

# MORTGAGE

## 1. INTRODUCTION تبادل کرنا

A mortgage is a conveyance of property by a debtor to a creditor as a security for the payment of debt. Mortgage is created by the act of the parties by a written document providing security for the performance of a duty or the payment of the debt. The different kinds of mortgage are simple mortgage, conditional mortgage, usufructory mortgage, English mortgage and anomalous mortgage

## 2. RELEVANT PROVISIONS

Section 58 of the Transfer of Property Act 1882.

## 3. MEANING OF MORTGAGE

### (I) General Meaning:

It means a conveyance of property by a debtor to a creditor as a security for a debt on the condition that it shall be returned on payment of the debt within a certain period.

### (II) Simple Meaning:

A mortgage is an interest in land created by a written instrument providing security for the performance of a duty or the payment of a debt.

## 4. DEFINITION OF MORTGAGE: SECTION 58

“Mortgage is transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to pecuniary liability.

### (I) Meaning of Mortgagor: Section 58

The transferor is called mortgagor.

### (II) Meaning of Mortgagee: Section 58

The transferee is called the mortgagee.

### (III) Meaning of Mortgage Money: Section 58

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

### (IV) Meaning of Mortgage Deed: Section 58

The instrument in any way which the transfer is effected is called a mortgage deed.

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## ESSENTIALS OF MORTGAGE

Following are essentials of mortgage.

- ✓ (I) Transfer of an interest.
- ✓ (II) Specific property.
- ✓ (III) Security for payment of loan.

## 6. KINDS OF MORTGAGE: SECTION 58

Following are various kinds of mortgage.

- (I) SIMPLE MORTGAGE. *A Mortgage personally himself To Pay*
- (II) MORTGAGE BY CONDITIONAL SALE
- (III) USUFRUCTUARY MORTGAGE:
- (IV) ENGLISH MORTGAGE:
- (V) MORTGAGE BY DEPOSIT OF TITLE DEED:
- (VI) ANOMALOUS MORTGAGE:

### (I) SIMPLE MORTGAGE: SECTION 58 (b)

Simple mortgage is a transaction in which, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money and agree expressly or impliedly that in the event if his failing to pay according to the contract, the mortgagee shall have right to cause the mortgage property to be sold the proceeds of sale to be applied in payment of mortgage money.

### ⇒ ESSENTIAL OF SIMPLE MORTGAGE

Following are the essentials of the simple mortgage:

#### (i) Sale of Property

Under the simple mortgage if the mortgagor does not repay the mortgaged money within the prescribed time then in such situations the mortgagee has the right to sale the property.

#### (ii) Personal Liability

Under the simple mortgage there is a personal liability of the mortgagor to repay the mortgage money.

#### (iii) Restriction on Transfer of Possession

In simple mortgage the possession of the mortgaged property remains with the mortgagor. It does not passes to the mortgagee.

(iv) **Restriction on Transfer of Title**

In simple mortgage the rights in the mortgaged property are not transferred to the mortgagee.

(v) **Repayment Suit**

If the mortgagor does not pay the mortgage money within the prescribed period then in such situations the mortgagee has the right to file a suit for the repayment of the mortgage money.

(vi) **Restriction on Foreclosure** *قسط رینا*

Under the simple mortgage the mortgagee does not enjoy the right of the foreclosure *ضبطی جائز*

(vii) **Security**

There is a two fold security in the simple mortgage. One is the property and the other is the personal obligation of repayment.

(viii) **Registration**

According to the provisions provided in the registration Act, a transfer of an interest in immovable property of more than 100 rupees is necessarily registerable.

(ix) **Limitation Period** *12 years*

The limitation period for the suit for the repayment of the mortgaged money is 12 years from the date since when the mortgaged money is due.

(II) **MORTGAGE BY CONDITIONAL SALE: SECTION 58 (c)**

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Where the mortgagor ostensibly sells the mortgaged property.

- On condition that on default of the payment of the mortgage money on a certain date the sale shall become absolute. OR
- On condition 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.

• Provided that no such transaction shall be deemed to be mortgage unless the condition is embodied in the document which effect or purports to the effect the sale.

## ⇒ **ESSENTIALS OF THE MORTGAGE BY CONDITIONAL SALE**

Following are the essentials of the mortgage by the conditional sale:

### **(i) Conditional Sale**

One of the essentials of the mortgage by the conditional sale, there should be conditions attached with the ostensible sale of the immovable property.

### **(ii) Ostensible Sale**

Under the mortgage by the conditional sale the mortgagor ostensibly sales the property which is not an actual sale.

### **(iii) Relationship**

The relationship between the parties should be like that of debtor and the creditor.

### **(iv) Sale**

Under the mortgage by the conditional sale the transaction should appear as the sale. And there should be some conditions which make it as conditional mortgage.

### **(v) Foreclosure**

Under the mortgage by the conditional sale the mortgagee has the remedy which is the foreclosure.

### **(vi) Redemption**

Under the mortgage by the conditional sale the right of redemption exists.

### **(vii) Forms of Conditions**

The conditions may be one of the following:

(a) The sale shall become absolute on the default of the repayment of the mortgage money.

(b) That on the payment of the mortgage money the sale shall be considered void.

### **(viii) Restriction of Personal Liability**

Under the mortgage by conditional sale, the mortgagor is not personally liable to repay the

mortgage money. However if it is provided in the transaction that the mortgagor is personally liable to repay the mortgage money then in such situations the mortgagor is personally liable to repay the mortgage money.

(ix) **Registration**

According to the provisions provided in the registration Act, a transfer of an interest in immovable property of more than 100 rupees is necessarily registerable.

(x) **Limitation**

The limitation period for the suit of mortgage by conditional sale is twelve years.

(iii) **USUFRUCTUARY MORTGAGE: SECTION 58 (d)**

Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgage 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 or any part of such rent and profits and to appropriate the same in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest or partly in payment of the mortgage money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

⇒ **ESSENTIALS OF USUFRUCTUARY MORTGAGE**

Following are the essentials of the usufructuary mortgage:

(i) **Delivery of Possession**

Under the usufructuary mortgage there should be delivery of the possession.

(ii) **Restriction on Personal Liability**

Under the usufructuary mortgage there is no personal liability on the mortgagor to repay the debt.

(iii) **Retention of Possession**

It is an essential feature of the usufructuary mortgage that the mortgagee enjoys the possession of the mortgaged property. And he delivers the property on the repayment of the mortgaged property.

(iv) **RESTRICTION ON SALE:**

It must be noted that under the usufructuary mortgage the mortgagee does not have the right to sale the mortgage property.

(v) **RENTS AND PROFITS:**

Under the usufructuary mortgage the mortgagee is entitled to receive the rents and profits accruing from the mortgaged property.

(vi) **RESTRICTION ON FIXED DURATION:**

Under the usufructuary mortgage there is no fixed period of duration. The mortgagee possesses the property until the mortgagor repays the mortgage money.

(vii) **REGISTRATION:**

According to the provisions provided in the registration Act, a transfer of an interest in immovable property of more than 100 rupees is necessarily registerable.

(IV) **ENGLISH MORTGAGE: SECTION 58 (e)**

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

⇒ **ESSENTIALS OF ENGLISH MORTGAGE:**

Following are the essentials of the English mortgage:

(i) **COMPLETE TRANSFER:**

A very important feature of the English mortgage is that it is a complete transfer which is followed by the delivery of possession to the mortgagee.

(ii) **PERSONAL LIABILITY:**

The mortgagor is personally liable to repay the mortgaged money on a fixed date.

(iii) **CERTAIN DATE:**

It is an essential feature of the English mortgage that a date is fixed for the repayment of the mortgage money.

(iv) **RE TRANSFER OF THE PROPERTY:**

The English mortgage is an absolute transfer and it is subject to the condition that the mortgage property shall be re transferred to the mortgagor on the repayment of the debt.

(v) **REGISTRATION:**

According to the provisions provided in the registration Act, a transfer of an interest in immovable property of more than 100 rupees is necessarily registerable.

**(vi) LIMITATION:**

The limitation period for the suit of English mortgage is twelve years.

**(V) MORTGAGE BY DEPOSIT OF TITLE DEED: SECT. 58 (f)**

Where the person specifies in his behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title deed.

⇒ **ESSENTIALS OF MORTGAGE BY DEPOSIT OF TITLE DEEDS:**

Following are the essentials of the mortgage by deposit of title deeds:

**(i) DEPOSIT OF TITLE DEEDS:**

One essential of the mortgage by deposit of the title deeds is that the mortgagor should deposit the title deeds with the mortgagee.

**(ii) DEPOSIT IN THE SPECIFIED AREA:**

According to the mortgage by deposit of the title deeds the title deeds should be deposited in the town in which the transaction is being made.

**(iii) DEBT:**

Under the mortgage by deposit of the title deeds the debt may be a future debt or existing debt.

**(iv) DEPOSIT AS SECURITY OF DEBT:**

The deposit of the title deeds which is made is considered as the security of the debt.

**(v) REGISTRATION:**

A mortgage deposit by title deeds is not required to be registered.

**(VI) ANOMALOUS MORTGAGE: SECTION 58 (g)**

A mortgage which is not a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage and English Mortgage or mortgage by deposit of title deed is called anomalous mortgage.

**7. REMEDIES FOR MORTGAGOR**

Mortgagor has following remedies.

(i) Suit for sale.

(ii) Suit for money.

The mortgagor may redeem from the mortgage by applying to a court of equity offering to pay the debt with accrued interest and costs.

## 8. **HOW CONDITIONAL MORTGAGE IS DETERMINED**

The court generally apply certain tests to determine whether the transaction was sale with a condition or repurchase or a mortgage by way of conditional sale.

- (i) The existence of debt indicate a mortgage.
- (ii) The long period of repayment indicate a mortgage.
- (iii) A stipulation for interest on repayment indicates mortgage.

## 9. **CONCLUSION**

To conclude that a mortgage is the transfer of an interest in specific immovable property for securing the payment of money advanced or to be advanced by way of money. The different kinds of mortgage are simple mortgage, conditional mortgage, usufructory mortgage, English by deposit of title deed mortgage and anomalous mortgage.