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FACULTY OF JURIDICAL SCIENCES

COURSE: **BALLB &BBALLB**

SEMESTER: VI

SUBJECT: Law of Property

SUBJECT CODE**B A L** 603 &**BBL**

603

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Lecture-22

Mortgage

Transfer of Property Act, 1882 is the statutory law in India that contains provisions for mortgage laws. In simple terms, Mortgage is transferring interest of an immovable property for securing a loan or for a performance of an engagement. This is a pecuniary liability in a form of a debt. Section 58(a) of the Act defines the term mortgage. The Section reads as under –

"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 person who mortgages the property, i.e. the transferor is the mortgagor and the person to whom the property is mortgaged, i.e. the transferee is the mortgagee.[i] The instrument used by the parties involved in such transfer is known as the 'mortgage deed.'[ii]

Types of Mortgages in India

There are various kinds of mortgages in India.

1. Simple Mortgage: Section 58 (b)

The term 'Simple Mortgage' is defined under Section 58(b) of the Transfer of Property Act, 1882. The Section reads as –

"Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee."

In this case, the possession of the property is with the mortgagor himself but he binds himself personally to pay the mortgage-money and agrees to a condition that if he fails to pay the mortgage money to the mortgagee then in that event, the mortgagee can sell that property by way of sale. The mortgagee in this case is known as a simple-mortgagee.

2. Mortgage by conditional sale Section 58 (c)[

The term ‘mortgage by conditional sale” is defined under Section 58(c) of the Transfer of Property Act, 1882. The Section reads as –

Where the mortgagor ostensibly sells the mortgaged property on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

1[Provided that no such transaction shall be deemed to be a mortgage, unless the

condition is embodied in the document which effects or purports to effect the sale.]

In a mortgage by conditional sale the mortgagor sells the mortgaged property to the mortgagee on a condition that if the mortgagor fails to pay the mortgage money on a certain date then the sale shall become absolute. But, if the payment is made by the terms agreed, then the sale shall become void. This is a type of mortgage where there is an ostensible sale which gets converted into an absolute sale if the ostensible seller is unable to repay the loan.

3. Usufructuary mortgage Section 58 (d):

The term ‘Usufructuary mortgage’ is defined under Section 58(d) of the Transfer of Property Act, 1882. The Section reads as –

“Where the mortgagor delivers possession 1 [or expressly or by implication binds himself to deliver 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 2[or any part of such rents and profits and to appropriate the same] in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest 3[or] partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee”

In this type of mortgage, the mortgagor delivers possession of the mortgaged property whether expressly or impliedly to the mortgagee and gives him the authorization to retain the mortgaged property until the payment of the mortgage-money. He also authorizes the mortgagee to receive the rent and profits accruing from the mortgaged property in lieu of interest, either partly or wholly or in payment of the mortgaged money, either partly or wholly.

4. English mortgage Section 58 (e):

The term English Mortgage is defined under Section 58(e) of the Transfer of Property Act, 1882. The Section reads as –

"Where the mortgagor binds himself to re-pay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage."

In English mortgagee, the transaction between the mortgagor and the mortgagee is such that the mortgagor agrees to repay the mortgage money on a specified date and transfers the mortgaged property absolutely to the mortgagee. The only condition being that the mortgagee agrees to retransfer the property to mortgagor upon payment of the agreed mortgage money.

5. Mortgage by deposit of title-deeds Section 58 (f):

The term 'Mortgage by title deed' is defined under Section 58(f) of the Transfer of Property Act, 1882. The Section reads as –

"Where a person in any of the following towns, namely, the towns of Calcutta, Madras,[and Bombay] and in any other town which the [State Government concerned] may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds."

This type of mortgage is known as an equitable mortgage. The essential requirements of this type of mortgage are

1. There must be a debt

2. There must be a deposit of title deed with the lender

3. The deposit must be with the intention that the said title deed shall be the security for the debt.

Mortgages by way of title deeds are on the same footing as that of simple mortgages.[viii]

6. Anomalous mortgage Section 58 (g)

The term 'anomalous mortgage'is defined under Section 58(g) of the Transfer of Property Act, 1882. The Section reads as –

"A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage."

So any mortgage that doesn't fall within the ambit of simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title deeds within the meaning of Section 58 of the Transfer of Property Act, 1882 is an anomalous mortgage.

Therefore, these are the six types of mortgages of immovable property used widely in I

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1. Section 58 (a) of theTransfer of Property Act defines

(a) mortgage, mortgagor, mortgagee and mortgage money

(b) mortgage, mortgagor, mortgagee and mortgage deed

(c) mortgage, mortgagor, mortgagee,

mortgage money and mortgage deed (d) mortgage, mortgagor, mortgage money and mortgage deed

2. In which section of Transfer of Property Act, the provisions of mortgage are defined?

(a) Section 54

(b) Section 56

(c) Section 58

(d) Section 85

3. Which one of the following is not an essential element of a mortgage as defined under Section 58 (a) of T.P.A.

(a) There must be transfer of interest (b)There must be promise to transfer of interest

(c) The interest must be of some specific immovable property

(d) The purpose of transfer must be to ensure payment of a debt.

4. 'A' transfers his property to 'B' by mortgage with the condition that for ten years 'B' will take the mortgage money from the income of the property and thereafter A shall redeem the property by making the payment of remaining amount. This

mortage is:

(a) Mortgage by conditional sale

(b) Anomalous mortgage:

(c) Simple mortgage

(d) English mortgage

5. Which of the following transfer is valid?

(a) An unregistered usufructuary mortgage for Rs. 99

(b) An unregistered gift of immovable

(c)Property of the value of Rs. 99 property from year to year

(d) An oral assignment of debts