Course Name- LL.B 4th sem
Subject- TPA
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Concept- Mortgage(kinds/Rights and Liability of Mortgagor and Mortagagee)

INTRODUCTION

A mortgage is a method of creating charge on immovable properties like land and building. Section 58 of the Transfer of Property Act 1882, define a mortgage as follows:

"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."

In terms of the definition, the following are the characteristics of a mortgage:

(1) A mortgage can be affected only on immovable property. Immovable property includes land, benefits that arise out of land and things attached to earth like trees, buildings and machinery. But a machine which is not permanently fixed to the earth and is shift able from one place to another is not considered to be immovable property.

(2) A mortgage is the transfer of an interest in the specific immovable property. This means the owner transfers some of his rights only to the mortgagee. For example, the right to redeem the property mortgaged.

(3) The object of transfer of interest in the property must be to secure a loan or performance of a contract which results in monetary obligation. Transfer of property for purposes other than the above will not amount to mortgage. For example, a property transferred to Liquidate prior debt will not constitute a mortgage.

(4) The property to be mortgaged must be a specific one, i.e., it can be identified by its size, location, boundaries etc.

(5) The actual possession of the mortgaged property is generally with the mortgager.

(6) The interest in the mortgaged property is re-conveyed to the mortgager on repayment of the loan with interest due on.

(7) In case, the mortgager fails to repay the loan, the mortgagee gets the right to recover the debt out of the sale proceeds of the mortgaged property.

DEFINITION AND NATURE OF MORTGAGE

According to Section 58 of the Transfer of Property Act, 1882, 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 agreement which may give rise to pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest the payment of which is secured for the time being are called the mortgage money and the instrument by which the transfer is effected is called the mortgage deed.

Essentials of a Mortgage

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.

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.

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.

4)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.

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

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.

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

FORMS OF MORTGAGES

Section 58 of the transfer of Property Act enumerates six kinds of mortgages:

(1) Simple mortgage.
(2) Mortgage by conditional sale.
(3) Usufructuary mortgage.
(4) English mortgage.
(5) Mortgage Ly deposit of title deeds.
(6) Anomalous mortgage.

(1)Simple Mortgage
In a simple mortgage, the mortgager does not deliver the possession of the mortgaged property. He binds himself personally to pay the mortgage money and agrees either expressly or impliedly, that in case of his failure to repay, the mortgagee shall have the right to cause the mortgaged property to be sold and apply the sale proceeds in payment of mortgage money.

The essential feature of the simple mortgage is that the mortgagee has no power to sell the property without the intervention of the court. The mortgagee can:
(i) apply to the court for permission to sell the mortgaged property, or
(ii) file a suit for recovery of the whole amount without selling the property.

(2) Mortgage by Conditional Sale
In this form of mortgage, the mortgager ostensibly sells the property to the mortgagee on the following conditions:
(i) The sale shall become void on payment of the mortgage money.
(ii) The mortgagee will retransfer the property on payment of the mortgage money.
(iii) The sale shall become absolute if the mortgager fails to repay the amount on a certain date.
(iv) The mortgagee has no right of sale but he can sue for foreclosure.

Foreclosure means the loss of right possessed by the mortgager to redeem the mortgaged property. The mortgagee has the right to institute a suit for a decree so that the mortgager will be absolutely debarred from his right to redeem the property. The right to foreclosure arises when the time fixed for repayment expires and the mortgager fails to repay the mortgage money. Without the fore closure order the mortgagee will not become the owner of the property.

(3) Usufructuary Mortgage
Under this form of mortgage, the mortgager delivers possession of the property or binds himself to deliver possession of the property to the mortgagee. The mortgagee is authorized to retain the possession until the debt is repaid. The mortgager reserves the right to recover the property when the money is repaid.

The essential feature of this form of mortgage is that the mortgagee is entitled to receive rents and profits relating to the mortgaged property till the loan is repaid and appropriate the same in lieu of interest or in repayment of the loan or both.

The mortgager is not personally liable to repay the mortgage money. So the mortgagee cannot sue the mortgager for repayment. He can neither sue foreclosure nor sue for sale of the mortgaged property; the only remedy for the mortgagee is to remain in possession of the property and pay himself out of the rents or profits of the mortgaged property. Since there is no time limit he has to wait for a very long time to recover his dues.

(4) English Mortgage
The English mortgage has the following characteristics:
(1) The mortgager transfers the property absolutely to the mortgagee. The mortgagee, therefore, is entitled to take immediate possession of the property. The transfer is subject to the condition that the property shall be transferred on repayment of the loan.
(2) The mortgager also binds himself to pay the mortgage money on a certain date.
(3) In case of non-repayment, the mortgagee has the right to sell the mortgaged property without seeking permission of the court in circumstances mentioned in section 69 of the Transfer of Property Act.

(5) Mortgage by Deposit of Title Deeds
When a debtor delivers to a creditor or his agent document of title to immovable property, with an intention to create a security there on, the transaction is called mortgage by deposit of title deeds. Such a mortgage is restricted to the towns of Kolkata, Mumbai and Chennai and other towns notified by the State government for this purpose in the Official Gazette. This type of mortgage requires no registration. This form of mortgage is also known as equitable mortgage.

Legal Mortgage vs. Equitable Mortgage

On the basis of transfer of title to the mortgaged property, mortgages are divided into two types, namely:
(i) Legal Mortgage.
(ii) Equitable Mortgage.

Legal Mortgage

In a legal mortgage, the legal title to the property is transferred in favour of mortgagee by a deed. The deed is to be registered when the principal money is Rs. 100/- or more. On repayment of the loan, the legal title is retransferred to the mortgagor. This method of creating charge is expensive as it involves registration charges and stamp duty.

Equitable Mortgage

An equitable mortgage is effected by mere delivery of documents of title to property to the mortgagee. The mortgagor through Memorandum of deposit undertakes to grant a legal mortgage if he fails to pay the mortgage money.

Essential Requirements of Equitable Mortgage

(1) An equitable mortgage requires three essential features
i. there must be a debt existing or future,
ii. there must be deposit of title deeds, are the title deeds should be deposited as security for the debt.

(2) Registration of documents is not necessary
Royal Printing Works and Others Vs. Oriental Bank of Commerce (7990). It was established in the above case, that where a security is furnished by deposit of title deeds, no registration is necessary.

(3) An equitable mortgage can be effected only in the towns of Kolkata, Mumbai and Chennai and in certain places notified by the State Government.

Sulochana and Others Vs. The Pandyan Bank Ltd. It was held in the above case that the debtor need not produce the documents and deposit the same in person in any of the towns mentioned in that Section. If the intention was to deposit the documents in the towns mentioned and the documents were duly forwarded, such deposit shall be deemed to have been made in the towns specified in the Section.

Sabasiva Rao Vs. Bank of Baroda (1989). It was held that even if certified copies of documents of title to goods are deposited, if the intention of the deposit is for. security to cover a loan, it would amount to equitable mortgage.

(4) The documents are to be retransferred to the mortgagee on repayment of the debt.

(5) The mortgagee is empowered to apply to the court to convert the equitable mortgage into a legal mortgage, if the mortgager fails to repay the loan on a specified date.

Advantages

(1) No registration is required in equitable mortgage and so stamp duty is saved.
(2) It involves minimum formalities.
(3) The information regarding such mortgage is kept confidential between the lender and borrower. So the reputation of the borrower is not affected.

Disadvantages

(1) If the mortgagor fails to repay, the mortgagee must get the decree for the sale of the property. Getting a decree is expensive and time consuming.

(2) The borrower may hold the title deeds not on his own account, but in the capacity of a trustee. If an equitable charge is created, the claim of the beneficiary under the trust will prevail over equitable mortgage.
(3) There is the risk of subsequent legal mortgage in favour of another party. If the equitable mortgagee parts with the security, even for a short period, the debtor may create a second legal mortgage over the same property. In that case, the second mortgage shall have the first priority over the equitable mortgagee. The mortgagee should be very careful in this regard.

(6)Anomalous Mortgage
In terms of this definition an anomalous mortgage is one which does not fall under anyone of the above five terms of mortgages. Such a mortgage can be effected according to the terms and conditions of the mortgager and the mortgagee. Usually it arises by a combination of two or more of the above said mortgages. It may' take various forms depending upon custom, usage or contract

RIGHTS OF MORTGAGOR

Right of Mortgagor
Every mortgage-deed leaves a right to the mortgagor and a corresponding liability for mortgagee and vice versa. Following are the rights given to a mortgagor given by the Transfer of Property Act, 1882:

1. Right to redemption
2. Right to transfer mortgaged property to a third party instead of retransferring
3. Right of inspection and production of documents
4. Right to accession
5. Right to improvements
6. Right to a renewed lease
7. Right to grant a lease

Right to Redemption (section-60)
It is one of the most important rights of a mortgagor given under section of the Act. This right puts an end to mortgage by returning the property of mortgagor. The right to redeem further grants three rights to the mortgagor:

- Right to end mortgage deal
- Right to transfer mortgaged property to his name
- To take back possession of property in case of delivery of possession

In the case of **Noakes & Co. vs. Rice (1902) AC 24**, Rice was a dealer who mortgaged his property, premise and goodwill to N subject to the provision that if R paid back the whole amount, the property would be transferred back to his name or any other person's. A covenant was attached that stated whether or not the amount is due, R would only sell Malt liquor by N in his premises. Because of this covenant, R had difficulty in redemption and it didn't give him absolute right over his property. House of Lords held that anything which clogs this right is bad and they came up with the concept that 'once a mortgage always a mortgage' and said that mortgage could never be irreducible.

This principle was added to protect the interest of a mortgagor. Any condition or provision which prevents a mortgagor from redeeming his mortgaged property is a clog on the right of redemption. The right to redemption continues even though the mortgagor fails to repay the loan amount to mortgagee. In the case of Stanley v. Wilde, (1899) 2 Ch 474, it was held that any provision mentioned in the mortgage-deed which has an effect of preventing or impeding the right to redemption is void as a clog on redemption.

Exceptions to the right- The right to redeem has three exceptions. It can be extinguished under the following cases:

1. By the act of parties
2. By operation of law
3. By decree passed by the court

Obligation to transfer to the third party instead of transferring it to mortgagor (section-60A)

This right was added in the Act by Amendment Act of 1929. This right provides the mortgagor with authority to ask the mortgagee to assign the mortgage debt and transfer the property to a third person directed by him. The purpose of this right is to help the mortgagor to pay off the mortgagee by taking a loan from a third person on the same security.

Right to inspection and production of documents (section-60B)

This section is also inserted by the Amendment Act of 1929. It is the right of mortgagor to ask mortgagee for the production of copies of documents of the mortgaged property in his possession for inspection on notice of reasonable time. The expenses incurred on production or copies of documents or travel expenses of a mortgagee are to be paid by the mortgagor. This right is available to the mortgagor only as long as his right to redeem exists.

Right to Accession (section-63)

Basically, accession means any addition to property. According to this right mortgagor is entitled to such accession to his property which is in the custody of mortgagee. There are two types of accession:

- Artificial accession- It is when mortgagor made some efforts and it increased the value of land.
- Natural accession- The name itself defines i.e. without any man-made efforts.

In case an accession is made to the property due to the efforts of mortgagee or at his expense and such accession is inseparable, mortgagor, in order to be entitled to such succession, needs to pay the mortgagee the expense of acquiring such accession.

If such separate possession or enjoyment is not possible, the accession must be delivered with the property; it is the liability of mortgagor, in the case of an acquisition which is necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, with interest at the same rate as is payable on the principal amount, or, where no such rate is fixed, at the rate of nine percent per annum.

Right to Improvements (section-63A)
According to this right if the mortgaged property has been improved while it was in possession of mortgagee, then on redemption and in the absence of any contract to the contrary mortgagor is entitled to such improvement. The mortgagor is not liable to pay mortgagee unless:

- Improvements made by the mortgagee were to protect the property or with the prior permission of mortgagor.
- Improvements were made by the mortgagee with the permission of the public authority.

Right to Renewed Lease (section-64)

If the mortgagor is entitled the mortgaged property is a leasehold property and during the duration of mortgage the lease gets renewed then, on redemption the mortgagor is entitled to have the benefit of the new lease. This right is available to the mortgagor unless he enters into any contract to the contrary with mortgagee.

Right to grant a Lease (section-65A)

This right was introduced by the Amendment Act of 1929. Prior to this right, the Transfer of Property Act did not allow a mortgagor to lease out the mortgaged property on his own but only with the permission of mortgagee. Now, a mortgagor has the right to lease out the mortgaged property while he is in lawful possession of that property, subject to the following conditions:

- All conditions in the lease should be according to the local laws and customs to prevent any fraudulent transaction.
- No rent or premium shall be paid in advance or promised by mortgagee.
- The contract shall not contain any provision for the renewal of the lease.
- Every such lease shall come into effect within a period of six months from the date of its execution.
- Where the mortgaged property is a building, the term of the lease should not exceed three years in total.

Duties/liabilities of a mortgagor

Along with the rights given to a mortgagor, the Transfer of Property Act has also conferred some duties on him. Following are the duties of a mortgagor:

1. Duty to avoid waste
2. Duty to indemnify for defective title
3. Duty to compensate mortgagee
4. Duty to direct rent of a lease to mortgagee

1.Duty to avoid waste (section-66)

This section imposes a duty on the mortgagor to not to commit any act which leads to the waste of property or any act which reduces the value of the mortgaged property. Waste is divided into two categories:

- Permissive waste– A mortgagor who is in possession of the mortgaged property is not liable to the mortgagee for any minor waste.
- Active waste– When an act is done which causes major waste of the property or leads to the reduction in the value of mortgaged property, then the mortgagor will be liable to the mortgagee.

2.Duty to indemnify for defective title
It is the duty of a mortgagor to compensate the mortgagee for a defective title in the mortgaged property. A defective title refers to a situation when a third party starts claiming or interferes with mortgaged property. It is a liability for the mortgagor to compensate for the expenses incurred by mortgagee for protecting the title of that property.

3.Duty to compensate mortgagee
If the mortgaged property is in possession of mortgagee who is paying all the taxes and other public charges, then it is the duty of mortgagor to compensate mortgagee for incurring such expenses. Similarly, when there is no delivery of possession i.e. the mortgaged property is still in possession of mortgagor, then it is his duty to pay all public charges and taxes levied on it.

4.Duty to direct rent of a lease to mortgagee
Where the mortgaged property is leased by mortgagor then it is his duty to direct lessee to pay the rent, etc. to the mortgagee.

RIGHTS OF MORTGAGEE

Rights of Mortgagee

(1) **Right to sue for mortgage money:** The mortgagee has the right to file a suit in a court of law for the mortgage money in the following cases:

a. Where the mortgager binds himself to repay the mortgage money, as in the case of simple and English mortgage.

b. Where the mortgaged property is wholly or partly destroyed or the security is rendered insufficient and to mortgager has not provided further security.

c. Where the mortgagee is deprived of the whole or a part of his security by the wrongful act of the mortgager.

d. Where the mortgager fails to deliver the mortgaged property in case the mortgagee is entitled to it.

(2) **Right of sale:** The mortgagee in case of a simple, English and equitable mortgage has the right to sell the property after filing a suit and getting a decree from a court.

A mortgagee has a right of sale without the intervention of the court under certain circumstances mentioned in Section 69 of Transfer of Property Act.

(3) **Right of foreclosure:** The mortgagee has a right to obtain from the Court a decree for foreclosure against the mortgager, that is, the mortgager is absolutely debarred of his right to redeem the property. The right of fore closure is allowed in (i) a mortgage by a conditional sale, and the anomalous mortgage.

(4) **Right of accession to property:** If any addition is made to the mortgaged property, the mortgagee is entitled to such addition for the purpose of security provided there is no contract to the contrary. For example, A mortgages a certain plot of land to B and afterwards constructs a building on it. B is entitled to the building and land as security for the loan.

(5) **Right of possession:** The mortgagee is entitled to the possession of the mortgaged property as per the terms of mortgage deed. Such a right is available in usufructuary mortgage.

Liabilities of Mortgagee –

1. Mortgagee bound to bring one suit on several mortgages (S. 67A) –

Section 67A provides that if a mortgage holds two or more mortgages of the same property or of different properties from the same mortgagor, he must enforce all or more, in the absence of a contract to the contrary. It provides that –

1. A mortgagee who holds 2 or more mortgages executed by the same mortgagor, and
2. In respect of each mortgagee he has a right to obtain the same kind of decree under section 67, and
3. He sues to obtain such decree on anyone of the mortgages,
4. He shall be bound to sue on all the mortgages in respect of which the mortgage-money has become due.

However, this liability is subject to a contract to the contrary that may be made between the mortgagor and the mortgagee.

2. Liabilities of mortgagee in possession (S. 76)
The mortgagee is the person who gives a loan to the mortgagor on the security of some property. This section says that when during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property he is bound by the following duties –

1. Duty to manage the property as a person of ordinary prudence.
2. Duty to collect rents and profits of the property to this best endeavour.
3. Duty to pay government dues unless there is a contract to the contrary.
4. Duty to make necessary repairs of the mortgaged property unless there is a contract to the contrary.
5. Duty not to commit any act which may destroy or injure the property permanently.
6. Duty to apply insurance money in reinstating the property or in reduction of the mortgage-money if he receives such money in respect of the mortgaged-property.
7. Duty to keep proper accounts of all sums received and spent by him as a mortgagee.
8. Duty to apply rents and profits in discharge of interest of making certain deductions.
9. Duty to account for gross receipts.

Priority (section 78- 80)

Section 78 of Transfer of Property Act 1882 : "Postponement of prior mortgagee"

78. Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

Section- 79 - "Mortgage to secure uncertain amount when maximum is expressed"

79. If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

Illustration

A mortgages Sultanpur to his bankers, B & Co., to secure the balance of his account with them to the extent of Rs. 10,000. A then mortgages Sultanpur to C, to secure Rs. 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 Rs. 5,000. B & Co. subsequently advance to A sums making the balance of the account against him exceed the sum of Rs. 10,000. B & Co. are entitled to the extent of Rs. 10,000, to priority over C.