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AN ANALYSIS ON THE CHARACTERISTICS OF LEGAL MORTGAGE IN A WIDENED LENS OF INTERPRETATION

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Abstract

Most of the people would have come across the term "mortgage" in their daily lives or when applying for a loan to purchase real estate. A mortgage, in simple terms, is a legal agreement between a debtor and a creditor, such as a bank or a society (creditor), wherein the debtor accepts to transfer his interest in the property to creditor till the loan is repaid. As a result, a mortgage is formed in the lender's favour on the immovable property (creditor). As per the Transfer of Property Act (TPA) of 1882, there exist six types of Mortgages and each one of them has its own advantages and disadvantages. This paper has outlined the characteristics of a legal mortgage as well as the various methods in which a mortgage deed can be used. It ends by complimenting the commendable move of widening the scope of the mortgage as it is defined in the act, enabling the mortgage procedure to be used in a variety of situations. The paper also explains how the right is not fully unrestricted and can be subjected to reasonable constraints.

Keywords: Transfer of Property, Immovable Property, Mortgage, Equitable mortgage, security of land.

Introduction

Anything that has the capacity and value to be owned by anyone can be considered as a basic definition of the term property. Before the existence of colonial rule in India, it was the personal laws which were applicable for diverse communities on matters regarding transfer of property. The lack of uniform set of laws subsequently led to a situation of ambiguity and uncertainty. This resulted in the appointment of commissions which has the task to consolidate the laws and this ultimately led to the enactment of the TPA. As per the legal system of India, there exists two categories of property namely, movable and immovable property. It is the "Sales of Goods Act of 1930" which governs the transfer of movable property whereas it is governed by the TPA in the case of immovable property. The act but does not cover properties that are acquired by succession and wills. As per Section 5 of the TPA, transfer of property is defined as the act of conveying property to one or more person by a living person. In this case, living person can be an association, body of individuals or even a company also. There exist various modes by which property can be transferred which are as follows: sale, mortgage, gift, lease, rent, actionable claim or exchange. All the above modes of transfer have their own advantages as well as disadvantages. It is the transfer of Mortgage that will be discussed in this particular paper. The term Mortgage is an English term meaning "dead pledge". It is "Section 58 of the TPA" that defines the term mortgage and enlists various kinds of Mortgage. Mortgage is a transfer of interest in the immovable property the purpose of which is to secure the payment of loan created by the act of the parties[55]. Only immovable assets, such as land and other benefits derived from objects

[55] Harbus v. Om Prakash AIR 2006 SC 686.

connected to the earth like, buildings and machinery are eligible for mortgages. Growing crops, grass, and standing wood, on the other hand, are not considered movable property because they are developed for a specific purpose and will be cut or removed for that purpose. One of the important characteristics of mortgage is that a full conversion of landowners does not take place but rather what occurs is transfer of certain interest in the property. The interest thus transferred can act a protection for the loan given. Under a mortgage, the person who borrows or the one who transfers the investment in his immovable property is known as the mortgagor. The person in whose interest the property is mortgaged is known as the mortgagor. The instrument of transfer by which the deed is initiated is known as a mortgage deed. Thus, in mortgage, the mortgagor or creditor lends money to the mortgagee for a certain interest rate in exchange for the transfer of the title of the property as mortgage for a specific period of time based on the condition that the transfer of the title will be void upon the repayment of the loan. Under the TPA, there exists six types of mortgages namely, "Simple Mortgage, Mortgage by conditional sale, Usufructuary Mortgage, English Mortgage, Mortgage by deposit of title deeds and Anomalous Mortgage". It is essential to know the difference between these different kinds of mortgages.

I. Ingredients for a valid mortgage

a. *Transfer of interest*

Mortgage is the transfer of interest in the specific immovable property. As an owner of the property, the mortgagor possesses all the interests associated with it. Thus, when the property is mortgaged, a part of the interest associated with the particular mortgage is departed from the mortgagor. When the property is mortgaged, the interest of the mortgagor is reduced by the interest that has been transferred to the mortgagee. Hence for the time being, the ownership becomes less and the transferee gets the property if it is transferred by the mortgagor. This is subject to the rights of the mortgagee to recover the amount due to him. In short, the mortgage turns out to be a vested remnant after the transaction of the interest in lieu of the mortgage. An agreement of mortgage creates a right in rem and is primarily the transfer of an interest. Thus, mere agreement to mortgage at a future time cannot be qualified as a mortgage deed.

b. *Specific immovable property*

Second essential ingredient is that the immovable property must be specifically mentioned in the mortgage deed. For instance, if the mortgagor mentions "all my property" in the mortgage deed, it cannot be considered as a mortgagor. The reason behind the necessity of mentioning the immovable property specifically and distinctly is that if there is a failure on the side of the mortgagor for repayment of the loan, the court, on a suit by the mortgagee, will be in a position to grant a specific decree for the sale of that particular property. Thus, an explicit identification of the property should be made in the deed, for the purpose of complying.

c. *Consideration of the Mortgage*

The consideration of the mortgage will be met as soon as the loan is secured. It must be noted that the object of a mortgage is to secure a debt and not to discharge a debt. The same was mentioned in the case of Neha Sha v. Muralidhar[56]. Consideration may be either the money advanced in the form of loan or an existing or future deb or the performance of a performance which gives rise to pecuniary liability. While discussing the same another important point that needs to noted is that a mortgage deed is not always executed for an already arisen debt.

II. Types of mortgages

i. *Simple Mortgage*

[56] Nidha Sha v. Murali Dhar AIR 1903.

As per "Section 58(b) of the TPA", "a mortgagor (debtor) promises to pay the loan amount or mortgage money without giving the mortgagee possession of his mortgaged property, he expressly or implicitly acknowledges that if he is unable to pay the loan amount within period specified, the mortgagee does have the authority to sell the mortgaged property through a decree or by acquiring an order from the Court to recover his loan amount". The mortgagee does not take possession of the mortgaged property in case of a simple mortgage. However, when the mortgagor fails to fulfil on his payments, the mortgagee attains the right to sell the mortgaged property, and the mortgagor must handover his right to sale to the mortgagee and is personally made liable to pay the loan, which implies that if the mortgaged property is inadequate to repay the loan amount, the mortgagee can sell it. The mortgagee will not be able to foreclose and keep the property rather than paying the mortgage, but he or she will be able to sell it. In short, the mortgagor retains control of the property in the case of simple mortgage but he binds himself personally to pay the mortgage money and to a clause that states that if he fails to make payment of the loan taken to the mortgagee, the mortgagee can exercise his right. "Ram Narayan Singh v. Adhindra Nath"[57], concluded that keeping certain property as security did not relieve the mortgagor of his personal responsibility to repay the loan and interest. The key feature of a simple mortgage would be that the mortgagee is unable to sell the property without the assistance of the court. In the case of "Kishan Lal v. Ganga Ram"[58], the Court decided that the phrase "right to cause the property to be sold" in Section 58(b) clarifies that the mortgagee will have the right to sell the property only when the Court intervenes. He can either petition to the court for permission to sell the mortgaged property in one of two ways or file a lawsuit in order to recover the whole sum without needing to sell property. Of foreclosure on the property. The mortgagee is referred as a simple-mortgagee in this situation. A simple mortgage, regardless of the amount of money secured, must be made only through a registered deed, as per "Section 59 of TPA".

In the matter of Mathai v Joseph Mary[59], a property was mortgaged as a surety for stridhan. The mortgagor was compelled to pay interest on the loan until it was paid off. The court determined that the deed should be interpreted as a simple mortgage because it did not contain any terms governing the conveyance of possession.

ii. Mortgage by conditional sale

Section 58(c) of TPA mentions about the mortgage by conditional sale. In a conditional sale mortgage, "the mortgagor sells the mortgaged property to the mortgagee with the knowledge that the sale will become final if the mortgagor fails to pay the mortgage money by a certain date". The sale will become void if the payment is not made as per the agreed-upon terms. An ostensible sale is changed into an absolute sale in this type of mortgage. The deal will be transformed into an absolute sale if the ostensible seller is unable to repay the loan. Thus, in a mortgage by conditional sale, the sale becomes unconditional on failure to repay the loan. This is a mortgage in which the ostensible sale is conditional and only serves to secure the obligation. The word is ostensibly used to describe something that looks to be for sale but is not. Possession does not have to follow the ostensible transaction.

In a mortgage by conditional sale, the mortgagee has no right of sale but can sue for foreclosure. In a foreclosure, the mortgagor's right to reclaim the mortgaged property is lost. The mortgagee has the ability to sue the mortgagor to have the mortgagor's right to redeem the property taken away completely. If the payback period has expired and the mortgagor has failed to repay the loan, the

[57] Ram Narayan Singh v Adhindra Nath, AIR 1916 PC 119
[58] Kishan Lal v Ganga Ram 1891 ILR 13 All 28 (41,43).
[59] Mathai v Joseph Mary 2014 INSC 376.

mortgagee has the right to foreclose. The mortgagee will not become the owner of the property without a foreclosure order.

iii. Usufructuary Mortgage

In the case of usufructuary mortgage, the mortgager either provides the mortgagee possession of the property or agrees to give the mortgagee possession of the property. Until the obligation is paid off, the mortgagee retains the right to keep possession of the property. The property can be reclaimed by the mortgagor if the money is returned. Until the loan is entirely repaid, the mortgagee is entitled to receive rents and profits linked to the mortgaged property, and to take the same in exchange of interest or in repayment of the loan, or both. The mortgagee is not immediately liable for the loan's repayment. As a reason, the mortgagee will be unable to pursue the mortgager for repayment. The mortgagee's only alternative is to continue in possession of the property and pay himself out of the rents or profits; he cannot sue for foreclosure or sale of the mortgaged property. Because there is no time restriction, he will have to wait a long period to recoup his debts.

It was held in "Hikmatulla v. Imam Ali"[60] that "*in a usufructuary mortgage, the mortgagee can retain possession of the property until the dues and interest are paid off, and that since there is no time limit prescribed in this mortgage, there cannot be a particular timeframe of possession of the property, and if a time limit is stipulated, it will not be considered a usufructuary mortgage*".

In the case of "Butto Kristo v. Govindram"[61], the Court determined that "*if the mortgaged property is rented, the only feasible option to surrender ownership is to give up the right to collect the rents*".

iv. "English Mortgage"

The "English mortgage" might be considered an "absolute sort of property transfer to the mortgagee, provided that the mortgagee re-transfers the property to the mortgagor whenever the loan is paid off on a set date". The mortgagor agrees to settle the debt amount on a specified time and transfers the property wholly to the mortgagee on the condition that the mortgagee will restore the property to the mortgagor upon repayment of the principal amount and interest, as indicated in "Section 58(e) of TPA. The Court noted the three essential elements of an English mortgage in "Narayan v. Venkataramana"[62], which included the mortgagor's liability to pay back the money, the property's unconditional transfer, and the mortgagee's obligation to give back the property to the mortgagor once the amount is paid. According to the state government's Official Gazette, the statutory power to sell property in India is limited to small of communities such as Christians. As a result, while Indians can enter an English mortgage, they are unable to sell mortgaged property.

V. Mortgage by deposit of title deeds

A mortgage by deposit of title deeds is a type of mortgage where a person submits the mortgagee or creditor documentation of title to an immovable property as security, according to clause "58 (f) of the 1882 TPA". Such a transaction is known as a mortgage by deposit of title deeds. Such a mortgage is authorized in the cities of Madras, Calcutta and Bombay, as well as any other city designated by the state government. This mortgage does not require registration; simply delivering the immovable property's title deeds to the mortgagee is sufficient. This is a one-of-a-kind mortgage because the mortgagor is not expected to execute the mortgage deed, and simply filing the title-deed documentation is enough to establish a mortgage. The title-deed documents serve as legal proof that the mortgagor is the rightful owner of the property. As a result, many people choose for this mortgage by providing their papers to the mortgagee in order to acquire speedy loans,

[60] Hikmatulla v. Imam Ali 1890 12 All 203.

[61] Butto Kristo v. Govindram AIR 1939 Pat 540.

[62] Narayan v. Venkataramana ILR 1902 25 Madras 220(235) FB.

which is particularly common in the trade community. Equitable mortgage, as it is often known, is a sort of mortgage that was borrowed from English law. A mortgage can be acquired by depositing title deeds without the requirement for any writing or performance of a deed, and is comparable to a simple mortgage, according to Section 96 of the TPA. This sort of mortgage is commonly used by bankers since it is less complex, less expensive, and takes less time, and the mortgagee can file a suit to sell the mortgaged title if the loan is not paid. In United Bank of India v Messra Lekharam Sonam and Co[63] the court found that *"submitting the property's title deed is the only requisite for it to be considered a security"*. Aside from that, there are no further criteria. In "Jethibai v. Putlibai"[64], the Court held that *"there could be no equitable mortgage until there is a clear relationship between the debt owed and the possession of title-deeds, which suggests the debtor's intention of security, and that this can only be achieved after the loan amount is repaid"*. It was held in "R. Janakiraman V/s State"[65], that *"an equitable mortgage cannot be created without the original title deeds being filed, and that no legal mortgage can be claimed unless the original title deeds are deposited."*

vi. Anomalous Mortgage

"Section 58(g) of the TPA", defines the term "anomalous mortgage." An anomalous mortgage is one that is not a mortgage by conditional sale, a simple mortgage, a usufructuary mortgage, an English mortgage, or a mortgage by deposit of title-deeds. As stated, a mortgage created by the combination of two or more different types of mortgages comes under this category. "Hathika v Puthiya Purayil Padmanathan"[66] involved a mortgage in which the mortgagor borrowed a certain amount from the mortgagee in exchange for the mortgagor handing over the property. The mortgagee had the right to sell the property and retrieve the money owing to him if the mortgage was not paid within six months. Even though the contract specified that the mortgage was usufructuary, the court concluded that it was an anomalous mortgage since it had both simple and usufructuary features.

III. Mode of Transfer

A property can be transferred by way of a mortgage in the following manners:

i. **Registered Instrument**: A registered instrument is compulsory in case of a mortgage other than the mortgage by title deeds if the principal money that is secured is an amount that is or more than hundred rupees.

ii. **Delivery of Possession**: If the mortgaged money secured is less than hundred rupees, then the mortgage can be brought into effect by both registered instrument as well as by way of delivery of possession.

iii. **Deposit of Title Deeds:** There exists no legal compulsion that a mortgage by deposit of title deeds need to be reduced into writing.

Suggestions and conclusion

The mortgage principle is one of the fundamental concepts under the TPA section 58 since it helps to protect the mortgagor's debt and also helps in the redemption of the property once the mortgagor pays back the mortgagee. One must have a basic awareness of the many forms of mortgages that exist and are approved in India, as well as the basic components of a mortgage that must be taken into account while putting one together. It is critical to understand the terms and conditions of any immovable property mortgage you take out so that you do not end up with an illegal property transfer. People should also be aware of their rights and obligations as a mortgagor and mortgagee, which differ depending on the sort of loan they take out. The meaning of mortgage under the TPA, must always be

[63] The United Bank of India v Messra Lekharam Sonaram and Co Civil Appeal no. 83 of 1963.
[64] Jethibai v Putlibai 1961 14 Bom. L. R. 1020.
[65] R. Janakiraman v State 2006 1 SCC 697.
[66] Hatika v Puthiya Purayil Padmanathan AIR 1994 Ker. 141.

interpreted in light of "Article 19(1)(f) of the Constitution (44th Amendment) Act", 1978, — the right to acquire, retain, and sell property, as well as the common Right to Property.

References

1)Butto Kristo v. Govindram AIR 1939 Pat 540.

2)Hatika v Puthiya Purayil Padmanathan AIR 1994 Ker. 141.

3)Harbus v. Om Prakash AIR 2006 SC 686.

4)Hikmatulla v. Imam Ali 1890 12 All 203.

5)H. W. Chaplin, The Story of Mortgage Law, Harvard Law Review, Vol. 4, No. 1, Apr 15, 1890, pg. 1-14.

6)Jethibai v Putlibai 1961 14 Bom. L. R. 1020.

7)Jitin Gambhir, An Analysis of the term mortgage under the Transfer of Property Act 1882, JETIR, Vol 6, Issue 2, Feb, 2019.

8)Kishan Lal v Ganga Ram 1891 ILR 13 All 28 (41,43).

9)Mathai v Joseph Mary 2014 INSC 376.

10)Ram Narayan Singh v Adhindra Nath, AIR 1916 PC 119

11)R. Janakiraman v State 2006 1 SCC 697

12)Narayan v. Venkataramana ILR 1902 25 Madras 220(235) FB.

13)Nidha Sha v. Murali Dhar AIR 1903

14)Sivam Goel, Equitable Mortgage: Essentials and Fundamentals, SSRN, (March 20, 2019).

15)1The United Bank of India v Messra Lekharam Sonaram and Co Civil Appeal no. 83 of 1963

16)Poonam Pradhan Saxena, Property Law, Lexis Nexis, 2017.

17)Mayank Burman, Mortgage and its Types, Law Times Journal, May 2019.

18)The Transfer of Property Act, 1882.