A, Transfer of Property Act provides that a mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under section 67 and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage money has become due.

22.0 Priority in Mortgages:

22.1 The general rule:

We will look at the rules relating to priority. Now, a single property may be mortgaged several times over. Priority, here, signifies the priority in the payment of mortgage money. the fundamental rule is he who is prior in time in right (qui prior est tempore postior est jure). A prior mortgagee has priority over another mortgage administered by the mortgagor subsequently.(*Maula Baksh v. Inam Din*, AIR 1927 Lah 81)

Therefore, if the prior mortgagee is shown to act dishonestly or disingenuously, which leads to the deception of the subsequent mortgagee, the prior mortgagee will be deprived of his priority. (*Salamat Ali v. Budh Singh*, (1879) 1 All 303).

Illustrations:

- a) A property of the value of TK 10000 is mortgaged first to A for TK 5000 and then to B for TK 2000 and then to C for 1000. If the mortgage money is not paid and the property comes to be sold, A will get his money first, and then out of the balance B will be paid before C.
- b) Asha had mortgaged her house to Bipasha. However, she could not repay the mortgage amount. To keep her house, she executed a second mortgage in favour of Aisha for half the amount of the original mortgage. However, Asha and Bipasha colluded and withheld from Aisha knowledge the existence of the first mortgage.

In such a case, Bipasha would lose her priority over the property and Aisha would be entitled to all the benefits of being a prior mortgagee.

22.2. 0 Exceptional rule:

When a mortgagee has been admitted through fraud, misrepresentation, or gross neglect of the prior mortgagee, then the prior mortgage is postponed to the subsequent mortgage and the subsequent mortgagee gains priority in payment of mortgage money by the operation of Section 78 of the Transfer of Property Act 1882.

Illustration:

A has advanced money TK 5000 to B by way of deposit of title deed, before advancing money to B enquires of A whether property is free from encumbrance and A does not mention his own mortgage and tells C that the property is free from mortgage. In such circumstance C will have priority over A.

The three occasions on which of a previous mortgagee may be lost or postponed are when the prior mortgagee is guilty of –

- a. Fraud (define 17 of contract act 1872)
- b. Misrepresentation (define 18 of contract act 1872)
- c. Gross negligence

22.2.a Fraud:

Fraud has been defined by Anson as "a false representation of fact made with the knowledge of its falsehood or recklessly without belief in its truth, with the intention that it should be acted upon by the complaining party and actually inducing him to act upon it". So,

- (i) Fraud is a representation of fact which is false. A representation of fact is different from a statement of opinion; for, in the latter case, the person making the statement does not invite the other party to accept the opinion as true.
- (ii) The false statement must be made with the knowledge of falsehood or recklessly. Fraud is thus distinguished from innocent misrepresentation.
- (iii) The false statement must be made with an intention to deceive.

(iv) The person to whom the false statement has been made must be actually deceived; or, in other words, a false statement is not actionable unless it causes injury to the person to whom it has been made

22.2. b.Misrepresentation:

Misrepresentation is the positive assertion of something, which is not true though the person making it believes it to be true. Thus defined, misrepresentation means innocent misrepresentation as distinguished from fraudulent misrepresentation where there is a wrongful intention to deceive.

22.2.c. Gross negligence:

Gross negligence does not mean mere carelessness but means carelessness of aggravated nature as to indicate an attitude of mental indifference to obvious risks.

Gross negligence is a degree of negligence so gross that a court of justice may treat it as evidence of fraud, impute a fraudulent motive to it and visit it with the consequence of fraud, although, morally speaking the party charged may be perfectly innocent. (By Wigram J.V.C. in case of *Jones vs Smith* 1841 1 Hare 41)

22.2. A. Distinction between fraud and misrepresentation:

(i) The distinction between the two turns mainly on the intention of the parties. If the defendant has made the false statement with an intent to deceive another, the action is fraudulent. If no such deceitful intention is present, the action constitutes misrepresentation.

(ii) Misrepresentation entitles the affected party to avoid the contract if he does not desire to have it fulfilled. But in a case of fraud, not only is the contract

voidable but also the party on whom fraud has been practiced can sustain an independent action in tort for damages.

22.2.1 Exceptional rule:

A mortgagee who makes a further advancement of money can gain priority for that subsequent advance over an intermediate encumbrancer, if the latter has notice of the earlier mortgage. Here, the earlier mortgage must specify the maximum amount to be secured and allowed for future advances. Then, to the extent of the maximum amount expressed, any further advances can be tacked on to the prior mortgage by the operation of Section 79 of the Transfer of Property Act 1882. However, in any other case, such tacking of subsequent advancement is prohibited by Section 93 of the Transfer of Property Act 1882. Further, by paying off a prior mortgage, a subsequent mortgagee with or without notice of the intermediate mortgagee cannot acquire priority

Illustration:

- a. A mortgages Sultanpur to his bankers, B & Co., to secure the balance of his account with them to the extent of Tk. 10,000. A then mortgages Sultanpur to C, to secure Tk. 10,000, C having notice of the mortgage to B & Co., and C gives notice to B & Co. of the second mortgage. At the date of the second mortgage, the balance due to B & Co. does not exceed Tk. 5,000. B & Co., subsequently advance to A sums making the balance of the account against him exceed the sum of Tk. 10,000. B & Co., are entitled, to the extent of Tk. 10,000, to priority over C.
- b. Asha mortgages her house to Bipasha for a total of Rupees Ten lakhs. Asha is to receive this amount in two parts over two years. After receiving Rupees Five lakhs in the first year, she carries out a second

mortgage in favour of Aisha for Rupees Seven lakhs. Subsequently, she claims the remaining Rupees Five lakhs from Bipasha as per the terms of that mortgage. In this case, the subsequent amount paid by Bipasha will have priority over Aisha's mortgage amount as the further advancement of money was tacked to the first mortgage and was part and parcel of it. Therefore, as long as Aisha was given notice of the terms of the prior mortgage, the subsequent Rupees Five lakhs paid by Bipasha will be considered as part of the prior mortgage only.

23.0 Marshalling:

Section 81, Transfer of property Act provides that if the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee is, in the absence of a contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties.

23.1 Conditions:

- a. There must be a common mortgagor or debtor.
- b. There must be two or more such property.
- c. The property must be immoveable property.
- d. Such property must give mortgage to two mortgagees.
- e. There is no contract to the contrary.
- f. The owner of property and such mortgagees are several persons.
- g. It must not to prejudice prior mortgagee.

Illustration:

A mortgages X and Y, property, to B and then mortgages Y alone to C. if B seeks to realise his mortgage out of Y, C can compel to proceed first against X and realise the debt from it .in case B is unable to realise the whole amount due to him from X, he is entitled to recover he balance from Y.

In Aldrich vs Cooper (1803) 8 Ves. 382, Lord Eldon held that if a creditor has two funds, the interest of the debtor shall not be regarded , but the creditor having two funds shall take that which playing him will leave another fund for another creditor .Accordingly , if a person has two estates mortgaged both to one mortgagee, and afterwards only one estate to a second mortgagee, the court will direct the first to realise in the first place out of the estate which is not mortgaged to the second mortgagee so as to leave the second estate to the second the mortgagee. The underlying principle behind the doctrine is that fair play and justice requires that one man should not be permitted capriciously or wilfully to do an injury to another.

23.2 Limitations of this rule:

The claim to marshal must not be a allowed to prejudice the rights of the first mortgagee or of others person who have acquired an interest for consideration.

Illustration:

If two estates ,X and Y belong to the same person are first mortgaged to B, then X is mortgaged to C and then Y to D, C would not be permitted to compel B to marshal in his favour, if that course would prejudice D. Similarly, D could not compel B to resort in the first instance to the estate X. the case would be for contribution under the first paragraph of section 82.as between C and D, B is

bound to satisfy himself out of two estates rateably, and thus to leave the surplus proceeds of each estate to be applied in the payment of the respective mortgages therein.

The right of marshalling may be excluded by a contract between the parties. It is applicable in moveable property.

24.0 Rule of Contribution:

Between two or mortgagors of the same property, the rule of contribution to mortgage debt under Section 82 of the Transfer of Property Act 1882, applies to all the mortgagors and any purchasers from them. The contribution claim arises when:

- a. The items mortgaged are owned by different persons and one of the owners has paid more than his proportionate share.
- b. The liability is not a personal one. It is imposed in the mortgaged property only.

The claim to contribution may be made by a mortgagor or a person claiming through him who has paid more than his proportionate share of the mortgage debt.

Between them, the mortgagors are liable to contribute in proportion to the value of their respective items. The value of each item is determined as on the date of the mortgage.

The obligation under Section 82 of the Transfer of Property Act 1882 may be altered by a contract either between the mortgagee and the mortgagors or between the mortgagors inter se.

Illustration:

Property X is mortgaged for TK to A. properties X and Y are mortgaged for TK 400 to B .X and Y are each worth TK 500 .X is sold to C and Y to D. The contribution of C and D to the mortgage of TK 400 in the ratio of 300 to 500, and C is liable for 150 and D for 250 .As a consequence of this rule, the who has paid in excess of his share or who has discharge the whole is entitled to be reimbursed by the others,if B has recovered the whole debt of TK 400 from C`s property X,C would be entitled to recover TK 250 from D by suit for contribution.

25.0 Miscellaneous rules:

There are only a few other rules that remain to be studied now. Under Section 83, the mortgagor or any person entitled to institute a suit for redemption has the power to deposit the money due to the mortgagee in the court before such a suit for is barred. Thereafter, a written notice is given by the court of the deposit to the mortgagee who may accept the amount due, deposit the mortgage deed in court, and apply for and receive the money. The deed and other documents are then delivered to the mortgagor.

Under Section 84 of the Transfer of Property Act 1882, the mortgagee's interest ceases after the mortgagor deposits in court the money due *and* does all that has to be done by him to enable the mortgagee to take such amount out of the court and notice is served upon the mortgagee.

“Mere notice without deposit of money or a conditional tender of money does not lead to cessation of interest.” (*Shriwrayan v. Bhaskar*, AIR 1954 Nag 193; *Sitaram v. Ramrao*, AIR 1931 Nag 91) The interest on the principal money ceases from the date of such tender or deposit.

For redemption, Section 91 of the Transfer of Property Act 1882, provides that, in addition to the mortgagor, any person who has an interest in the property including a surety for the payment of the mortgage debt and a creditor of the mortgagor who has obtained a decree for the sale of the mortgaged property in a suit for the administration of his estate, can file a suit for redemption.

The rights of the mortgagee against the mortgagor will be subrogated to the person who files the suit for redemption and redeems the property by the operation of Section 92 of the Transfer of Property Act 1882.

By the application of the *doctrine of subrogation*, that person stands in the shoes of the mortgagee and acquires all the rights that he may have had against the mortgagor.

Further, under Section 95 of the Transfer of Property Act 1882, if the person to whom the rights are so subrogated is one of many mortgagors enforcing their subrogated rights, he will also be entitled to add to the mortgage money recoverable from the remaining mortgager such proportion of the expenses properly incurred in such redemption, as can be attributed to their share in the property.

26.0 Conclusion:

Mortgage was critically discussed in the Transfer of Property act 1882.it creates balance between rights and liability of mortgagor and mortgagee. Mortgage is very important for transfer of immoveable property .In the present age; there are many conflicts between parties with property. It is very essential to know this act for solving that problem .it must be applied appropriately among people. Mortgage means transfer any immoveable property for security of money loan or advance or future debt.

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