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Different Kinds of Mortgages

The various types of Mortgages

A mortgage corresponds to the Hypotheca of Roman Law. The creditor, on the failure of the debtor to pay the debt, could bring the debtor's property to sale and recoup himself. It differs from Nexum and Fiducia of that system of law. Under the former, the debtor was merely forced to become the servant or slave of the creditor, and, under the latter, the debtor was kept out of ownership and possession of his own property. Hindu and Mahomedan Laws also recognised the latter type of mortgage. Property was pledged to the creditor and the debtor was kept out of possession till the debt was repaid, the creditor taking the profits in lieu of the interest.

Section 58(*a*) defines 'mortgage', 'mortgagor', 'mortgagee', 'mortgage-money' and 'mortgage-deed'. It provides:

> 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.
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> 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 (if any) by which the transfer is effected is called a mortgage-deed.

The definition in the Stamp Act is wider (See *Rama Chand & Sons* v. *State*, AIR 1978 All 443).

In a mortgage deed there are the following ingredients:[1]

(1) the transfer of an interest in specific immovable property;

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1. *Hindelkar* v. *Nazar*, AIR 1983 Kant 19; *Santosh Kumar* v. *Chameli Devi*, AIR 1983 All 195; *Madhavan* v. *Dhanga*, AIR 1983 All 60; *Janardhan* v. *Gangadharan*, AIR 1983 Ker 178; *Satyanarayan* v. *Star & Co.*, AIR 1984 Cal 399; *Mahendra* v. *Brindavan*, AIR 1984 Ori 62; *Janki* v. *Ganesh*, AIR 1984 All 214; *Swarnalata* v. *Chandicharan*, AIR 1982 Cal 130; *Gulab Chand* v. *Babulal*, (1998) 9 SCC 211.

(2) the transfer is for the purpose of securing: (*i*) the payment of money advanced by way of loan; (*ii*) the payment of money to be advanced by way of loan; or (*iii*) the payment of an existing debt; or (*iv*) the payment of a future debt; or (*v*) performance of an engagement which may give rise to a pecuniary liability.

The scope of the various ingredients is discussed below:

(1) The mortgagor, who is the owner of the property, has several interests in his property, such as possession, enjoyment and right to sell the property. In a mortgage, he transfers any one of these interests in specified immovable property, to the mortgagee, whereas in a sale there is a transfer of the ownership which is the entire bundle of interests in the property sold.

(2) (*ii*) Money to be advanced by way of loan arises in the case of a running account between the parties. [*See* Section 79].

(2) (*iv*) A future debt is a contingent liability which arises on the happening of some contingency, for example, a mortgage of property to pay the mortgage money if an usufructuary mortgagee is deprived of the possession of the mortgaged property.

(2) (*v*) Suppose the parties enter into an engagement to do something, and if one of them does not do what he agreed to do, an obligation to pay damages may arise. That is there may be a pecuniary liability. In a mortgage there could be a transfer of interest to secure the performance of such an obligation, that is, if the engagement was not performed, to secure the discharge of the pecuniary liability that would arise on such non-performance.[2]

An undertaking by a person borrowing money not to alienate his property until the money is repaid is not a mortgage, because there is no transfer of any interest in property.

It is only after first determining that a transaction is a mortgage under clause (*a*) that one should turn to other clauses in order to find out what *kind* of mortgage it is. It is necessary to know the kind of mortgage, because, different rights and liabilities arise in the mortgagor and mortgagee.

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2. *Jagan Nath* v. *Harpal*, AIR 1980 All 139.

Section 59-A provides:

Unless otherwise expressly provided, references in this Chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively.

Mortgage money: This would include interest only when its payment is secured by the mortgage deed.

Even in the case of a person who is not the full owner, any of his rights can be transferred to the mortgagee. Thus a lessee can transfer his right to possession and create a usufructuary mortgage. The only test is 'The interest conveyed is it available to the mortgagor in the property?' For example, a mortgagor may have a limited right, which, however, does not include the right to possession. Such a mortgagor cannot in the nature of things, create a usufructuary mortgage. Any right that is transferable without infringing Section 6 can be the subject of a mortgage.[3]

In Indian law there are six different types of mortgages.They are: (1) The Simple Mortgage, (2) Mortgage by conditional sale, (3) Usufructuary Mortgage, (4) English Mortgage, (5) Mortgage by deposit of title deeds, and (6) Anomalous Mortgage.

Simple Mortgage

Simple Mortgage is defined in Section 58(*b*). It provides:

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.

The ingredients of a simple mortgage are: (1) there is a personal undertaking by the mortgagor to repay the loan; (2) possession and enjoyment remains with the mortgagor; (3) there is a power of sale but to be exercised only through Court; (4) it must be effected by a registered instrument whatever the amount of consideration; (5) there is no delivery of ownership or possession; and (6) there is no foreclosure.

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3. *C.C. Revenue Authority* v. *M.F. Corporation*, AIR 1979 Mad 282 (Property given as security for payment by bidder at auction is mortgage); *Dorik* v. *State*, AIR 1980 Pat 163; *Ganpat* v. *Nanaji*, AIR 1981 Bom 335.

(1) In the case of a simple mortgage the mortgagee has two remedies: one on the personal undertaking to obtain a money decree against the debtor (mortgagor) and the other to sue on the mortgage and obtain a decree for the sale of the property. If the land is not of sufficient value, the balance may be recovered by personal action. If there is excess it is to be returned to the mortgagor.

(3) If money is to be realised from the income of a specific item of property, without any right to have the property sold, it is only a *charge*. But if the creditor (mortgagee) has the right to have the property sold from the moment the debt is incurred, then it is a mortgage.

Mortgage by Conditional Sale

The next type is mortgage by conditional sale and it is defined in Section 58(*c*) as follows:

> Where the mortgagor ostensibly sells the mortgaged property—
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> on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or
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> on condition that on such payment being made the sale shall become void, or
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> 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 a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

The ingredients of a mortgage by conditional sale are: (1) there is an ostensible sale by the mortgagor to the mortgagee of the mortgaged property; (2) there is a condition that the sale shall be void if the loan is repaid on a particular date. The property is then retransferred to the mortgagor. If however the payment is not made *on* the stipulated date, the sale becomes absolute in favour of the mortgagee. (In the absence of special conditions, the mortgagor cannot pay *before* the stipulated date); (3) the remedy of the mortgagee is by a suit for foreclosure; (4) registration is compulsory only if the consideration exceeds Rs 100; (5) there should be only one document (*see* proviso).

The question whether a transaction is a mortgage by conditional sale or an out-and-out sale is important, because, if it is only a mortgage, time for repayment is not of the essence of the contract and the mortgagor can

redeem even after the time specified has expired. If, however, the transaction is an out-and-out sale, if the vendor fails to repay within the date specified he cannot do so thereafter and the vendee becomes absolute owner.

The scope of this type of mortgage is illustrated by the following three cases:—

In *Pandit Chunchun Jha* v. *Sk. Ebadat Ali*[4], a deed purported to be a sale and had the outward form of one but at the same time it called itself a 'conditional sale'. It had however no clause for retransfer and instead said that if the executants paid the money within two years, the property 'shall come in *exclusive possession* and occupation of us, the executants'. On the question whether it was an out-and-out sale with a covenant for repurchase, or a mortgage it was held:

The question whether a given transaction is a mortgage by conditional sale or a sale outright with a condition of repurchase is a vexed one which invariably gives rise to trouble and litigation....Each case must be decided on its own facts. But certain broad principles remain. The first is that the intention of the parties is the determining factor: See *Balkishendas* v. *Legge*[5]. But the intention must be gathered, in the first place from the document itself....The real question in such a case is not what the parties intended or meant but what is the legal effect of the words which are used....As Lord Cranworth said in *Alderson* v. *White*[6], 'prima facie an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase....In every such case the question is, what, upon a fair construction, is the meaning of the instrument'. Their Lordships of the Privy Council applied this rule to India in *Bhagwan Sahai* v. *Bhagwan Din*[7], and in *Jhanda Singh* v. *Wahid-ud-din*[8]. The converse also holds good and if, on the face

4. (1955) 1 SCR 174; *Kanippanna* v. *Thimmalai*, AIR 1978 Mad 75; *Babulal* v. *Kantilal*, AIR 1979 Guj 5 (lease by mortgagee to mortgagor); *Amir Bee* v. *S.D.M.*, AIR 1980 Kant 154; *Palani* v. *Thimmalai*, AIR 1982 Mad 57; *Nana Thakuram* v. *Sonabai*, AIR 1982 Bom 437; *Ram Swarup* v. *Ratiram*, AIR 1984 All 369; *Abdul Gaffar* v. *Sudha*, AIR 1985 Cal 133; *Tamboli* v. *Ghanchi*, AIR 1992 SC 1236.
5. 27 IA 58.
6. 44 ER 924, 928.
7. 17 IA 98, 102.
8. 43 IA 284, 293.

of it, an instrument clearly purports to be a mortgage it cannot be turned into a sale by reference to a host of extraneous and irrelevant considerations....Because of the welter of confusion caused by a multitude of conflicting decisions the Legislature stepped in and amended Section 58(*c*) of the Transfer of Property Act. Unfortunately that brought in its train a further conflict of authority. But this much is now clear. If the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage whether the documents are contemporaneously executed or not. But the converse does not hold good, that is to say, the mere fact that there is only one document does not necessarily mean that it must be a mortgage and cannot be a sale. If the condition of repurchase is embodied in the document that effects or purports to effect the sale, then it is a matter of construction which was meant. The Legislature has made clear cut classification and excluded transactions embodied in more than one document from the category of mortgages; therefore, it is reasonable to suppose that persons who, after the amendment, choose not to use two documents, do not intend the transaction to be a sale, *unless they displace that presumption by clear and express words; and if the conditions of Section 58(c) are fulfilled, then we are of the opinion that the deed should be construed as a mortgage*....(In the present case) on a fair construction the document means that if the money is paid within the two years then the *possession* will revert to the executants with the result that the *title which is already in them will continue to reside there*. The necessary consequence of that is that the ostensible sale becomes void....In those circumstances seeing that the deed takes the form of a mortgage by conditional sale under Section 58(*c*) of the Act, it is legitimate to infer, in the absence of clear indications to the contrary, that the relationship of debtor and creditor was intended to continue, and the deed is a mortgage by conditional sale.

In *Bhaskar Waman Joshi* v. *Srinarayan Rambilas Agarwal*[9], on the question whether a deed which ostensibly conveyed property was an absolute conveyance or a mortgage by conditional sale, it was held:

> The proviso to Section 58(*c*) was added by Act 20 of 1929. Prior to the amendment there was a conflict of decisions on the question whether the condition contained in a separate deed could be taken into account in ascertaining whether a mortgage was intended by the principal deed. The Legislature resolved this conflict by enacting that

9. (1960) 2 SCR 117.

a transaction shall not be deemed to be a mortgage unless the condition referred to in the clause is embodied in the document which effects or purports to effect the sale. But it does not follow that if the condition is incorporated in the deed effecting or purporting to effect a sale a mortgage transaction must of necessity have been intended. The question whether by the incorporation of such a condition a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. The circumstance that the condition is incorporated in the sale deed must undoubtedly be taken into account, but the value to be attached thereto must vary with the degree of formality attending upon the transaction. The definition of a mortgage by conditional sale postulates the creation by the transfer of a relation of mortgagor and the mortgagee, the price being charged on the property conveyed. In a sale coupled with an agreement to reconvey there is no relation of debtor and creditor nor is the price charged upon the property conveyed, but the sale is subject to an obligation to retransfer the property within the period specified. What distinguishes the two transactions is the relationship of debtor and creditor and the transfer being a security for the debt. The form in which the deed is clothed is not decisive. The definition of a mortgage by conditional sale itself contemplates an ostensible sale of the property. As pointed out by the Judicial Committee of the Privy Council in *Narasingerji Gyanangerji* v. *P. Pardhasardhi*[10], the circumstance that the transaction as phrased in the document is ostensibly a sale with a right of repurchase in the vendor, the appearance being laboriously maintained by the words of conveyance needlessly iterating the description of an absolute interest or the right of repurchase bearing the appearance of a right in relation to the exercise of which time was of the essence is not decisive. The question in each case is one of determination of the real character of the transaction to be ascertained from the provisions of the deed viewed in the light of surrounding circumstances. If the words are plain and unambiguous they must in the light of the evidence of surrounding circumstances be given their true legal effect. If there is ambiguity in the language employed the intention may be

10. LR 51 IA 305.

ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts. Oral evidence of intention is not admissible in interpreting the covenants of the deed but evidence to explain or even contradict the recitals as distinguished from the terms of the document may of course be given. Evidence of contemporaneous conduct is always admissible as a surrounding circumstance but evidence as to subsequent conduct of the parties is inadmissible.

[From the facts that: (1) interest was agreed to be paid on the price till the date of reconveyance; and (2) the price paid was wholly inadequate, the Court held that it was a mortgage and not a sale.]

In *P.L. Bapuswami* v. *N. Pattaya Gounder*[1], the owner of a certain property executed a sale deed of the property for Rs 4000, and the document contained a stipulation that the vendee (defendant) would reconvey the property to the vendor on repaying the same amount of Rs 4000. The vendor died and his sons sold their right in the property to the plaintiff. The plaintiff claimed that the transaction with the defendant was a mortgage by conditional sale, and that the plaintiff as the purchaser of the equity of redemption was entitled to redeem the mortgage by paying Rs 4000. It was held:

The question whether by incorporation of the condition (of re-sale) a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of surrounding circumstances. The definition of a mortgage by conditional sale postulates the creation by the transfer of a relation of mortgagor and mortgagee, the price being charged on the property conveyed. In a sale coupled with an agreement to reconvey there is no relation of debtor and creditor nor is the price charged upon the property conveyed, but the sale is subject to an obligation to retransfer the property within the period specified. The distinction between the two transactions is the relationship of debtor and creditor and the transfer being a security for the debt. The form in which the deed is clothed is not decisive. The question in each case is one of determination of the real character of the transaction to be ascertained from the provisions of the document

1 (1966) 2 SCR 918.

viewed in the light of surrounding circumstances. If the language is plain and unambiguous it must in the light of the evidence of surrounding circumstances be given its true legal effect. If there is ambiguity in the language employed, the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts.

[The court held that it was a mortgage by conditional sale in view of the following: (*i*) the real value of the property was Rs 8000 whereas the amount paid was only Rs 4000; (*ii*) the patta was not transferred to the name of the vendee; (*iii*) the Kist was continued to be paid by the vendor; and (*iv*) the consideration for reconveyance was the same amount of Rs 4000.]

If *A* transfers a property to *B* for Rs 5000 and the document provides that if, at anytime *A* requires the property, he may get it back on payment of Rs 5000 and any amount equivalent to the improvements made by *B* on the property, the transaction is not a mortgage, because, the essential requirement of the relationship of debtor and creditor is not present.

Sir Rash Bihari Ghose quotes[12] Butler on Coke on Littleton: 'If the money paid by the grantee was not a fair price for the absolute purchase of the estate conveyed to him; if he was not let into the immediate possession of the estate; if instead of recovering the rents for his own benefit, he accounted for them to the grantor, and only retained the amount of interest or if the expense of preparing the deed of conveyance was borne by the grantor, each of these circumstances has been considered by the courts as tending to prove that the conveyance was intended to be merely pignorititious' (that is of the nature of a pledge).

Usufructuary Mortgage

The next type is usufructuary mortgage and is defined as follows:

Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the 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 or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

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12. *Ghosh on Mortgages*, 7th Edn., p. 75.

The ingredients of the usufructuary mortgage are: (1) There is delivery of possession to the mortgagee. (2) The mortgagee is to retain possession until the money is repaid and is entitled to appropriate the rents and profits towards the principal and interest. (3) If the loan is repaid or discharged by the appropriation of rents and profits then the property is redeemed. (4) There is no personal liability and there is no remedy available either by sale or foreclosure. (5) Registration is compulsory if the consideration is over Rs 100.

(1) As the definition shows, it is also sufficient if there is an undertaking to deliver possession. But it should not be contingent.

(2) The mortgagee's right to retain possession is for an indefinite period till the loan is repaid. If it is for a term of years and the debt is deemed to be satisfied at the end of the term, or there is a personal covenant for payment of the balance, then it may be an anomalous mortgage or only a grant of the income of the land in satisfaction of the debt. In the latter case it is *not* a security for the debt and hence is not a mortgage.[13]

In *Raghu Nath (Dr.)* v. *Competent Officer, Delhi*[14], the rights and liabilities of the mortgagor and the mortgagee in the case of an usufructuary mortgage are summarised as follows:

> Since the mortgage was usufructuary, the mortgagee, and after his having been declared an evacuee, the custodian could claim and retain possession till the mortgage debt was paid and the mortgage was discharged. If the property is let out in the meantime, the mortgagee and those claiming his rights therein are entitled to receive the rents and profits accruing from the property in lieu of interest or towards part payment of the mortgage debt. Under Section 60 of the Transfer of Property Act, the mortgagor has a right at any time after the principal amount has become due to require the mortgagee on payment or tender of the mortgage debt (*a*) to deliver to him the mortgage deed and all other documents relating to the mortgaged property which are in the mortgagee's possession or power, (*b*) to deliver possession when the mortgagee is in possession of the mortgaged property, and (*c*) to retransfer the mort-

13. *Fuzhakkal* v. *Bhargavi*, AIR 1977 SC 105.
14. (1970) 2 SCC 537; *Gopi* v. *Nanak*, AIR 1979 All 8; *Sushil Kumar* v. *Brij Mohan*, AIR 1981 Pat 172.

gaged property to him or to such third person as he may direct at his cost. Under Section 76, the mortgagee in possession has to manage the property as a person of ordinary prudence would manage it if it were his own. Under Section 83, the mortgagor, provided his right of redemption is not barred, may deposit in the court where he might have instituted a suit for redemption, to the account of the mortgagee, the mortgage debt then due. The court thereupon has to issue a notice to the mortgagee and on the mortgagee stating the amount due to him and his willingness to accept the money so deposited in full discharge of the mortgage debt, pay the amount to the mortgagee on his depositing the mortgage deed and all other documents relating to the mortgaged property. When the mortgagee is in the possession of the property, the court before paying the amount has to ask him to deliver possession thereof to the mortgagor. When the mortgagor has tendered or deposited in court the mortgage debt together with the interest thereon and has done all that is to be done by him to enable the mortgagee to take such amount out of court, and a notice, as aforesaid, has been served on the mortgagee under Section 83 interest ceases to run. If the mortgagee thereafter refuses to accept the amount so deposited or to deliver the mortgage deed and other documents or possession of the property where it is in his possession, the remedy of the mortgagor is to file a suit for redemption. The position, therefore, is that upon the mortgage being paid off, the mortgagor is entitled to have the property restored to him free from the mortgagee's security. The repayment of the debt would be made against delivery of possession and of the mortgage deed and other documents, and these have to be simultaneous transactions. A tender of the mortgage debt or a deposit thereof in court conditional upon the mortgagee then and there delivering possession or executing reconveyance, if required, and handing over the deeds would be a good tender so that if it were to be refused interest would cease running. It follows that a mortgagee is not permitted to deal with the property in such a way that upon discharge of the debt the property cannot be restored.

Since possession is with the mortgagee sometimes the question arises whether the transaction is a mortgage or a lease.

In *Mahant Ramdhan Puri* v. *Bankey Behari*[15], the question was whether a deed was a lease or a mortgage. It was held:

> The only guiding rule that can be extracted from the cases on the subject is that the intention of the parties must be looked into and that 'once you get a debt with a security of land for its redemption, then the arrangement is a mortgage by whatever name it is called'.[16] In the present case, whatever ambiguity there might be in the receipts that was dispelled by the unambiguous declaration made by the parties that the property was given as security for the loan and the document was executed as a mortgage. The gist of the document, was not a letting of the premises, with a rent reserved, but a mortgage of the premises with a small portion of the income of it made payable to the plaintiff. There is therefore, no scope for the argument in this case that the document is a lease and not a mortgage.

Section 62 provides:

> In the case of an 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,—
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> (*a*) where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits of the property,— when such money is paid;
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> (*b*) where the mortgagee is authorised to pay himself from such rents and profits or any part thereof a part only of the mortgage-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 mortgage-money or the balance thereof or deposits it in Court as hereinafter provided.

This is a special provision with respect to usufructuary mortgages and must be read as supplementary to Section 60. The mortgagor has a right to call for an account from the usufructuary mortgagee even if his right of redemption is lost by a supervening statutory provision.[17]

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15. 1959 SCR 1085.
16. *See* Ghosh on MORTGAGES, 7th Edn., p. 91.
17. *K.P. Muhammad* v. *Maya Devi*, AIR 1971 Ker 290 (FB); *K. Variath* v. *P.C.K. Haji*, (1974) 1 SCC 590: AIR 1974 SC 689; *Shah Mathuradas Maganlal & Co.* v. *N.S. Malage*, (1976) 3 SCC 660.

In *Shah Mathuradas Maganlal & Co.* v. *N. S. Malage*[18], the appellant was a mortgagee in possession of the mortgaged property under a deed of mortgage. No interest was to be paid on the amount advanced and instead possession of the property was agreed to remain with the mortgagee. The period for redeeming the mortgage was fixed for 10 years from 7th November, 1953. The respondent-mortgagor informed the appellant just a month before the expiry of 10 years that he was ready and willing to redeem the mortgage. The appellant, however, put forth a claim that even after the redemption he was entitled to retain possession because his previous tenancy right subsisted. Dismissing the appeal to it the Supreme Court held:

> The Deed of Mortgage shows features indicating that there was surrender of tenancy and the appellant was only a mortgagee. The High Court found that there was a surrender of tenancy right. No particular form of words is essential to make a valid surrender. The surrender may be oral. The surrender may be express although delivery of possession is necessary for surrender in the facts and circumstances of the given case. In the present case delivery of possession was immediately followed by a re-delivery of possession of the appellant as mortgagee. The mortgage deed established beyond doubt that fact and the deed was inconsistent with the continuance or subsistence of the lease because the parties themselves stipulated that the lease was to exist only up to 6th November, 1963. On the redemption of the mortgage the respondent had a right to recover possession both on the terms of the mortgage and under Section 62 of the Transfer of Property Act.

These two sections show that a mortgage may be regarded as usufructuary mortgage even though the entire debt is not to be paid out of the profits of the property. Since mortgage money denotes principal and interest, there may be a usufructuary mortgage when (*a*) the principal alone is recovered from the profits; (*b*) when interest alone is recovered from the profits; and (*c*) where a part of each is recovered from the profits.

A *zuripeshgi* lease is a transaction between debtor and creditor and not between a lessor and a lessee. It is not a mere contract for the culti-

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18. (1976) 3 SCC 660; *Nandlal* v. *Sukhdev*, (1987) Supp SCC 87; *Nemi Chand* v. *Onkar Lal*, (1991) 3 SCC 464; *Paricchan Mistry* v. *Achhiabar Mistry*, (1996) 5 SCC 526; *Appalaswamy* v. *Venkataramanayya*, AIR 1984 SC 1728.

vation of the *land let*, but it is a real and valid security to the tenant for his money advanced. There is very little difference between a usufructuary mortgage and a *zuripeshgi* lease, but it is in law treated as a lease and not as a mortgage. In Wilson's Glossary, *Zuripeshgee* is defined as a compound word formed from "Zur" —gold money, and "Peshgee" — advance. It means payment in advance. It is a lease for a premium and the premium is the loan.

It depends on the facts of each transaction whether it is mortgage or a lease. If the lease is as security for money lent, if the right of redemption is reserved, expressly or by necessary implication, to the lessor, or if the lessee's interest continues till the loan is repaid, the transaction would be considered a mortgage. If however, there is no relationship of debtor and creditor, that is, the advance is not repayable, the transaction will be considered a lease. It depends on whether the sum advanced to the owner of the land is a loan or a lump sum given as premium.[19]

English Mortgage

The next type of mortgage is the English mortgage. It is defined in clause (*e*) as follows:

> Where the mortgagor binds himself to repay 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.

Its characteristics are:

(1) a personal covenant to repay the amount on a certain date, (2) there is an absolute transfer of property with a provision for retransfer in case of repayment; (3) there is delivery of possession; (4) the remedy is by sale and *not* by foreclosure; and (5) there can be a power of sale out of Court.

(1) Unlike a mortgage by conditional sale, in the case of an English mortgage there is a personal covenant to repay the amount.

(2) In the case of a mortgage by conditional sale there is an ostensible sale, whereas in an English mortgage there is an absolute transfer the nature of which is explained in the following case:—

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19. *Mangala* v. *Puthiyaveethil*, (1971) 1 SCC 562: AIR 1971 SC 1575.

In *Ramkinkar* v. *Satyacharan*[20], the appellants were lessees for 999 years of certain mining rights with liberty to sub-lease. A sub-lessee mortgaged his leasehold interest and the mortgage was in the form of an English mortgage. The rent payable by the sub-lessee having fallen into arrears and some covenants of the sub-lease remaining unperformed, the appellants filed a suit against the sub-lessee and his mortgagees claiming the performance of the terms of the sub-lease. It was held:

By English law and by Indian law an assignee of a lease is liable by priority of estate for all the burdens of the lease, burdens which are imposed upon him by the mere assignment, whether he enters into possession or not,: See *Kunhanujan* v. *Anjelu*[21] and *Monica* v. *Subraya Hebbara*[22] ....Up to the time of the passing of the Transfer of Property Act the rights of mortgagors and mortgagees of land in India were subject to much controversy, though in general the law of England, subject to such modification as justice, equity and good conscience required, was recognised as the law of India also. But whether the English rules of equity were applicable to such cases was not certain. Since the passing of that Act, however, the distinction drawn in England between law and equity in such cases does not exist in India. As Sir George Rankin says in *Bengal National Bank Ltd.* v. *Janaki*[23], 'the Transfer of Property Act has left no room for such a distinction'. The Indian mortgagor, however, retains some rights, though the English rules of equity do not apply. He retains a right to a reconveyance of the land and a right to transfer such right by way of sale or second mortgage (*See* Sections 81, 82, 91 and 94), and this right in India is a legal right. When therefore the mortgagor transfers his property by way of mortgage, can he be said to transfer his whole interest? Russel, J. in *Vithal Narayan's case*[24] answers the question thus: 'In India there is no equity of redemption in the mortgagor and there being no distinction between his legal and equitable estate, his "whole estate" is not transferred by the mortgage'. The observation is general, though in the particular case Russel, J. was dealing with a mortgage in a form widely different from that employed in England.

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20. (1939) LR 66 IA 50.
21. (1889) ILR 17 Mad 296.
22. (1907) ILR 30 Mad 410.
23. (1927) ILR 54 Cal 813, 822.
24. (1905) ILR 29 Bom 391.

Apart from the two cases referred to above, the Indian authorities recognise the principle that the distinction between law and equity has no place in Indian law. For this proposition reference may be made to two of the cases quoted by the appellants in argument—namely *Thethalan* v. *The Eralpad Raja*[25] and *Falakrishna Pal* v. *Jagannath Marwari*[26].

The same view is commonly accepted in the Indian textbooks[27] and was indeed adopted by the appellants in argument in the present case. Their contention was that the Act was a self-contained code by which alone the rights of mortgagor and mortgagee were to be ascertained and under which statutory and not equitable rights were brought into existence.

Their Lordships agree with this contention and accordingly turn to a consideration of those sections of the Act which deal with mortgages. Section 58(*a*) of the Act enacts that a mortgage is a transfer of an interest in specific immovable property. Upon this definition there follows in the Act as in force at the material time an enumeration of four classes of mortgage—namely (1) simple mortgage, (2) mortgage by conditional sale, (3) usufructuary mortgage, (4) English mortgage. Two other classes, equitable mortgage and anomalous mortgage, are recognised and dealt with in Sections 59 and 98 respectively. Of these six it is contended that the English mortgage by its terms amounts to, and the anomalous mortgage by its terms may amount to, a transfer of the whole interest of the mortgagor, and therefore, where the subject-matter is a lease, create privity of estate between the lessor and the mortgagee of the lease. No doubt in English law this would be so, but it does not follow that, under a system in which equity has no place, the same wording which would transfer *the whole interest of the mortgagor* under the former law would do so under the latter. The outlook is different. By Indian law the interest which remains in the mortgagor is a legal interest and its retention may therefore prevent the whole of the mortgagor's interest from passing to the mortgagee—a result which would not follow if an equitable interest only were retained....

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25. (1917) ILR 40 Mad 1111.
26. (1932) ILR 59 Cal 1314.
27. *See* Ghosh's *Law Of Mortgage in India*, 7th Edn., p. 95, and Mulla's *Transfer of Property Act*, 2nd Edn. 1936, p. 345.

To this argument the appellants reply that whatever may be the case with other types of mortgage, Section 58(*e*) in defining the term 'English mortgage' speaks of an *absolute* transfer of the mortgaged property to the mortgagee.... The wording of Section 58(*e*) undoubtedly gives rise to some difficulty, but before considering the construction to be put upon it, the soundness of the appellant's general contention must be considered....

Under the Indian Act no equitable rights exist and therefore, unless the mortgagor retains some legal interest in the land, he has merely a contractual right to have it reconveyed. If he retains some legal interest, it is difficult to say that he has parted with his whole interest. On the other hand, there are strong reasons against holding that he retains merely a contractual right against the mortgagee. If the case arose in England, it would be possible to say that the contract for reconveyance gave the mortgagor an equitable interest in land, but this argument is untenable in India. In the first place, as has been pointed out, equitable estates do not exist in that country, and in the second, under the provisions of Section 54 of the Transfer of Property Act a contract for the sale of immovable property does not create any interest in or charge upon land sold. Having this provision in view it is difficult to see how a personal contract to reconvey can create an interest in the land itself.

But to regard the mortgagor's right of redemption as being merely contractual and as creating no interest in the land would make it impossible for him to assign his right of redemption or to create a second mortgage so as to bind the land.

Such a state of things is, of course, theoretically possible, but it is inconsistent with the provisions of the Act (which in Sections 81, 82, 91 and 94 recognise second mortgages) and with the possibility, well established in India, of transferring the right of redemption to a purchaser.

Bearing these considerations in mind it remains to consider the effect of the wording of Section 58(*e*) of the Act. That section speaks of the mortgagor transferring the 'mortgaged property *absolutely* to the mortgagee'. In using those words does it mean that no interest or no legal interest in the property remains in the mortgagor? Their Lordships cannot think so. If the sub-section stopped at the word 'mortgagee' it might be necessary to put this construction upon it,

but it does not stop there: it adds the proviso that the mortgagee 'will retransfer' the property 'upon payment of the mortgage money as agreed'. Their Lordships think that with this addition the sub-section upon its true construction does not declare 'an English mortgage' to be an absolute transfer of the property. It declares only that such a mortgage would be an absolute transfer were it not for the proviso for retransfer.

Therefore, the mortgage of a lease in any of the six forms referred to above is not an absolute assignment under Indian law and does not create privity of estate between the lessor and the mortgagee.

It is called an English mortgage because, under that system a mortgage is a conveyance as a security for payment of debt, subject to the promise that upon payment of the debt at a certain time, the property should be re-conveyed. This is very similar to the definition in Section 58 (*e*), but the real difference as pointed out above, is, in England it was an absolute transfer of the mortgagor's entire legal interest in the property, with an equitable interest to re-conveyance on repayment. But, reading Section 58 (*a*) and (*e*) together shows that the Indian mortgagor retains some legal rights in the property and the equitable rules of English Law do not apply.

(3) Though in an English mortgage there is a personal covenant to pay as in the case of a simple mortgage, there is in an English mortgage delivery of possession of the property mortgaged.

(4) In a mortgage by conditional sale, the remedy is by foreclosure, whereas in an English mortgage it is by sale.

(5) Such remedy by sale can sometimes be without the intervention of court. (*See* Section 69). A sale outside court is impossible in the case of a simple mortgage as already noticed.

Equitable Mortgage

The fifth type of mortgage is mortgage by deposit of title-deeds. It is defined in clause (*f*) thus:

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 immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds

Its characteristics are:

(1) It is restricted to persons in certain towns, but the property can be anywhere. On the other hand, if property is situate in one of the towns mentioned, but the title-deeds are handed over in a town which is not included, the transaction would not be a mortgage by deposit of title-deeds; For example, if documents of title relating to property in Madras are handed over, at the request of the creditor in Madras, to the post office at a place where the Act does not apply, because the post office is then the agent of the creditor. (2) it is effected by the deposit of title-deeds *with the intention* that they should be security for the debt. It is recognised in order to enable the commercial world to raise quick money; (3) possession of the property is not given; (4) no registration is necessary; (5) the remedy is by a suit for sale and *not* by foreclosure; and (6) the provisions relating to simple mortgage apply to these mortgages also. Many towns in addition to those mentioned in the section have been notified.[28]

Such a mortgage is called an equitable mortgage in English law. In *Pranjiwandas Mehta* v. *Chan Ma Phee*[29], there was a mortgage by deposit of documents of title to the immovable property. Subsequently a memorandum was drawn up by the parties which stated that only a part of the property covered by the documents of title was to be the security for the debt. On the question whether an equitable mortgage was created upon the whole property, it was held: The law upon this subject is beyond any doubt:

(*i*) Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title.

(*ii*) Where, however, titles are handed over accompanied by a bargain, that bargain must rule.

(*iii*) Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and the extent of the security. In the words of Lord Cairns in the leading case of

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28. For a complete list *see* AIR Manual.

29. (1916) LR 43 IA 122, *Amulya* v. *UI Bank*, AIR 1981 Cal 404. *Prakash* v. *Rama Krishna*, AIR 1982 AP 272; *Ishar Das* v. *Dhanwant*, AIR 1985 Del 83.

> *Shaw* v. *Foster*[30]: 'Although it is a well-established rule of equity that a deposit of document of title, without more, without writing, or without word of mouth create in equity a charge upon the property referred to, I apprehend that that general rule will not apply where you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written agreement, any implication that might be raised supposing there were no document, is put out of the case and reduced to silence by the document by which alone you must be governed'.Though registration is not necessary, if there is a memorandum evidencing the deposit of title-deeds *and contains the terms of mortgage*, it must be registered.

In *Rachpal Mahraj* v. *Bhagwandas Daruka*[31], accounts relating to the appellant's dealings were examined and a large sum was found due to the respondents who demanded payment. The appellant brought and gave certain documents, being title-deeds relating to immovable property, for the purpose of being held as security. On the same day, a little later, he gave a letter. The respondents filed a suit for enforcing the mortgage by deposit of title-deeds and sought to rely on the letter as a memorandum proving the mortgage. The appellant contended that the memorandum created the mortgage and as it was not registered as required by Section 17 of the Registration Act, it was inadmissible in evidence to prove the mortgage. It was held:

> A mortgage by deposit of title-deeds is a form of mortgage recognised by Section 58(*f*) of the Transfer of Property Act which provides that it may be effected in certain towns by a person 'delivering to his creditor or his agent documents of title to immovable property with intent to create a security thereon'. That is to say, when the debtor deposits with the creditor the title-deeds of his property with intent to create a security, the law implies a contract between the parties to create a mortgage, and no registered instrument is required under Section 59 as in other forms of mortgage. But if the parties choose reduce the contract to writing the implication is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and

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30. (1872) LR 5 HL 321.
31. (1950) SCR 548.

the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. As the deposit alone is not intended to create the charge and the document, which constitutes the bargain regarding the security, is also necessary and operates to create the charge in conjunction with the deposit, it requires registration under Section 17 of the Indian Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. The time factor is not decisive. The document may be handed over to the creditor along with the title-deeds and yet may not be registrable, as in *Obla Sundarachariar* v. *Narayana Ayyar*[32] or, it may be delivered at a later date and nevertheless be registrable as in *Hari Sankar Paul* v. *Kedar Nath Saha*[33]. The crucial question is: Did the parties intend to reduce this bargain regarding the deposit of the title-deeds to the form of a document. In *Sundarachariar's case*, the criterion applied was: 'No such memorandum can be within Section 17 of the Registration Act, unless on its face it embodied such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that, so far as the deposit is concerned, it constitutes the agreement between the parties'. In *Hari Sankar Paul case*, Lord Macmillan, after reviewing the earlier decisions of the Board, held that the document required registration, observing, 'where, as here, the parties professing to create a mortgage by a deposit of title-deeds contemporaneously enter into a contractual agreement, in writing, which is made an integral part of the transaction, and is itself an operative instrument and not merely evidential, such a document must, under the statute be registered'.

(In the present case) the document purports only to record a transaction which had been concluded and under which rights and liabilities had been orally agreed upon. No doubt it was taken by the respondents to show that the title-deeds of the appellant's property were deposited with them as security for the money advanced by them, and to obviate a possible plea that the deeds were left with them for other purposes....But that is far from intending to reduce the bargain to writing and make the document the basis of the rights and

32. (1931) LR 58 IA 68.
33. (1939) LR 66 IA 184.

liabilities of the parties....It did not require registration and was admissible in evidence to prove the creation of the charge.

If the memorandum connects the deposit with the debt and states the purposes of the deposit it should be registered even if it does not contain all the terms of the contract.[34]

In *Gokul Das* v. *Eastern Mortgage Company*[35], *R* executed a mortgage in favour of *D*, and *D* assigned the mortgage to the appellant by way of equitable sub-mortgage [*See* p. 173] by depositing the title-deeds. *R* borrowed money from the respondents on a mortgage and paid off *D*. On the question of priority between the appellant and respondents with respect to their respective mortgagee-rights, it was held:

> A mortgage is defined in Section 58 of the Transfer of Property Act. No registration then was required under Section 59 (of the appellant's sub-mortgage). As stated by the Judicial Committee in the case of *Webb* v. *Mcpherson*, 'the law of India, speaking broadly, knows nothing of the distinction between legal and equitable property in the sense in which that was understood when equity was administered by the Court of Chancery in England'. The case of the respondents as presented to us is that they are 'legal' mortgagees and that they are in the same position as a legal mortgagee in England, who has obtained the legal estate without notice of the prior equitable encumbrance. But the reasoning is fallacious because in India there is no such distinction between legal and equitable estates as is known to the English law. If the respondent's claim can be sustained, it can only be sustained under Section 48 of the Indian Registration Act, 1877, and that brings us to the question whether the transaction in the present case, under which these documents of title were deposited with the appellant, was merely an oral agreement within the meaning of that section. Now, it was decided more than 20 years ago by Mr. Justice Pigot, in the case of *Coggan* v. *Pogose*[36], that a deposit of title-deeds of certain property, under a verbal arrangement to secure payment of a debt, is not an oral agreement or declaration relating to such property within the meaning of Section 48 of the Registration Act. That de-

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34. *Bhavanarayan* v. *Venkataratnam*, AIR 1971 AP 359; *Nathan* v. *Rao*, AIR 1965 SC 430.
35. (1905) ILR 33 Cal 410.
36. (1884) ILR 11 Cal 158.

cided the precise point. So far as we are aware, that decision has never been dissented from. We think it is unlikely that during this long series of years the point would not have arisen. The case is stronger since the passing of the Transfer of Property Act, for Section 59 recognises such a transaction as a valid mortgage without the necessity of registration [Therefore the respondent was not entitled to any priority over the appellant.]

Section 96 provides:

The provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds.

See Section 67(*a*) and *Lingam Krishna's case*, page 238.

A document is a title-deed if it shows the claim of the mortgagor to the property. Merely because Section 59 excludes a mortgage by deposit of title-deeds from registration, it does not mean that memoranda of the kind discussed above do not need registration.

Anomalous Mortgage

The last type of mortgage mentioned in Section 58 is anomalous mortgage. It is defined in Section 58(*g*) as follows:

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 the section is called an anomalous mortgage.

Examples of anomalous mortgages are a simple usufructuary mortgage and a usufructuary mortgage by conditional sale. Suppose in the case of a usufructuary mortgage, the mortgagor also personally covenants to repay the mortgage amount. It ceases to be a usufructuary mortgage and becomes both a simple and a usufructuary mortgage. Such a mortgage is an anomalous mortgage. Suppose possession of the mortgaged property is given to the mortgagee, the terms of the mortgage being that the rents and profits of the property should be appropriated towards interest and that if the principal amount is not paid by a particular date, the property is deemed to be sold to the mortgagee. It partakes of the characteristics of both a mortgage by conditional sale as well as a usufructuary mortgage. Such a mortgage again would be an anomalous mortgage. In *Kider Nath* v. *Mangat Rai*[37], properties were

37. (1969) 3 SCC 588; *Haji Fatima* v. *Prahlad*, AIR 1985 MP 1.

mortgaged with possession, and under the covenants in the mortgage-deed, there was a stipulated rate of interest payable by the mortgagor on the mortgage money and the amount recovered from the income of the property was to be first applied towards the interest and the balance towards the principal. The mortgagee was also entitled to recover by suit the interest accruing due. It was held:

The mortgages are clearly anomalous mortgages.

Many of the customary mortgages prevailing in various parts of the country, and especially in Malabar are really anomalous mortgages. It is to protect them that clause (*g*) has been enacted.

In fact, the terms of the contract between the parties could be anything provided the right of the mortgagor to redeem is not affected.

Section 68 may be read along with this section. It provides:

In the case of an anomalous mortgage the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed and, so far as such contract does not extend, by local usage.

When a mortgagor transfers an interest in immovable property to a mortgagee a mortgage is created and each of them, the mortgagor and mortgagee have an interest in the mortgaged property. Since an interest in immovable property is itself immovable property both the mortgagor and the mortgagee can create mortgages over their respective interests. The kind of mortgage that a mortgagee can create would depend upon his rights in his mortgage. In the case of the mortgagor the subsequent mortgage is known as puisne mortgage and when the mortgagee creates a mortgage over his interest it is said to be sub-mortgage.[38]

Formalities for creating a Mortgage

Section 59 deals with the formalities necessary for entering into a mortgage transaction. It provides:

Where the principal money secured is one hundred rupees or upwards, a mortgage, other than a mortgage by deposit of title-deeds, can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

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38. *Chelamanna* v. *Paramesvaran*, AIR 1971 Ker 3 (FB).

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.[39]

Registration

The word 'registered' is defined in Section 3 as follows:

"registered" means registered in any part of the territories to which this Act extends under the law for the time being in force regulating the registration of documents;

The English common law insisted on the notoriety of transfers of land which was secured by 'livery of seisin' or delivery of ownership and possession. This was done by the feoffor (the transferor) and the feoffee (the transferee) going upon the land and the feoffor offering a lump of earth or a twig of a tree growing on the land to the feoffee; or, first going through the formality in sight of the land and then the feoffee entering on the land. Modern English law requires a deed in conveyances of legal estates (in contrast to equitable estates). Registration however is optional. But in the absence of registration in the case of estates capable of being registered, they lose their overreaching character and are unavailable against subsequent purchasers.

In Indian law, certain transfers must be in writing (*see* Section 9) and in those cases, except in the case of a transfer of an actionable claim, the document requires to be registered. Section 17 of the Registration Act also enumerates the cases in which registration is compulsory, and Section 18 refers to the cases in which it is optional. Section 49 of that Act deals with the effect of non-registration. It declares that no document required by Section 17 of the Transfer of Property Act to be registered, shall, unless it has been registered: (*i*) affect the immovable property dealt with; (*ii*) confer a power to adopt; and (*iii*) be received as evidence of any transaction affecting such property or conferring such power. The proviso provides that notwithstanding the absence of registration the instrument may be received as evidence of a contract in a suit for specific performance under the Specific Relief Act, or evidence of part performance of a contract for the purposes of Section 53-A of the Transfer of Property Act. Also the instrument, which is required to be registered but has not been registered, is admissible in evidence for proving matters which are only collateral as for example, an unregistered

39. *Sirichand* v. *Nathi*, AIR 1983 P&H 171.

partition deed dealing with immovable properties may be used for proving division in status but not for proving what items were allotted to whom; and the document can be used as evidence of the personal covenant in the case where it is a mortgage-deed required to be registered.

Under Section 48 of the Registration Act, an oral transfer will not avail against a subsequent transfer of same property if such subsequent transfer is registered, unless the anterior oral transfer has been followed up by delivery of possession.

Attestation

'Attested' is defined as follows in Section 3:

"attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary;

and 'instrument' is defined as follows in Section 3:

"instrument" means a non-testamentary instrument;

The definition of 'attested' has been added by the Transfer of Property Amendment Act (27 of 1926). The amendment has been given retrospective operation by using the words, 'shall be deemed always to have meant'. As a result of the definition, it is no longer necessary, as was held in *Samu Patter* v. *Abdul Khadir*[40], that the act of signing by the executant should be done *in the presence* of the witnesses. Such a requirement exists in English law. Under the present law it is sufficient if the attestor receives an acknowledgment of execution. In view of the language of the definition, the signatures of the Registering Officer and of identifying witnesses affixed to the registration endorsement under the Registration Act could amount to valid attestation, if the intention was to sign as attesting witnesses.

40. ILR 35 Mad 607(PC).

In *Abdul Jabbar* v. *Venkata Sastri*[41], the defendant in a suit on a promissory note on the original side of the High Court was allowed to defend the suit on his furnishing security for a sum of Rs 50,000 to the satisfaction of the Registrar of the High Court. He executed a security bond charging his immovable properties. The signature of the executant was attested by the Assistant Registrar of the High Court and the document was registered by the Registrar under the Registration Act. The document bore the signatures of the Registrar and of two identifying witnesses. On the question whether it was attested by only one witness, namely, the Assistant Registrar of the High Court, or by more than one witness, it was held:

> *Prima facie* the registering officer put his signature on the document in discharge of his statutory duty under Section 59 of the Registration Act. Likewise the identifying witnesses put their signatures on the document to authenticate the fact that they had identified the executant. It is not shown that they put their signatures for the purposes of attesting the document. To attest is to bear witness to a fact. *Briefly put, the essential conditions for valid attestation under the section are: (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgment of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant.* It is essential that the witness should have put his signature *animo attestandi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, for example, to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness.
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> 'In every case the court must be satisfied that the names were written *animo attestandi*'. *See* Jarman on *Wills*, 8th Ed., p. 137. Evidence is admissible to show whether the witness had the intention to attest. 'The attesting witnesses must subscribe with the intention that the subscription made should be complete attestation of the will, and evidence is admissible to show whether such was the intention or not'. *See* Theobald on *Wills*, 12th Ed., p. 129. In *Girja Datt* v.

41. (1969) 1 SCC 573.

Gangotri[42], this Court held that the two persons who had identified the testator at the time of registration of the will and had appended their signatures at the foot of the endorsement by the Sub-Registrar, were not attesting witnesses as their signatures were not put *animo attestandi*. In *Abinash Chandra Bidvanidhi Bhattacharya* v. *Dasarath Malo*[43], it was held that a witness who had put his name under the word 'scribe' was not an attesting witness as he had put his signature only for the purpose of authenticating that he was a scribe. In *Shiam Sunder Singh* v. *Jagannath Singh*[44], the Privy Council held that the legatees who had put their signatures on the will in token of their consent to its execution were not attesting witnesses and were not disqualified from taking as legatees....It follows that [in the present case] the document was attested by one witness only.

The object of attestation is to establish that the purported executant in fact executed the document. An attestor should be *sui juris*, that is, capable of entering into a contract. Therefore, illiterate persons and marksmen can be attesting witnesses though it is never considered advisable, if it can be avoided, to have marksmen as witnesses. (*See* Jarman on *Wills*, 8th Edn., Vol. I, pp.134-137). A person who is a party to a deed cannot be an attesting witness. A person is however not disqualified to be an attesting witness merely because he is interested in the transaction. In *Kumar Harish Chandra* v. *Bansidhar*[45], a mortgage deed was executed by the appellant in favour of the second respondent, but, since the first respondent advanced the money, the first respondent filed the suit to enforce the mortgage. One of the attesting witnesses was the first respondent himself. On the question whether there was proper attestation, it was held:

> It will be seen that the definition of 'attested' does not preclude in terms the lender of money from attesting a mortgage-deed under which the money was lent....The law requires that the testimony of parties to a document cannot dispense with the necessity of examining at least one attesting witness. Inferentially, therefore, *it debars a party from attesting a document which is required by law to*

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42. AIR 1965 SC 346, 351.
43. ILR 56 Cal 598; *Pyare Mohan* v. *Narayan*, AIR 1982 Raj 43; *Dhruba* v. *Paramananda*, AIR 1983 Guj 24.
44. 54 MLJ 43 (PC).
45. (1966) 1 SCR 153; *Banga Chandra* v. *Jagat Kishore*, ILR 44 Cal 186 (PC).

be attested. Where, however, a person is not a party to the deed there is no prohibition in law to the proof of execution of the document by that person.

A distinction was thus drawn between a person who is *a party to the deed* and a person who, though not a party to the deed, is *party to the transaction* and the latter was not incompetent to attest the deed.

No particular form is necessary, but the executant must have executed the deed before the attestor can witness the executant's signature. In *Santlal Mohan* v. *Kamla Prasad*[46], a suit was filed for enforcement of a simple mortgage. The bond was attested by the witness on the same day on which it was written, but the document was executed (that is, signed by the mortgagor) later. It was held that the attestation was not valid. The effect of invalid attestation is that the document cannot be enforced in a court of law.

In *Kundanlal* v. *Musharrafi Begum*[47], a mortgage-deed was executed by a *pardanashin* lady. As there was a thick curtain behind which she sat she could not have seen through the curtain. On the question whether the terms of Section 3 relating to attestation, namely, that each of the attesting witnesses should have signed in the presence of the executant, were satisfied, it was held:

> It is clear enough that the defendant (executant), if she had been minded to see the witness sign could have done so even if she did not actually see through the curtain.

The *mere* attestation of a document is no proof that the attesting witness is awaGre of the contents of the document.[48] (*See* The Law of Evidence by Vepa P. Sarathi—Estoppel by Attestation).

Exercises

1. What is meant by attestation? (pp. 212-214)
2. What are the essential elements of a mortgage? (pp. 187-189)
3. What are the essential elements of a simple mortgage? (pp. 189-190)
4. What are the remedies of a simple mortgagee? (p. 190)

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46. 1952 SCR 116.
47. (1936) LR 63 IA 326; *Rao Ganga Prasad* v. *Ishri*, AIR 1918 PC 3; *Padarath Halwai* v. *Ram Narain*, AIR 1915 PC 21.
48. *Badrinarayan* v. *Rajabhagyathammal*, (1996) 7 SCC 101.

5. What are the essential elements of a mortgage by conditional sale? (pp. 190-195)
6. Distinguish between a mortgage by conditional sale and a condition for re-conveyance. (pp. 190-195)
7. What are the essential elements of a usufructuary mortgage? (pp. 195-200)
8. What are the essential elements of an English mortgage? (pp. 200-204)
9. What are the essential elements of an equitable mortgage? (pp. 204-209)
10. What are the essential elements of an anomalous mortgage? (pp. 209-210)
11. Distinguish between a sub-mortgage and mortgage? (p. 210).

12
General Considerations in Relation to Mortgages

Implied Covenants

The first rule is that the mortgagor is deemed to have covenanted regarding his title and for the quiet enjoyment by the mortgagee. These are implied covenants breach of which will give rise to the mortgagee an independent action for damages. These are set out in Section 65 which is as follows:

In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee,—

(*a*) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same;

(*b*) that the mortgagor will defend, or, if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto;

(*c*) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due in respect of the property;

(*d*) and, where the mortgaged property is a lease, that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been paid, performed and observed down to the commencement of the mortgage; and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all claims sustained by the reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts;

(*e*) and, where the mortgage is a second or subsequent encumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior encumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior encumbrance.

The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

Under clause (*a*), the mortgagor is also estopped from denying his title which he represented that he has to the mortgagee. The mortgagee

can also rely on Section 43 if the mortgagor had no title but subsequently acquires it. [*See* Section 55(2)].

Under Section 72(*c*) the mortgagee is entitled to recover any money spent by him for supporting the mortgagor's title if the mortgagor does not do so under clause (*b*) of this section.

If the mortgagor does not pay the public charges under clause (*c*) and the mortgagee does, the latter is entitled to recover the amount under Section 72(*b*).

Substituted Security

The second rule is the doctrine of substituted security. This is laid down in Section 73 which is as follows:

(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 (1 of 1894), or any other enactment for the time being in force providing for the compulsory acquisition of immovable 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 encumbrancers, and may be enforced notwithstanding that the principal money on the mortgage has not become due.

Scope

The sale contemplated by the section is *not* one subject to encumbrances for, in that case, the mortgagee can proceed against the property in the hands of the purchaser. The sale proceeds are treated as substituted security for the mortgagee.

The principle of this section applies not merely to the sales referred to in the section but also to execution sales and cases of partition.[1]

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1. *Barhan Dev* v. *Tarachand*, LR 41 IA 45.

In *Mohd. Afzal Khan* v. *Abdul Rahman*[2], the third respondent mortgaged his two-third share in certain properties which were held jointly with respondents 1 and 2. Thereafter, there was a partition by arbitration and the properties mortgaged fell to the share of respondents 1 and 2. On the question of the mortgagee's right to proceed against these properties, it was held:

> Their Lordships are of opinion that when one of two or more co-sharers mortgages his undivided share in some of the properties held jointly by them, the mortgagee takes the security subject to the right of the other co-sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. If the mortgage, therefore, is followed by a partition, and the mortgaged properties are allotted to the other co-sharers, they take those properties, in the absence of fraud, free from the mortgage, and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution of his undivided share: This was the view taken by the Board in *Byjnath Lal* v. *Ramoodeen Chowdhry*[3]....Their Lordships think that the principle enunciated in this case applies equally to a partition by arbitration such as the one in the present case. Their Lordships are therefore of opinion that the appellant is not entitled to enforce his charge against the properties allotted to the first and second respondents.

Liabilities of Mortgagee in Possession

The third rule is that ordinarily a mortgagee is not entitled to possession. Where he is entitled to possession as in the case of a mortgage by conditional sale or in an English mortgage, the mortgagee is subject to certain liabilities. These are set out in Section 76 which is as follows:

> When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property,—
>
> (*a*) he must manage the property as a person of ordinary prudence would manage it if it were his own;
>
> (*b*) he must use his best endeavours to collect the rents and profits thereof;

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2. [1932] LR 59 IA 405; *Gopala Pillai* v. *State Bank of Travancore*, AIR 1979 Ker 224; *Lakshmanan* v. *Alagappa*, AIR 1981 Mad 338.
3. LR 19 IA 106; *Issaku* v. *Seetharamaraju*, AIR 1948 Mad 1 (FB); *Padmanabha Pillai* v. *Abraham*, AIR 1971 Ker 154.

(*c*) he must, in the absence of a contract to the contrary out of the income of 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;

(*d*) 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 rents and profits thereof after deducting from such rents and profits, the payments mentioned in clause (*c*) and the interest on the principal money;

(*e*) he must not commit any act which is destructive or permanently injurious to the property;

(*f*) 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 reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage-money;

(*g*) 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;

(*h*) 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;

(*i*) When the mortgagor tenders, or deposits in manner hereinafter provided, the amount for the time being due 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 court, as the case may be and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time in connection with the mortgaged property.

Loss occasioned by his default.—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.

Scope

While Section 72 deals with the rights of a mortgagee in possession, this section deals with his liabilities. The mortgagee must be in possession and as a mortgagee. It is possible that he may be in possession as lessee as in the case of *zuripeshgi* leases. In such cases, since he is not in possession *qua* mortgagee, this section will not apply.

Examples of clause (*a*) are as follows:

In *Mahabir Gope* v. *Harbans Narain Singh*[4], the mortgagee in possession of certain lands, entered into a settlement with tenants contrary to a term in the *ijara* deed disentitling the mortgagee from locating tenants on the mortgaged land. As a result of a statute, occupancy rights were conferred on such tenants. When the mortgagors wanted to take possession of the lands after redeeming the mortgage, they were resisted by the tenants. It was held:

> The general rule is that a person cannot by transfer or otherwise confer a better title on another than he himself has. A mortgagee, cannot, therefore, create an interest in the mortgaged property which will enure beyond the termination of his interest as mortgagee. Further, the mortgagee, who takes possession of the mortgaged property, must manage it as a person of ordinary prudence would manage it if it were his own; and he must not commit any act which is destructive or permanently injurious to the property; *see* Section 76(*a*) and (*e*) of the Transfer of Property Act....A permissible settlement by a mortgagee in possession with a tenant in the course of prudent management and the springing up of rights conferred or created by statute based on the nature of the land and possession for the requisite period is a different matter altogether... ... It is an exception to the general rule. The settlement of the tenant by the mortgagee must have been a *bona fide* one and this exception will not apply in a case when the terms of the mortgage prohibit the mortgagee from making any settlement of tenants on the land either expressly or by necessary implication.

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4. 1952 SCR 775; *Mahadev* v. *Kantilal*, AIR 1980 Bom 79; *Kuttappan* v. *Kathyayini*, AIR 1981 Ker 10; *Ram Chand* v. *Randhir Singh*, (1994) 6 SCC 552.

In *Asa Ram* v. *Ram Kali*[5], a usufructuary mortgagee of agricultural land inducted the respondents as tenants. When the mortgagors (appellants) redeemed the mortgage, the respondents resisted delivery of possession claiming to be hereditary tenants under the U.P. Tenancy Act. It was held:

> Now Section 76(*a*) provides that a mortgagee in possession 'must manage the property as a person of ordinary prudence would manage it if it were his own'. Though on the language of the statute this is an obligation cast on the mortgagee, the authorities have held that an agricultural lease created by him would be binding on the mortgagor even though the mortgage has been redeemed, provided it is of such a character that a prudent owner of property would enter into it in the usual course of management. This being in the nature of an exception, it is the person who claims the benefit thereof, to strictly establish it. (In the present case the lands) were home farm lands under the direct cultivation of the proprietors, as distinguished from lands which were under cultivation by tenants, and having regard to the special rights which the tenancy laws all over India have recognised in the owner in respect of such lands, an act of the mortgagee which puts those rights in peril cannot, as held in *Mahabir Gope case* be regarded as that of a prudent owner, and it requires exceptional grounds to justify it.

As the lease could not be protected by Section 76(*a*), there was no proper admission of a tenant and the respondents could not claim the rights under the U. P. Tenancy Act.

Under clause (*b*) the mortgagee has not only a right to collect the rents and profits, he is under a duty to do so, because, he has to account and reduce the mortgagor's liability especially when the rent is more than the interest due on the mortgage-money, and is to be set off against the interest and principal amount of mortgage-money. In *Mathuralal* v. *Keshar Bai*[6], the mortgagor mortgaged his house with possession. The mortgage-deed provided that the tenant shall execute rent notes in favour of the mortgagee and whatever rent shall be realised will be credited in

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5. 1958 SCR 986; *Sachel Mal Paresram* v. *Mst. Ratan Bai*, AIR 1972 SC 637; *All India Film Corpn.* v. *Raja*, (1969) 3 SCC 79; *Jagan Nath* v. *Mitter*, AIR 1970 P&H 104; *Purushottam* v. *Madhavji*, AIR 1976 Guj 161; *Tarachand* v. *Gangaram*, AIR 1978 Del 58.

6. (1970) 1 SCC 454.

lieu of interest and if the amount of rent shall exceed the amount of interest, the difference shall be deducted from the original sum due, but, if the amount of interest shall exceed the amount of rent, then the mortgagor shall pay it. The mortgagor himself became the tenant and he agreed to pay rent which was slightly less than the interest on the mortgage-money. The period of redemption was two years. After that period the mortgagee filed a suit on his mortgage and a preliminary decree for sale of the property was passed, but no steps were taken for the passing of the final decree within the period of limitation. In a suit for ejectment of the mortgagor and for rent, it was held:

> The mortgagor's right to redeem under the Limitation Act, 1908, was to enure for 60 years from the date of the mortgage and the mortgagor had not lost his right to redeem notwithstanding the passing of the preliminary decree in the mortgage suit....After the mortgagee had lost his right to apply for a final decree for sale, he did not lose his status as a mortgagee. He only lost his remedy to recover the mortgage money by sale. The mortgagor did not lose his right to redeem. In all such cases the leasing back of the property arises because of the mortgage with possession but we find ourselves unable to hold that the mortgagee does not secure to himself any rights under the deed of lease but must proceed on his mortgage in case the amount secured to him under the deed of lease is not paid. If the security is good and considered to be sufficient by the mortgagee there is no reason why he should be driven to file a suit on his mortgage when he can file a suit for realization of the moneys due under the rent note....If during the continuance of the security the mortgagee wants to sue the mortgagor on the basis of the rent note and take possession himself or induct some other tenant thereby securing to himself the amount which the mortgagor had covenanted to pay, there can be no legal objection to it.

Clause (*c*) corresponds to Section 65(*c*) and (*d*), under which the *mortgagor* if in possession is bound to make the payments but only out of the income. If the income is not sufficient, the mortgagee's rights and obligations are governed by Sections 72(*b*) and 73.[7] When mortgaged property is part of a larger holding and the entire holding is brought to sale for default in payment of rent, and the mortgagee purchases the

7. *Panchanan* v. *Basudeo*, AIR 1995 SC 1743.

property under the rent sale, the mortgagor's right of redemption is extinguished (*Sacchidanand* v. *Sheo Prasad*, AIR 1966 SC 126.)

Clause (*d*) shows the payment under clause (*c*) has a priority over repairs.

Clause (*e*) corresponds to the mortgagor's obligation under Section 66 and the lessee's obligation under Section 108.

Clause (*f*) deals with the application of the insurance money which he is entitled to receive, when he had insured the property under Section 72.

The scope of clauses (*g*) and (*h*) is explained in the following case:

In *Mahant Ramdhan Puri case* (p. 198) it was also contended that the deed, if at all, represented an anomalous mortgage, that Section 98 of the Transfer of Property Act applied to it and that the mortgagee was not liable to account, because, the contract so provided. The mortgagor contended that it was a usufructuary mortgage and that the mortgagee was liable to account under Section 76(*g*) and (*h*). It was held:

> Whether the transaction is a usufructuary mortgage or an anomalous mortgage, in the circumstances of the case, there will not be any difference in the matter of rendition of accounts, for, in the ultimate analysis, the true construction of the relevant terms of the document would afford an answer to the question raised....Section 76(*g*) of the Transfer of Property Act imposes a liability on a mortgagee to keep full and accurate accounts supported by vouchers. So too, he is under a statutory liability under clause (*h*) to debit the net receipts of the mortgaged property in reduction of the amount due to him from time to time on account of the interest and where such receipts exceed any interest due, in reduction and discharge of the mortgage money and to pay the surplus, if any, to the mortgagor. Therefore, every mortgagee in possession is bound to keep clear, full and accurate accounts and to render the accounts to the mortgagor in the manner prescribed in clause (*h*). But Section 77 enacts an exception to the mortgagee's liability under clauses (*g*) and (*h*) of Section 76. Under Section 77, if there is a contract between the mortgagor and the mortgagee, whereunder it is agreed that the receipts of the mortgaged property should, so long as the mortgagee is in possession of the property, be taken in lieu of interest and a defined portion of the principal, the mortgagee is freed from the

statutory liability to keep accounts or to render accounts to the mortgagor in the manner prescribed under clauses (*g*) and (*h*) of Section 76 of the Act. This is so because, the receipts are set off against the interest, and there is nothing to account for. Therefore, to insist upon the mortgagee to keep accounts or render accounts to the mortgagor would be an empty formality. The essential condition for the application of the section is that the receipts of the property should be taken in lieu of interest and a defined portion of the principal....The Judicial Committee in *Pandit Bacchu Lal* v. *Chaudhri Syed Mohammad Mah*[8], held that notwithstanding the fact that a particular rate of interest was mentioned in the mortgage-deed, there was a contract within the meaning of Section 77 of the Transfer of Property Act. It was a case of a mortgage with possession and a particular rate of interest was mentioned in the mortgage-deed. There was a provision for repayment of the principal either in whole or in part, before the stipulated period, but it was otherwise provided that the mortgagee should appropriate the surplus profits towards interest, he having no claim to interest and the mortgagors having no claim to the profits. The Privy Council held, on a construction of the mortgage-deed, that the said deed contained a contract within the meaning of Section 77 of the Transfer of Property Act....(Therefore) whether Section 77 applies or not, under the express terms of the contract (in the present case) the appellant is not liable to render accounts for the excess receipts.

Under clause (*i*) if the mortgagee wrongfully refuses the mortgage-money tendered or deposited, it also ceases to bear interest; and

Section 77 provides:

Nothing in Section 76, clauses (*b*), (*d*), (*g*) and (*h*), applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property, shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

Clauses (*b*) and (*d*) of Section 76 are excepted because, if the mortgagee does not collect the full rents and profits, it is he who suffers. The interest and part of the principal loan are deemed to be discharged and he has to make the necessary repairs. Clauses (*g*) and (*h*) are

8. [1933] 37 CWN 457 (PC); *Mancheri* v. *Kuthiravattam*, (1996) 6 SCC 185.

excepted because, there is nothing to account, the appropriation of the rent having been specified by the contract itself.

Rights of Mortgagor in Possession

Section 76 may be compared with Sections 66 and 65-A which deal with certain rights of the mortgagor in possession. Section 66 provides:

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.

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

Section 65-A provides:

(1) Subject to the provisions of sub-section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

(2) (*a*) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom, or usage.

(*b*) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.

(*c*) No such lease shall contain a covenant for renewal.

(*d*) Every such lease shall take effect from a date not later than six months from the date on which it is made.

(*e*) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed 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.

(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-section (2) may be varied or extended by the mortgage-deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section.

Under sub-section (2)(*a*), the lease shall be in the ordinary course of management *and* in accordance with local laws and customs.

Suppose there is a contract in the mortgage-deed that the mortgagor shall not lease the mortgaged property without the consent of the

mortgagee; and if the mortgagor grants a lease without the mortgagee's consent, the lease would be binding on the mortgagor, but not on the mortgagee. Since the lease does not bind the mortgagee, there is no breach of covenant as far as he is concerned, because, the covenant is only not to create a lease binding on the mortgagee without his consent.

In *Raja Kamakshya Narayan Singh* v. *Chohan Ram*[9], a mortgagor in possession granted a permanent lease of the mortgaged properties in 1925. The plaintiff who was subrogated to the position of the mortgagee and purchased the properties in execution of the mortgage decree filed a suit for possession against the lessees. It was held:

> The question whether a mortgagor in possession has power to lease the mortgaged property (in cases coming prior to the enactment of Section 65-A of the Act by the Amending Act 20 of 1929), has got to be determined with reference to the authority of the mortgagor as the bailiff or agent for the mortgagee *to deal with the property in the usual course of management.* It has to be determined on general principles and not on the distinction between an English mortgage and a simple mortgage or on considerations germane to Section 66 of the Act. Section 66 has nothing to do with the mortgagor's power to lease the mortgaged property. The section is a statutory enactment of the powers of the mortgagor in possession in regard to waste of mortgaged property. The mortgagor in possession is not liable for what in terms of the English law of Real Property is known as permissive waste, that is, for omission to repair or to prevent natural deterioration. He is however liable for destructive waste, that is, acts which are destructive or permanently injurious to the mortgaged property if the security was insufficient or would be rendered insufficient by such acts. Section 66 has therefore no application to the grant of a lease by mortgagor in possession.
>
> It is for the lessee if he wants to resist the claim of the mortgagee to establish that the lease in his favour was granted on the usual terms in the ordinary course of management. Such a plea if established—and it must not be overlooked that the burden of proof in this matter is upon him—would furnish a complete answer to the claim of the mortgagee.

9. 1953 SCR 109; *Gauri Shanker* v. *Kapoor Chand*, AIR 1983 Raj 77.

In the present case there was neither allegation nor proof that the grant of permanent lease was a dealing with the mortgaged property in the usual course of management by the mortgagor and therefore the permanent lease could not prevail against the plaintiff.

But now the mortgagor's power to grant leases is recognised statutorily subject to the conditions laid down in this section.

Accessions

The fourth rule deals with accessions to the mortgaged property and the law relating to this aspect is dealt with in Sections 63, 63-A, 64, 70, 71 and 72.

An accession to property is something which increases the value of the property. If the accession is natural the mortgagor is ordinarily entitled to the increase. If it is due to expense incurred by the mortgagee, the rights of the mortgagor depend upon whether it is separable or inseparable. The rights under the section are subject to a contract to the contrary.

An accession to property is an addition to property, whereas an improvement is an alteration to the property.

An accession generally becomes part of the principal. Under Section 70,

> 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 the 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 corresponds to Section 63 which deals with the mortgagor's rights. In illustration (*b*) if the *mortgagee* erects the building, he is entitled to treat it as part of his security, though on redemption, the mortgagor is entitled to it without any payment, because, the structure would not be necessary to preserve the land. The accession contemplated by the section is not merely a physical addition to the

property, but would also cover the case of an enlargement of the mortgagor's right in the property. In *Raja Kishendatt* v. *Raja Mumtaz*[10], immediately after the execution of the mortgage-deed an usufructuary mortgagee attempted to receive collections from the lands comprised in the mortgage, but was encountered by the opposition of a number of persons holding the land under subordinate tenures known as *birt* tenures. The resistance having been successful, the mortgagee purchased the rights of the *birtias*. On the question whether the mortgagor, by paying the purchase-money of the *birts*, plus the original mortgage-money, could redeem the estate, or, whether the mortgagee was entitled to retain the rights and interests of the *birtias*, it was held:

> Their Lordships are not prepared to affirm the broad proposition that every purchase by a mortgagee of a sub-tenure existing at the date of the mortgage must be taken to have been made for the benefit of the mortgagor, so as to enhance the value of the mortgaged property, and make the whole, including the sub-tenure, subject to the right of redemption upon equitable terms....It seems to their Lordships that, although some of the earlier cases may have been qualified by more recent decisions, the general principle is still recognised by English law to this extent, namely, that most acquisitions by mortgagor enure for the benefit of the mortgagee, increasing thereby the value of his security; and that, on the other hand, many acquisitions by the mortgagee are in like manner treated as accretions to the mortgaged property or substitutions for it, and, therefore, subject to redemption. The law laid down in *Rakestraw* v. *Brewer*[11], as to the renewal of a term obtained by the mortgagee of the expired term, being, 'as coming from the same root' subject to the same equity, has never been impeached. The English case, which in its circumstances comes nearest to the present, is that of *Doe* v. *Pott*[12], in which the principle was enforced against the mortgagor. It was there held, that if the lord of a manor mortgaged it in fee, and afterwards, pending the security take surrenders to himself in fee of copyholds held of the manor, they shall enure to the mortgagee's benefit, and the lord cannot lessen the security by alienating them. It is difficult to see why, as in the case of a renewable lease, the same

10. [1879] ILR 5 Cal 198 (PC); *Sorabjee* v. *Dwarakadas*, AIR 1932 PC 199.
11. 2 PW 511.
12. 2 Dong 710.

equity should not attach to the mortgagee, particularly if by reason of his position as mortgagee in possession he has had peculiar facilities for obtaining the surrenders.

Suppose *A* mortgages to *B*, a land containing trees which belong to the government. *B* as occupant, purchases the trees from the government. *A* on payment of the amount spent by *B* for the purchase will be entitled to the trees on redemption. The test seems to be, would the acquisition by the mortgagee bring it under Section 90 of the Trusts Act.

Section 71 provides:

When 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.

This section corresponds to Section 64 which deals with the mortgagor's right when the mortgagee obtains a renewal of the lease.

Section 64 provides:

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

Under Section 72(*e*), the mortgagee is entitled to recover the cost of such renewal.

Section 63 provides:

Where mortgaged 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.

Where such accession has been acquired at the expense of the mortgagee and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property; the mortgagor being liable, in the case of an acquisition 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, or, where no such rate is fixed, at the rate of nine per cent per annum.

In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any arising from the accession shall, in the

absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

Section 72 provides:

A mortgagee may spend such money as is necessary—

(*a*) for the preservation of the mortgaged property from destruction, forfeiture or sale;

(*b*) for supporting the mortgagor's title to the property;

(*c*) for making his own title thereto good against the mortgagor; and

(*d*) when the mortgaged property is a renewable lease-hold, 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 per cent per annum. Provided that the expenditure of money by the mortgagee under clause (*b*) or clause (*c*) shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property; and the premiums paid for any such insurance shall be added to the principal money with interest at the same rate as is payable on the principal money or, where no such rate is fixed, at the rate of nine per cent per annum. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed or (if, no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction to reinstate the property insured.

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure.

Though the marginal note refers to 'mortgagee *in possession*', the section in fact applies to all mortgagees. The section is limited to the *costs incurred with respect to mortgaged property*, but unlike the rule in English law, the mortgagee has a right not only to proceed against such property, under this section in order to recover such costs, but has also the personal remedy against the mortgagor or under Section 69 of the Indian Contract Act, 1872. But whether the costs incurred are with respect to the mortgaged property and were necessary to be incurred are questions depending upon the circumstances of the case. [*See* Sections 64 and 65].

In *Parsotim Thakur* v. *Lalmohar Thakur*[13], the plaintiffs as the permanent lessees of the equity of redemption, filed a suit for redemption. The mortgagees claimed an additional sum which was spent by them in resisting the claims of certain tenants. It was held:

> The respondents were mortgagees in possession and would be entitled under Section 72 of the Transfer of Property Act, 1882, to add to the principal of their mortgages any money properly expended by them in supporting the title of their mortgagors. It can hardly be said, therefore, that any express agreement was necessary.

Improvements

Section 63-A, which deals with improvements to mortgaged properties, provides as follows:

(1) 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 not, save only in cases provided for in sub-section (2), be liable to pay the cost thereof.

(2) Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable 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, or where no such rate is fixed, at the rate of nine per cent per annum, and the profits, if any, accruing by reason of the improvement shall be credited to the mortgagor.

Exercises

1. When is the mortgagee entitled to compensation for 'accessions' and for 'improvements'? (pp. 228-230)
2. Between a mortgagor and a mortgagee—neither can deny the title of the other. Explain. (pp. 217-218)
3. What is the doctrine of substituted security? (pp. 218-219)
4. What are the general duties of a mortgagee in possession? (pp. 219-226)

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13. [1931] LR 58 IA 254; *Nemi Chand* v. *Onkar Lal*, (1991) 3 SCC 464.

13
Rights of Mortgagees

Mortgagee's right against the person of the Mortgagor

The mortgagee has two rights, one against the person of the mortgagor, and the other against mortgaged property. The former is dealt with in Section 68 and the latter in Sections 67, 69 and 69-A. The mortgagee may sue the mortgagor for the money in cases dealt with in Section 68 or he may use the profits of the property as in a usufructuary mortgage, or get the mortgaged property sold as in the case of a simple mortgage, English mortgage and a mortgage by deposit of title-deeds, or foreclose as in the case of a mortgage by conditional sale and become the owner.

Section 68 provides:

(1) The mortgagee has a right to sue for the mortgage-money in the following cases and no others, namely—

(*a*) where the mortgagor binds himself to repay the same;

(*b*) 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;

(*c*) 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;

(*d*) 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 or from his legal representative shall not be liable to be sued for the mortgage-money.

(2) Where a suit is brought under clause (*a*) or clause (*b*) of sub-section (1), the Court may, at its discretion, stay the suit and all proceedings therein, notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and, if necessary, retransfers the mortgaged property.

The contract referred to in clause (*a*) always exists in a simple mortgage, English mortgage or mortgage by deposit of title-deeds and it

may also exist if expressly provided for in an anomalous mortgage. It must be noted that merely because a mortgage is a secondary remedy for the recovery of the money, it cannot be assumed that the primary remedy of suing on the loan also always exists. The period of limitation for enforcement of personal remedy is now 3 years.

Clause (*b*) deals with cases when the whole or part of the property is destroyed by an act of God. This clause may also be compared with Section 73 already discussed.

Clauses (*c*) and (*d*) are really examples of cases where there is breach of covenant for title referred to in Section 65. One point to be noted with respect to clause (*d*) is that the mortgagor is responsible only when the mortgagee's possession is disturbed by the mortgagor and not by a trespasser.

This applies only to usufructuary mortgages. In *Rajah Pertab Bahadur* v. *Gajadhar*[1], the mortgagor covenanted that until delivery of possession of the mortgaged property (12 villages) he would pay interest at 2% on the loan. Possession was given immediately, but shortly thereafter, the mortgagee was dispossessed of six villages. Thirty-one years thereafter the mortgagor filed a suit for redemption and contended that he was entitled to redeem on payment of the original amount advanced without any liability to pay interest. It was held:

> The mortgage was of the class known as usufructuary mortgages, which are not uncommon in India, and in which possession of the mortgaged property is delivered to the mortgagee who takes the rents and profits [in lieu of interest or in payment of the mortgage money, or partly in lieu of interest and partly in payment of the mortgage-money (Act 4 of 1882, Section 58 (*d*)]. In this case the arrangement between the parties was completed by the execution of lease, under which the mortgagor became the tenant of the mortgagee, and paid rent in lieu of interest. Under such a mortgage the mortgagee takes his chance of the rents and profits being greater or less than the interest which might have been reserved by the bond, and the mortgagor is entitled to redeem on repayment of the mortgage-money. But it was contended that the reduction of the

1. (1902) LR 27 IA 148; *Lingaiah* v. *Chikkahanna*, AIR 1978 Kant 146; *Saojung* v. *Bhamarlal*, AIR 1982 Pat 180; *Indian Overseas Bank* v. *Sellamuthu*, AIR 1982 Mad 83.

number of villages to six constituted a failure on the part of the mortgagor, to secure to the mortgagee possession of the mortgaged property, which entitled the mortgagee to claim interest in lieu of rents and profits of the property of which he was dispossessed....But the mortgagee appears to have acquiesced in his dispossession....He brought no suit then, or at any time subsequently, to recover his mortgage money, but appears to have remained satisfied for 31 years with the diminished security and the possession of the remaining villages. It may be added that he made no attempt to enhance the rent of the villages which were left to him, and they constituted an ample security for the whole amount of his claim.

The scope of the proviso is shown by the following

In *Janna Das* v. *Ram Autar*[2], the mortgagor sold the mortgaged property including the equity of redemption to the respondent who retained the amount of the mortgage debt out of the price due in order to redeem the mortgage if he thought fit. The appellant, who was the mortgagee, obtained a decree for sale of the property. The proceeds proving insufficient, he sued the respondent personally. It was held:

The action is brought by a mortgagee to enforce against a purchaser of the mortgaged property an undertaking that he entered into with his vendor. The mortgagee has no right to avail himself of that. He was no party to the sale. The purchaser entered into no contract with him, and the purchaser is not personally bound to pay his mortgage debt.

Under clause (2), a suit filed by a mortgagee under clause (1)(*a*) or (*b*) may be stayed. The reason is that the mortgagor is not at fault and it is only fair that the mortgagee should extinguish or exhaust the mortgage before resorting to the suit for recovering the mortgage-money.

Other rights of the Mortgagee

As regards the rights against property, those of foreclosure and sale are provided for in Section 67, which reads:

In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become due to him, and before a decree has been made for the re-

2. (1912) LR 39 IA 7.

demption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property, or a decree that the property be sold.

A suit to obtain a decree that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

Nothing in this section shall be deemed—

(*a*) to authorize any mortgagee, other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or an usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale; or

(*b*) to authorize a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure; or

(*c*) to authorize the mortgagee of a railway, canal, or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or

(*d*) to authorize a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.

Scope

This section deals with mortgagee's rights. It corresponds to Section 60, under which the mortgagor has the right to redeem, while under this section, the mortgagee has a right to foreclosure. The effect of foreclosure is to make a conditional conveyance absolute, but, under clause (*a*), it is only a mortgagee by conditional sale and a mortgagee under an anomalous mortgage which gives him the right, that have the right to foreclose. The mortgagor's right of redemption and the mortgagee's right of foreclosure are co-extensive. Neither can exercise his right before the due date. But if no date is fixed the mortgagee must formally make a demand on the mortgagor.[3] Also the mortgagee can enter into a contract to the contrary unlike a mortgagor with respect to his right to redemption. The reason for the rule in clause (*d*) is to prevent harassment to the mortgagor with several suits by the various

3. *Nilakanth* v. *Bharati*, LR 57 IA 194; *Amulya* v. *UI Bank*, AIR 1981 Cal 404; *Mana* v. *Gopal*, AIR 1983 P&H 37.

mortgagees. That is, all the co-mortgagees should, ordinarily, join together and file a single suit.

In *Kumar Harish Chandra case*, p. 214, it was held by the Supreme Court that the real beneficiary under a transaction (mortgage) cannot be disentitled to enforce a right arising thereunder. It was observed that in *Gour Narayan* v. *Sheo Lal*[4], the Privy Council only recognised that the *benamidar* can also sue and not that the *benamidar* alone can sue.

The following cases show the scope of the phrase 'become due':

In *Lasa Din* v. *Gulab Kunwar*[5], the mortgage was dated July 26, 1912 and was for 6 years from that date. It was also covenanted that the mortgagor would pay interest at 12% per annum and in default of such payment, the mortgagee had power to realise the entire mortgage money. The mortgagor defaulted in the payment of interest for the first year. The mortgagee filed the suit for a mortgage decree on February 28, 1928. On the question whether the limitation period of 12 years started to run from 1913 (the date of first default) or 1918 (1912+6 years), it was held:

> [After quoting from *Panchan* v. *Anwar Husain*[6] (below).] It is no doubt true that the question now before the Board was advisedly left open for future discussion, but the considerations referred to are of great weight, and it is difficult to find an answer to them....Their Lordships are not prepared to hold that the mortgagor could in this way take advantage of his own default: they do not think that upon such default he would have the right to redeem, and in their opinion the mortgage-money does not 'become due' within the meaning of Article 132 of the Limitation Act until both the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued.

In *Panchan* v. *Anwar Husain*[6], a mortgage deed was executed on 21st February, 1893, and the time fixed for repayment was 12 years, but the mortgagors covenanted to pay annually Rs 500 towards principal and interest and that in case of default the mortgagee could sue for the entire debt. The mortgagor defaulted in making the payment due on February 1894. The mortgagee instituted the suit to enforce the mortgage by sale of the property on 21st February, 1917. On the question whether the

4. (1919) LR 46 IA 1.
5. (1932) LR 59 IA 376.
6. (1926) LR 53 IA 187.

cause of action arose on 21st February, 1894 or 21st February, 1905 (1893+12 years), for the purposes of limitation, it was held:

> Applying certain previous decisions of the High Court, and in particular a Full Bench decision in *Gaya Din* v. *Jhummanlal*[7], the High Court held that under a clause in the above form a single default on the part of the mortgagors, without any act of election, cancellation or other form of response or acceptance on the part of the mortgagees, and even, it would appear, against their desire, operates, *eo instanti*, to make the money secured by the mortgage *become due* so that all right of action in respect of the security is finally barred 12 years later, that is, in the present case on the 21st February, 1906. All this the High Court held, notwithstanding that the mortgage is for a term certain, a provision which may be as much for the benefit of the mortgagees as of the mortgagors and notwithstanding that the proviso is exclusively for the benefit of the mortgagees....Their Lordships would be reluctant, however, to pronounce on the question in the absence of full argument and it is accordingly a satisfaction to them to find that the present case can be decided on its own special circumstances....The plaintiff's assertion was that the cause of action accrued to them on the 21st February, 1894....and that the suit, which would otherwise have been out of time, is exempted from limitation by payments of interest, but the plaintiff's attempt to prove them entirely failed.

In *Lingam Krishna* v. *Sir Mirza Gajapatiraj*[8], the mortgage was a simple mortgage and provided that if the whole or portion of the interest remained unpaid the mortgagee could take possession of the mortgaged properties as a usufructuary mortgage. The mortgagee on the mortgagor's failure to pay the principal and interest sued for sale of the mortgaged property. It was held:

> (The mortgagee) retained the position of a simple mortgagee and asks the court to enforce his rights. The decree for sale was a matter of course. [*See* clause (*a*)].

In *Lal Narsing* v. *Yakub Khan*[9], the mortgage-deed provided: (1) that one eight annas share in certain villages had been hypothecated in lieu of

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7. (1915) ILR 37 All 400 (FB).
8. (1911) 21 MLJ 1147 (PC).
9. (1929) LR 56 IA 299.

the principal and interest and that possession had been delivered in order to pay a part or whole of the interest; (2) the mortgage-money was promised to be repaid within 35 years; and (3) that the mortgagees were to manage the property. Possession, however, was not given. On the question of the mortgagee's right to a sale, it was held:

> In Their Lordships' opinion the mortgage is a combination of a simple mortgage and a usufructuary mortgage....It is plain according to the findings of the Subordinate Judge that the mortgagors have failed to discharge their obligation of making over possession to the mortgagee and have thereby deprived the mortgagee of part of his security and in these circumstances Their Lordships are of opinion that under Section 68 the money has become payable and the plaintiff is entitled to a money decree for the same, but if the money has become payable under Section 68 their Lordships are further of opinion that under Section 67 a decree for sale can be made. [*See* clause (*a*)].

For the remedies available to the mortgagee under the various mortgages, *see* the notes under Section 58.

In *Yeo Htane* v. *Abu Zaffar*[10], the mortgagor agreed to pay the principal amount of the mortgage within one year and the interest every month and that in default of paying interest in one month the entire amount of principal and interest should become due and payable. Ordinarily, default in payment of interest does not accelerate the mortgagee's right but in this case it was held that there was an express provision to the contrary.

Clause (*b*)

The reason for this clause, is that if a mortgagor, who is also a trustee for the mortgagee is allowed to foreclose, he will become trustee of his own property.

Clause (*c*)

The reason for this clause is convenience and interest of the general public.

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10. (1900) LR 27 IA 98.

Clause (*d*)

In *Sunitabala Devi* v. *Dhara Sundari*[11], the appellant executed a mortgage mortgaging the real and personal estate to secure payment of two equal sums to two widows. One of the widows instituted a suit on the mortgage deed for sale of half the mortgaged property. It was held:

> It would, of course, be possible though inconvenient, to execute in one document a mortgage of one-half of an entire property in favour of each of two mortgagees. By this means two independent mortgages would be combined in one deed, and in such a case independent relief might be granted to each mortgagee; but the present mortgage does not take that form....This mortgage clearly effects the conveyance of the real estate to the mortgagees as tenants-in-common, and no redemption could be effected of part of the property by paying to one of the mortgagees her separate debt.... When a mortgage is made by one mortgagor to two tenants-in-common, the right of either mortgagee who desires to realise the mortgaged property and obtain payment of the debt, if the consent of the co-mortgagee cannot be obtained, is to add the co-mortgagee as a defendant to the suit and to ask for the proper mortgage decree, which would provide for all the necessary accounts and payments.

That is, normally, a partial sale or foreclosure is not allowed. There may be exceptions as where the mortgagee becomes part owner or where the mortgagor expressly consents to such severance.[12] In such a case it is better for one co-mortgagee to implead the other co-mortgagees.

Section 69 provides for sale without intervention of court in certain cases. It provides:

> (1) A mortgagee, or any person acting on his behalf, shall, subject to the provisions 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 other namely:
>
> (*a*) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan 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;

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11. (1920) LR 46 IA 272.
12. *Vijayabhushanammal* v. *Evalappa*, (1914) ILR 39 Mad 17; *Variavan* v. *Eachampi*, 1993 Supp (2) SCC 201.

(*b*) 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;

(*c*) 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.

(2) No such power shall be exercised unless and until—

(*a*) 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 part thereof, for three months after such service; or

(*b*) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

(3) When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised, or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(4) The money which is received by the mortgagee, arising from the sale, after discharge of prior encumbrances, if any, to which the sale is not made subject, or after payment into court under Section 57 of a sum to meet any prior incumbrance, shall in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgage-money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.

(5) Nothing in this section or in Section 69-A applies to powers conferred before the first day of July, 1882.

Scope

For the purposes of clauses (*a*) and (*b*) it is immaterial where the mortgaged property is situate. The right conferred by this section, namely, the right to sell without the intervention of the court, is in addition to the rights which a mortgagee has to realise his money through court and the right under Section 69-A of having a receiver appointed. The power under this section can be exercised by an assignee from the mortgagee by virtue of Section 59-A. The power can be exercised only

when the conditions in sub-section (2), are satisfied, and the conditions are not subject to a contract to the contrary. The sale must be to a third party, because, the mortgagee cannot be both seller and purchaser.

Notwithstanding the wide amplitude of the language, the purchaser is protected only if he satisfies himself after reasonable enquiries that the mortgagee has an express power of sale, and fraud of the mortgagee protects neither the mortgagee nor the purchaser, so that, on that ground even the sale could be set aside. In *Chabildas* v. *Dayal*[13], the mortgage property was sold on condition that the purchaser should accept such title as the vendors (mortgagees) would give (though the mortgagor had absolute title to the property) and during the sale the mortgagees made announcements (which the purchaser knew) which led the bidders to suppose that the sale was adjourned and to go away. The purchaser could not get possession from the mortgagor and hence filed a suit against him for possession. The conveyance in his favour was prepared at his instance by the mortgagees' solicitor who knew that the condition was unjustifiable. It was held:

(1) The view of the Court of Appeal imputes to a principal (the purchaser) the knowledge of an agent (the solicitor), not acquired in the matter for which he was agent, and uses it to upset a transaction of a date before the agency commenced. This is an extension of the doctrine of constructive notice in which their Lordships cannot concur.

(2) But the mortgagees by themselves or their agents so conducted themselves with reference to this sale that would-be bidders at it were induced to leave. The plaintiff (purchaser) had notice of those circumstances, using the word as it is defined in the Transfer of Property Act. He therefore bought at his peril, and as the sale was not a *bona fide* auction sale it must be set aside.

In *Ramkrishna* v. *Official Assignee*[14], it was pointed out that the mortgagor having given under the mortgage an express power of sale, cannot, by filing a suit for redemption, invoke lis pendens under Section 52.

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13. (1907) ILR 34 Bom 566 (PC); *S.V.S. Davy Sons* v. *Narayanswami*, AIR 1983 Mad 217.

14. ILR 45 Mad 774.

The remedy of taking possession is available to the usufructuary mortgagee and an anomalous mortgagee, if there is a special contract giving such a right to enter into possession.

The mortgagee, instead of entering into possession and becoming liable to account may yet keep control over the mortgaged property by exercising the power to appoint a Receiver under Section 69-A. The section provides:

(1) A mortgagee having the right to exercise a power of the 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.

(2) Any person who has been named in the mortgage-deed and is willing and able to act as receiver may be appointed by the mortgagee.

If no person has been so named, or if all persons named are unable or unwilling to act, or are dead, the mortgagee may appoint any person to whose appointment the mortgagor agrees; failing such agreement, the mortgagee shall be entitled to apply to the court for the appointment of a receiver, and any person appointed by the court shall be deemed to have been duly appointed by the mortgagee.

A receiver may at any time be removed by writing signed by or on behalf of the mortgagee and the mortgagor, or by the court on application made by either party and on due cause shown.

A vacancy in office of receiver may be filled in accordance with the provisions of this sub-section.

(3) A receiver appointed under the powers conferred by this section shall be deemed to be the agent of the mortgagor, and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage-deed otherwise provides or unless such acts or defaults are due to the improper intervention of the mortgagee.

(4) The receiver shall have power to demand and recover all the income of which he is appointed receiver, by suit, execution or otherwise, in the name either of the mortgagor or of the mortgagee to the full extent of the interest which the mortgagor could dispose of, and to give valid receipts accordingly for the same, and to exercise any powers which may have been delegated to him by the mortgagee, in accordance with the provisions of this section.

(5) A person paying money to the receiver shall not be concerned to inquire if the appointment of the receiver was valid or not.

(6) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges and expenses incurred by him as receiver, a commission at such rate not exceeding five per cent, on the gross amount of all money received as is specified in his appointment, and, if no rate is so specified then at the rate of five per cent, on that gross amount, or at such other rate as the court thinks fit to allow, on application made by him for that purpose.

(7) The receiver shall, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured, and keep insured against loss or damage by fire, out of the money received by him, the mortgaged property or any part thereof being of an insurable nature.

(8) Subject to the provisions of this Act as to the application of insurance money, the receiver shall apply all money received by him as follows, namely—

(*i*) in discharge of all rents, taxes, land revenue, rates and outgoings whatever affecting the mortgaged property;

(*ii*) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver;

(*iii*) in payment of his commission, and of the premiums on fire, life or other insurances, if any, properly payable under the mortgage-deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee;

(*iv*) in payment of the interest falling due under the mortgage;

(*v*) in or towards discharge of the principal money, if so directed in writing by the mortgagee;

and shall pay the residue, if any, of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property.

(9) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-sections (3) and (8) inclusive may be varied or extended by the mortgage-deed, and, as so varied or extended, shall, as far as may be, operate in like manner and with all the like incidents, effects and consequences, as if such variations or extensions were contained in the said sub-sections.

(10) Application may be made, without the institution of a suit, to the Court for its opinion, advice or direction on any present question respecting the management or administration of the mortgaged property, other than questions of difficulty or importance not proper in the opinion of the Court for summary disposal. A copy of such application shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court may think fit.

The costs of every application under this sub-section shall be in the directions of the court.

(11) In this section, "the Court" means the Court which would have jurisdiction in a suit to enforce the mortgage.

The power under this section can be exercised only when a mortgagee can exercise the power of sale. Sub-section (2) sets out who can be appointed as a receiver. Under sub-section (3) the receiver is deemed to be the agent of the mortgagor and accountable to the mortgagee. Sub-section (4) sets out his powers. Sub-section (6) deals with his

remuneration. Sub-section (8) sets out his duties in applying the money received by him. Under sub-section (10) the parties to the mortgage and the receiver can apply to the court for directions. [15]

Section 67-A provides:

> 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.

Scope

The section corresponds to Section 61, but whereas the mortgagor is not obliged to consolidate, a mortgagee under this section is under an obligation to consolidate, where he has a right to obtain the same kind of decree or relief with respect to each of the mortgages. There may be difficulty in giving effect to this section when the mortgages are in different areas under the jurisdiction of different courts.

In *Rajagopalaswami Naidu* v. *Bank of Karaikudi*[16], there were three mortgages in favour of the respondent-Bank, two of which were executed by the appellant and his wife and one by the appellant. The Bank filed a suit on the two mortgages executed by the husband and wife, and thereafter, filed a suit on the foot of the mortgage executed by the appellant alone. On the question whether it was barred under Section 67-A it was held:

> To attract the applicability of Section 67-A it is essential that the mortgagor must be the same and he should have executed two or more mortgages in respect of each of which the mortgagee has the right to obtain the same kind of decree. In this case it is not possible to hold that the mortgagor is the same. There is no statutory provision or principle by which the wife and the husband could be treated as one entity for the purpose of the mortgage. Each was the owner of a separate and distinct property and both joined in mortgaging their respective properties. In *Moro Raghunath* v. *Balaji*[17], the first mortgage was by two brothers and the second mortgage of

15. *Sakaram* v. *SI & J Co.*, AIR 1979 Bom 66.
16. (1971) 1 SCC 18.
17. ILR 13 Bom 45.

part of the same property by one brother. The Bombay High Court held that the suit to enforce the first mortgage did not bar the suit to enforce the second. This was before the insertion of Section 67-A, but the principle embodied is clearly illustrated by that case.

Further, failure to consolidate will not bar the suit. The consequence of such failure is to preclude the mortgagee from enforcing his other mortgages, with respect to which he could have sued, on the basis that he had abandoned that part of the claim.

Exercises

1. What is meant by foreclosure? (pp. 233-235)
2. When can a mortgagee sue for the mortgage money? (pp. 235-238)
3. How is the power of private sale exercised? (pp. 240-242)

14
The Rights of the Mortgagor

Right to Redeem

From the definition of 'mortgage', one may imagine that if the money is not repaid within the specified period, the mortgagor may be debarred for ever from recovering the property. From the ideas that the mortgagor is a person in dire need of money and so needed to be protected from himself because he would be willing to prostitute his signature; and the mortgagee is an unscrupulous moneylender who would drive any kind of hard bargain and therefore required to be watched, arose the idea that the mortgagor should be allowed to redeem the mortgaged property even after the expiry of time of payment; and thus arose the equity of redemption in favour of the mortgagor. We have, however, the famous Lord Halsbury (whose name is associated with the Laws of England) saying in *Samuel* v. *Jarrah Timber and Wood Paving Corpn.*[1], that the equitable doctrine directed against clogging the equity of redemption as 'a principle of equity, the sense or reason of which I am unable to appreciate'. This equity in English law is a statutory right under Section 60 of the Act. This right may become barred, however, by the Statute of Limitation or the mortgagee obtaining a decree of foreclosure. Even in suit for foreclosure, indulgence is shown to the mortgagor. In such a suit, two decrees are passed, a preliminary and a final decree. The former allows the mortgagor a further period to pay the debt and redeem the property, and it is only when he fails to take advantage of this period, that a final decree is passed barring the mortgagor's right to redeem.

Section 60 provides:

> At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (*a*) 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, (*b*) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (*c*) at the cost of the mortgagor either to retransfer 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

1. (1904) AC 323, 325.

acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

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

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

Nature of the right to redeem

The right to redeem a mortgage, at any time after the mortgage-money becomes due, is known as the equity of redemption in English law; but it is statutory, and therefore, a legal right in India. Under the law of limitation it subsists for 30 years after the mortgage money has become due. It can be extinguished only as provided in the proviso. Any other attempt to prevent the exercise of the right would be treated as a clog and as invalid, because, the rule is 'once a mortgage always a mortgage'. It could however be controlled by act of parties, *if it is not a part of the transaction creating the mortgage*. Whether or not it is a part of mortgage transaction is a difficult question depending on the facts and circumstances of each case. In *Shankar Din* v. *Gokal Prasad*[2], the mortgagor mortgaged his two villages in 1846 and since then the mortgagee and his representatives were in possession. In 1870 certain compromises were entered into between the parties. The documents showed that although the right of redemption was admitted as subsisting, it was subjected to certain conditions. On the

2. (1912) 34 All 620 (PC); *Khatubai* v. *Rajjo*, AIR 1979 Guj 171; *Gulkandi* v. *Harnarayan*, AIR 1980 MP 111; *Shankar* v. *Malkappa*, AIR 1980 Bom 213 (suit to redeem second mortgage against different mortgagees); *Abdul Rahim* v. *Vithaldas*, AIR 1981 Bom 58; *Sushil Kumar* v. *Brij Mohan*, AIR 1981 Pat 172; *Chhaganlal* v. *Narandas*, (1982) 1 SCC 223: AIR 1982 SC 121; *Madhavan* v. *Puthanoor*, AIR 1982 Ker 327; *Jayasingh* v. *Krishna*, (1985) 4 SCC 162: AIR 1985 SC 1646; *Devakinanda* v. *Roshanlal*, AIR 1985 Raj 11 (lease by mortgagee for clogging redemption); *Banwarilal* v. *Puranchand*, AIR 1985 P&H 189.

question whether the appellants were entitled to a decree for redemption, it was held:

> Whatever may have been the mortgagor's right under the deed of 1846, the parties deliberately came to a settlement in 1870 by which his representatives for certain additional benefit reserved to them under the *razinamahs*, agreed to subject their right of redemption to certain conditions. There is nothing in law to prevent the parties to a mortgage from coming to any arrangement *afterwards* qualifying the right to redeem.

A condition postponing redemption in case there was a default in epaying the mortgage money is a clog. In *Mohd. Sher Khan* v. *Seth Swami Dayal*[3], the mortgagor mortgaged his property for 5 years and agreed that if he did not redeem it at the end of that period, the mortgagee had a right to take and keep possession for 12 years, during which time the mortgagor had no right to redeem. The mortgagor committed default at the end of 5 years, but later sued to redeem, but the mortgagee opposed. It was held:

> The rights and liabilities of the litigants must depend on the terms of the instrument as controlled by the Transfer of Property Act, for, even if the mortgage were an anomalous mortgage, its provisions offend against the statutory right of redemption conferred by Section 60, and the provisions of one section cannot be used to defeat those of another unless it is impossible to effect reconciliation between them. An anomalous mortgage enabling a mortgagee after a lapse of time and in the absence of redemption to enter and take the rents in satisfaction of the interest would be perfectly valid if it did not also hinder an existing right to redeem. But it is this that the present mortgage undoubtedly purports to effect. It is expressly stated to be for 5 years and after that period the principal money became payable. This under Section 60 of the Transfer of Property Act, is the event on which the mortgagor had a right on payment of the mortgage money to redeem.
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> The section is unqualified in its terms, and contains no saving provisions as other sections do in favour of contracts to the contrary....In this view, the mortgagor's right to redeem must be affirmed.

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3. (1921) LR 49 IA 60.

Even a collateral advantage which subsists in favour of the mortgagee *after* the period of redemption is considered a clog if it *affects the property*. In *Chelikani Venkatarayanim* v. *Zamindar of Tuni*[4], a mortgage deed contained an agreement by which, if the mortgagee entered into possession of the property, he could take credit of a fixed sum of Rs 4000 annually with respect to certain charges which the mortgagee would have had to incur. The contingency on which the mortgagee could take possession of the property having happened, the mortgagee sued for possession and entered in pursuance of the decree he obtained, so that, the agreement for the annual payment of Rs 4000 became operative. On the question of the validity of the agreement, it was held:

> It is urged on behalf of the appellants that it gives the mortgagee a collateral advantage under the deed *which he is not entitled to exact*, but their Lordships think that, that contention cannot be supported. The truth is that it is a fixed payment to be made in respect of a variable charge, and though it may be assumed that the amount was not fixed so as to prejudice the mortgagee, there is nothing to prevent the mortgagor and mortgagee entering into a bargain as to what sum should be charged annually for expenses that may or may not exceed the agreed figure.

[In this case, the advantage, though collateral, *did not extend beyond the period of redemption*. The mortgagor could release the property, put an end to the mortgagee's possession and his right to the sum of Rs 4000.]

If the mortgagee stipulates that *during the subsistence of the mortgage*, if the mortgagor wants to sell the property, the mortgagee has a right of pre-emption, it is not regarded as a clog, because, there is no obligation on the mortgagor to sell and the mortgagor can redeem the property. If however, the mortgagee has an option to purchase, it would be treated as a clog, because, the mortgagee by exercising the option can put an end to the mortgagor's right to redeem.

In *Seth Ganga Dhar* v. *Shanker Lal*[5], a usufructuary mortgage provided that: 'I or my heirs will not be entitled to redeem the property for a period of 85 years. After the period of 85 years we shall redeem it

4. (1923) LR 50 IA 41.
5. (1959) SCR 509.

within a period of six months. In case we do not redeem within a period of six months I, my heirs and legal representatives shall have no claim over the mortgaged property and the deed shall be deemed to be a sale deed.' A suit for redemption was filed 47 years after the execution of the deed and it was contended that it was premature. It was held:

> Under Section 60 of the Transfer of Property Act, the right to redeem can be exercised only after the mortgage money has become due. In *Bakhtawar Begam* v. *Husaini Khanam*[6], also the same view was expressed in these words: 'Ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created the right of redemption can only arise on the expiration of the specific period'. Now, in the present case there is no stipulation entitling the mortgagor to redeem during that term (85 years) and that term has not yet expired.... The term providing that the right to redeem will arise after 85 years does not *take away* the mortgagor's right to redeem and is not therefore, in that sense, a clog on the equity of redemption. It does however prevent accrual of that right for the period mentioned.... The rule against clogs on the equity of redemption involves that the courts have the power to absolve a party from his bargain. If he has agreed to forfeit, wholly his right to redeem in certain circumstances, that agreement will be avoided. But the courts have gone beyond this. They have also relieved mortgagors from bargains whereby the right to redeem has not been taken away but *restricted*. The question is, is the term now under consideration such that a court will exercise its power to grant relief against it?....
>
> In a very early case, namely, *Vernon* v. *Bethell*[7], Earl of Northington L. C. said, 'This Court, as a court of conscience, is very jealous of persons taking securities for a loan, and converting such securities into purchases. And therefore I take it to be an established rule, that a mortgage can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged, and the conveyance absolute. And there is great reason and justice in this rule, for necessitous men are not, truly speaking free men but, to answer a present exigency, will submit to any terms that the crafty may impose on them'.

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6. (1913-14) LR 41 IA 84.
7. (1762) ER 838.

Viscount Haldane said in *G & C Krelinger* v. *New Patagonia Meat and Cold Storage Co. Ltd.*[8], 'The case of the common law mortgage of land was indeed a gross one. The land was conveyed to the creditor upon the condition that if the money he had advanced to feoffor was repaid on a date and at a place named, the fee-simple would revest in the latter, but if the condition was not strictly and literally fulfilled he should lose the land forever. What made the hardship on the debtor a glaring one was that the debt still remained unpaid and could be recovered from the feoffor notwithstanding that he had actually forfeited the land to the mortgagee. Equity, therefore, at an early date began to relieve against what was virtually a penalty by compelling the creditor to use his legal title as a mere security.

My lords, this was the origin of the jurisdiction which we are now considering, and it is important to bear that origin in mind. For the end, to accomplish which the jurisdiction had been evolved ought to favour and limit its exercise by equity judges. That end has always been to ascertain, by parol evidence, if need be, the real nature and substance of the transaction, and if it turned out to be in truth one of mortgage simply, to place it on that footing. It was, in ordinary cases, only when there was conduct which the Court of Chancery regarded as unconscientious that it interfered with the freedom of contract'.

The reason then justifying the court's power to relieve the mortgagor from the effects of his bargain is given as want of conscience. Putting it in more familiar language the court's jurisdiction to relieve a mortgagor from his bargain depends on whether it was obtained by taking advantage of any difficulty or embarrassment that he might have been in when he borrowed the moneys on the mortgage....

Does the length of the term itself lead to the conclusion that it was an oppressive term. In our view it does not do so.... It is quite conceivable that it was to the mortgagor's advantage.... It seems to us impossible that if the term was oppressive, that was not realised much earlier and the suit brought within a short time of the mortgage.

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8. (1914) AC 25.

In the case of a mortgage where the right of redemption is postponed as contrasted with a case in which the right arose after a long period of time, the condition disabling a mortgagor from exercising his right of redemption would be construed as a clog on the right to redeem. See *Mohammad Sher Khan case* on page 249.

In *Seth Ganga Dhar case* (p. 250) it was also held:

> The rule against clogs on equity of redemption is that, a mc.tgage shall always be redeemable and a mortgagor's right to redeem shall neither be taken away nor limited by any contract between the parties. The principle behind the rule was expressed by Lindley M. R. in *Santley* v. *Wilde*[9] in these words: "The principle is this: 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. This is the idea of a mortgage: and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void. It follows from this, that 'once a mortgage always a mortgage'.".
>
> The right of redemption, therefore, cannot be taken away. The courts will ignore any contract the effect of which is to deprive the mortgagor of his right to redeem the mortgage. One thing, therefore, is clear, namely, that the term in the mortgage contract, that on the failure of the mortgagor to redeem the mortgage within the specified period of 6 months the mortgagor will have no claim over the mortgaged property, and mortgage deed will be deemed to be a deed of sale in favour of the mortgagee, cannot be sustained.... The same result also follows from Section 60 of the Transfer of Property Act. So it was said in *Mohammad Sher Khan* v. *Seth Swami Dayal*[10].

In *Mrutunjay Pani* v. *Narmada Bala*[11], the mortgagor delivered possession of the mortgaged property to the mortgagee and under the mortgage deed the mortgagee had a duty to pay arrears of rent to the

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9. (1892) 2 Ch 474.
10. (1921) LR 49 IA 60, *See* pp. 166 and 167.
11. AIR 1961 SC 1352.

mortgagor's landlord. The sale, in which the mortgagee purchased the mortgagor's equity of redemption was the result of a dereliction of the aforesaid duty of the mortgagee. On the question whether the mortgagor's right to redeem was lost, it was held:

> The legal position may be stated thus: (1) The governing principle is 'once a mortgage always a mortgage' till the mortgage is terminated by the act of the parties themselves, by merger, or by order of the court. (2) When a mortgagee purchases the equity of redemption in execution of his mortgage decree with the leave of court or in execution of a mortgage or money decree obtained by a third party, the equity of redemption may be extinguished; and, in that event, the mortgagor cannot sue for redemption without getting the sale set aside. (3) When a mortgagee purchases the mortgaged property by reason of a default committed by him the mortgage is not extinguished and the relationship of mortgagor and mortgagee continues to subsist even thereafter, for his purchase of the equity of redemption is only in trust for the mortgagor (*See* Section 90 of the Trusts Act, 1882).

In *Murari Lal* v. *Devkaran*[12], a term in the mortgage deed executed in the State of Alwar (one of the Rajasthan States) provided that if the debt was not paid by the mortgagor within 15 years, the mortgagee would become the owner of the property. The mortgagor sued to redeem the property after the stipulated period was over. It was held:

> Does the equitable doctrine ensuring the mortgagor's equity of redemption in spite of a clog created on such equity by stipulations in the mortgage deed apply to the present case? This question arises in this form, because, the Transfer of Property Act did not apply to Alwar at the time when the mortgage was executed nor at the time when the 15 years' stipulated period expired....In *Pattabhiramier* v. *Vencatarow*[13], the Privy Council upheld the mortgagee's plea that he became the absolute owner of the property at the expiration of the stipulated period. It was said: stipulations in such contracts were recognised and enforced according to their letter by the ancient Hindu Law as well as under Mohammedan Law....If the ancient law of the country has been modified by any later rule, having the force

12. (1964) 8 SCR 239.
13. (1890) 13 Mad. 560.

of law, that rule must be founded either on positive legislation or on established practice; but no specific statutory provision had been cited before the Board, nor established practice in that behalf had been proved. The Board however took the precaution of adding: 'it must not be supposed that their Lordships design to disturb any rule of property established by judicial decisions so as to form part of the *Law of the Forum*, wherever such may prevail, or to affect any title founded thereon'....

In *Thumbusawamy Mood·lly* v. *Hossain Rowthen*[14], Sir James W. Colville, who delivered the opinion of the Board, referred to the earlier decision of the Privy Council in *Pattabhiramier case*, noticed the trend of judicial pronouncements made by the High Courts in India while *Pattabhiramier case* was pending before the Privy Council, and strongly reiterated the view that the said decisions of the High Courts were judicially unsound. He referred to the fact that unfortunately, *Pattabhiramier case* 'slept for 9 years, and that in the interval the Sudar Court, and afterwards the High Court which succeeded it, continued the course of decision which the former had given in 1858, to the effect, that stipulations contained in mortgage deeds which amounted to clog on the equity of redemption could not be enforced on equitable principles....'

Though the position of the Privy Council decisions is thus clear and consistent, it would be relevant to observe that traditionally, Courts in India have been consistently enforcing the principles of equity which prevent the enforcement of stipulations in mortgage deeds which unreasonably restrain or restrict the mortgagor's right to redeem....In fact in *Namdeo Lokman Lodhi* v. *Narmadabai*[15], this Court has emphatically observed that it is axiomatic that the courts must apply the principles of justice, equity and good conscience to transactions which come before them for determination even though the statutory provisions of the Transfer of Property Act are not made applicable to these transactions....

It is true that according to strict letter of the ancient Hindu law, a stipulation that a mortgagor shall pay the amount advanced to him by the mortgagee within a specified period was intended to be

14. (1875) LR 2 IA 241.
15. (1953) SCR 1009.

enforced....Though this is so, we ought also to add that according to Sir R.B. Ghose ordinarily, time was not of the essence of the contract of mortgage in Hindu Law[16] and in support of this opinion the learned author quotes with approval Colebrooke's opinion.

It is (thus) material to refer to the recent decisions pronounced by the Rajasthan High Court....In *Ambalal* v. *Ambalal*[17], the Rajasthan High Court held that Section 60 and its proviso contained a general principle of law applicable to mortgages in this country, which would be applicable even in those places where the Transfer of Property Act may not be in force as such, but where its principles may be in force....

Similarly in the case of *Seleh Raj* v. *Chandan Mal*[18], the Rajasthan High Court held that the principle underlying Section 60 may well be regarded to be a salutary one and in accordance with the principles of equity, justice and good conscience....

The same principle has been applied in Himachal Pradesh (vide *Mainu* v. *Kishan Singh*[19]).

Thus, it is clear that the equitable principle of justice, equity and good conscience had been consistently applied by civil courts in dealing with mortgages in a substantial part of Rajasthan and that lends support to the c ntention of the respondent that it was recognised even in Alwar and that if a mortgage deed contains a stipulation which unreasonably restrains or restricts the mortgagor's equity of redemption courts were empowered to ignore the stipulation and enforce the mortgagor's right to redeem, subject, of course, to the general law of limitation prescribed in that behalf.

In *Gulab Chand* v. *Saraswati*[20], in a mortgage by conditional sale of a perpetual lease, the mortgagor was given 4 years time to repay. It was also provided in the deed that if the mortgagee received a notice of re-entry by a public authority (government) for breach of any covenant of the lease before 4 years, then the transfer in favour of the mortgagee would be absolute. The mortgagee averted re-entry by performing the

16. *Ghose* on 'The Law of Mortgage in India', Tagore Law Lectures, 7th Edn., p. 232.
17. ILR (1957) Raj 964.
18. ILR (1957) Raj 88.
19. AIR 1957 HP 46.
20. AIR 1977 SC 242.

covenant. It was held that the mortgagor could successfully claim to redeem, the clause relating to the transfer becoming absolute, being a clog on the right of redemption.

In *Noakes and Co.* v. *Rice*[21], the mortgagee was a brewer. The mortgagor mortgaged the leasehold of a public house to him. The mortgagor entered into an agreement with the mortgagee that the former would buy all the beer consumed in the public house only from the mortgagee. It was held that the stipulation would be valid during the continuance of the mortgage, but on redemption, the mortgagor would be free from it.

Lord Macnaughten observed: Redemption is of the very essence and nature of a mortgage.... It is inherent in the thing itself. Equity will not permit any device or contrivance designed or calculated to prevent or impede redemption... when the money secured by a mortgage of land is paid off, the land itself, and the owner of the land in the use and enjoyment of it, must be as free and unfettered to all intents and purposes as if the land had never been made the subject of the security.

That is, the agreement conferring the collateral benefit on the mortgagee will not be enforceable if it is extended beyond the period of redemption. The earlier view in England was that whether a stipulation was reasonable or not, depended on its reasonableness and not whether it was confined to the period of mortgage or extended beyond the period of redemption. This view was restored in *Kreglinger case* p. 252. This rule does not apply in India. Here, on redemption, the mortgagor is entitled to get back the property mortgaged free from the debt, as well as every other obligation. Such an obligation if reasonable may enure during the subsistence of the mortgage but even that will not survive when the debt is paid off.[22]

Has become due

The word 'due' shows that the mortgagor could not redeem before the time fixed for payment, but there can be a specific contract enabling the mortgagor to redeem earlier. In usufructuary mortgages, the mortgagor can claim the property as soon as the debt is realised from the profits even without such provision.

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21. (1902) AC 24.
22. *Khan Bahadur* v. *Makhwana*, AIR 1930 PC 142.

In *Bakhtawar Begam* v. *Husaini Khanam*[23], the question was whether the right to redeem accrued only on the expiration of the period of nine years for which the contract was made. It was held:

> Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specific period. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property. Such a provision is usually to the advantage of the mortgagor....Here the plaintiff's case is that the mortgagors were entitled to recover the property *within* the period of nine years on the liquidation of the debt with the usufruct of the property.

Mortgage money

The second part of Section 58(*a*) shows that it includes principal and interest. If there are two or more joint mortgagees, a payment to one of them, even of the whole amount, is valid only to the extent of his share of the debt. Therefore to operate as a payment in respect of the entire mortgage it must be paid to all of them jointly.

Since 'mortgage money' includes both principal and interest, ordinarily, that is, unless there is an express covenant giving a right sue for interest separately, the mortgagee cannot bring a separate suit for interest alone.

Decree of court

The decree must specifically extinguish the right of redemption. If it does not do so the mortgage continues to subsist and the mortgagor continues to have the right to redeem. In *Raghunath Singh* v. *Hansraj Kunwar*[24], it was pointed out that the mortgagor can be deprived of the right to redeem only 'by means of and in the manner enacted for that purpose'; and so unless the section is strictly complied with a second suit for redemption would lie.

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23. (1913-14) LR 41 IA 84; *Lingaiah* v. *Chikkahanna*, AIR 1978 Kant 146; *Lakshmanan* v. *Alagappa*, AIR 1981 Mad 338 (Usufructuary mortgage).
24. ILR 56 All 561 (PC).

Though the proviso does not say so, the equity of redemption would also be extinguished by operation of law as when the mortgagee inherits the right or purchases the right in execution of a decree obtained by a third party against the mortgagor. (*See* p. 254).

Indivisibility of the mortgage security

Except in the case of the last paragraph to the section a portion of the mortgaged property cannot be redeemed. The reason is that the mortgagee values his security as an indivisible whole and if piece-meal redemption is allowed, the security may depreciate. In *Nilakant* v. *Suresh Chunder*[25], the plaintiff obtained a mortgage in 1866. In June 1867 he filed a suit for foreclosure. While the suit was pending, in July 1867, the defendant purchased a part of the mortgaged property in execution of a decree obtained by a third party against the mortgagor. A decree for mortgage, accounts, and for sale in default of redemption was passed and in 1880, the property purchased by the defendant was put up for sale and the plaintiff purchased the equity of redemption for Rs 1600 and sued the defendant for possession. The High Court gave the plaintiff a decree for possession conditional on the defendant's failure to redeem on the basis that he was himself a purchaser of the equity of redemption and gave the defendant 6 months' time for redeeming. It was held by the Privy Council:

> It is quite a new thing to hold that the purchaser of a single fragment of the equity of redemption (defendant) may come without bringing the other purchasers before the court, and have one account as between himself and the mortgagee alone, so that the mortgagee may be paid off piece-meal. Such a law would result in great injustice to the mortgagee. It would put him to a separate suit against each purchaser of a fragment of the equity of redemption though purchasing without his consent, and he would have separate suits against each of them, and suits in which no one of the parties would be bound by anything which took place in a suit against another. Different proportions of value might be struck in the different suits, and the utmost confusion and embarrassment would be created.

25. (1885) 12 IA 171; *Nawrang* v. *Jangir*, AIR 1985 P&H 268.

In *Mirza Yadalli Beg* v. *Tukaram*[26], the mortgagor mortgaged 16 fields to the appellant and sold one of them to the respondent. The appellant (mortgagee) filed a suit against the mortgagor without impleading the respondent and in pursuance of a consent decree of foreclosure entered into possession of 9 of the fields, one of which was the field sold to respondent. The respondent sought to redeem his property and it was held that he could redeem *the entire mortgage*. It was held by the Privy Council:

> According to English law the respondents would have been entitled to redeem the mortgage in its entirety, subject only to the safeguarding of the equal title to redeem of any other person who had a right of redemption....The respondent being a transferee of the part of security, by English law, if it applied, would *on the one hand be entitled to redeem the entire mortgage* on the properties generally, and *co-relatively could not compel the mortgagee to allow him to redeem his part*....Subject to proper safeguarding of the rights to redeem, which (other co-mortgagors) may possess, their Lordships are of the opinion that *it is not the law in India* any more than in England, that one of several mortgagors cannot redeem more than his share unless the owners of the other shares consent or do not object.

In *Ramchand* v. *Prabhu Dayal*[27], a mortgagee (appellant), having obtained a decree in a suit to enforce his mortgage, bought the mortgaged property in a judicial sale. On the question as to the amount he must pay to release the property bought by him from a prior mortgage created by the mortgagor in respect of that property and three other items in favour of the respondent, the appellant contended that he need not pay the whole sum outstanding, because, the respondent himself had released two of the items from the mortgage. It was held:

> Apart from the exception which it recognises, the last clause of Section 60 was intended to preclude mortgagors or persons deriving title from them from claiming independently of agreement to have an equity to redeem their own share on payment of a proportionate part of the mortgage-money. The High Court, in their Lordships' view have rightly dismissed the plaintiff's appeal in this case, on the

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26. (1921) 47 IA 207.
27. (1942) 69 IA 98; *Jagir Singh* v. *Atma Singh*, AIR 1979 P&H 70.

ground that under Section 60 *the integrity of a mortgage is not broken except when the mortgagee has purchased or otherwise acquired as proprietor a certain portion of the property mortgaged.* [*See* S. 67(*d*).]

Suppose *A* mortgages for Rs 12,000, three properties *X*, *Y* and *Z* whose values are in the ratio of 1:2:3 to *B*. *A* then sells *X* to *C*. Thereafter, in execution of a money decree obtained by some creditor against *A* property *Y* is brought to sale and *B*, the mortgagee purchases it, subject to his own mortgage. *C* is entitled to make partial redemption of *X* by paying to *B* Rs 2000.

The mortgagor may deposit the money in the Court. The mode and effect of such deposit is set out in Sections 83 and 84.

Section 83[28] provides:

At any time after the principal money payable in respect of any mortgage has become due and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

The court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in a manner prescribed by law for the verification of plaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same court the mortgage-deed and all documents in his possession or power relating to the mortgaged property, apply for and receive the money, and the mortgage-deed and all such documents, so deposited shall be delivered to the mortgagor or such other person as aforesaid.

Where the mortgagee is in possession of the mortgaged property the court shall, before paying to him the amount so deposited, direct him to deliver possession thereof to the mortgagor and at the cost of the mortgagor either to retransfer the mortgaged property to the mortgagor or to such third person as the mortgagor may direct or to execute and (where the mortgage has been effected by a registered instrument) have registered an acknowledgment in writing that any right in derogation of the mortgagor's interest transferred to the mortgagee has been extinguished.

In *Narandas Karsondas* v. *S.A. Kamtam*[29], the respondent Housing Society, the mortgagor, had taken loan from the co-respondent Finance Society and mortgaged the property to it under an English mortgage. On

28. *Thakur Singh* v. *Rambaran Singh*, (1972) 2 SCC 740: AIR 1973 SC 45 (mortgagor held not entitled to mesne profits).

29. (1977) 3 SCC 247; *Parameshwaran* v. *Krishnan*, AIR 1992 SC 1135; *Mancheri* v. *Kuthiravattam*, (1996) 6 SCC 185.

default, the mortgagee exercised his right under the mortgage to sell the property without intervention of Court and after notice put the property to sale by public auction. The appellant auction purchaser paid the sums due. Before the sale was completed by registration etc. the mortgagor sought to exercise his right of redemption by tendering the amount due. The appellant based his case on the plea that in such a situation the mortgagee acts as agent of the mortgagor and hence binds him.

Rejecting the appeal, the Supreme Court held that the right of redemption which is embodied in Section 60 of the Transfer of Property Act is available to the mortgagor unless it has been extinguished by the act of parties. In India it is only on execution of the conveyance and registration of transfer of the mortgagor's interest by registered instrument that the mortgagor's right of redemption will be extinguished. The conferment of power to sell without intervention of the Court in a mortgage-deed by itself will not deprive the mortgagor of this right of redemption. The extinction of the right of redemption has to be subsequent to the deed conferring such power. The right of redemption is not extinguished at the expiry of the period. The equity of redemption is not extinguished by mere contract for sale.

The mortgagor's right to redeem will survive until there has been completion of sale by the mortgagee by a registered deed. In England a sale of property takes place by agreement but it is not so in our country. The power to sell shall not be exercised unless and until notice in writing requiring payment of the principal money has been served on the mortgagor. Further Section 69(3) of the Transfer of Property Act shows that when a sale has been made in professed exercise of such a power the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale. Therefore, until the sale is complete by registration the mortgagor does not lose right of redemption.

The English decisions are based on the provisions of the Law of Property Act, 1925. In England sale is effected by the contract of sale, and in India an agreement for sale is not a sale or transfer of interest. In England, a mortgagee gets an equitable interest in the property. Under the English doctrine a contract of sale transfers an equitable estate to the purchaser. In India there is no equity or right in property created in favour of the purchaser by the contract between the mortgagee and the proposed purchaser. In India, there is no distinction between legal and equitable estates. The law of India knows nothing of that distinction between legal

and equitable property in the sense in which it was understood when equity was administered by the Court of Chancery in England. Under the Indian law, there can be but one owner that is, the legal owner.

A contract of sale does not of itself create any interest in, or charge on, the property. This is expressly declared in Section 54 of the Transfer of Property Act. The fiduciary character of the personal obligation created by a contract for sale is recognised in Section 3 of the Specific Relief Act, 1963, and in Section 91 of the Trusts Act. The personal obligation created by a contract of sale is described in Section 40 of the Transfer of Property Act as an obligation arising out of contract and annexed to the ownership of property, but not amounting to interest or easement therein.

In India, the word "transfer" is defined with reference to the word "convey". The word "transfer" in English law in its narrower and more usual sense refers to the transfer of an estate in land. The word "conveys" in Section 5 of the Transfer of Property Act is used in the wider sense of conveying ownership.

Hence it cannot be held that the mortgagor lost the right of redemption just because the property was put in auction. The mortgagor has a right to redeem unless the sale of the property was complete by registration in accordance with the provisions of the Registration Act.

It is erroneous to suggest that the mortgagee is acting as the agent of the mortgagor in selling the property. The mortgagee exercises his right under a totally superior claim which is not under the mortgagor, but against him.

Where the mortgagor binds himself to repay 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.

The Court also referred to *Rani Chhatra Kumari* v. *Mohan Bikram*[30], *Rambaran Prasad* v. *Ram Mohit Hazra*[31], *Abraham Ezra Issac Mansoor* v. *Abdul Latif Usman*[32], *Ellappa Naicker* v. *Sivasubramanian*

30. (1931) 58 IA 279: AIR 1931 PC 196: (1931) ILR 10 Pat 851 (PC).
31. (1967) 1 SCR 293: AIR 1967 SC 744.
32. ILR 1944 Bom 549: AIR 1944 Bom 156.

Maniagram[33], *Meenakshi Velu* v. *Kasturi Saku Thala*[34], *Waring (Lord)* v. *London & Manchester Assurance Co.*[35], and *Property and Bloodstock Ltd.* v. *Emerton*[36].

Who can Redeem

Section 91 sets out the persons who are entitled to sue for redemption and hence entitled to deposit. The section provides:

> Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property namely—
>
> (*a*) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;
>
> (*b*) any surety for the payment of the mortgage-debt or any part thereof; or
>
> (*c*) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property.

Clause (*a*)

If the mortgagor is the lessee of the property, his lessor cannot redeem, because he has no interest in the tenancy right. So also a Hindu reversioner is not entitled to redeem, because, he has no *present interest* in the property. But a person who has the smallest interest in the equity of redemption is entitled to sue under this section.[37] A sub-mortgagee (*See* p. 174) of the puisne mortgagee has also the right to redeem. See *Mirza Yadalli Beg* v. *Tukaram*[38].

A mortgagor has thus, after the mortgage money has become due and before he loses his right to redeem, the following remedies:

(1) pay or tender at the proper time and place under Section 60;

(2) deposit the amount due under Section 83; and (3) sue for redemption under this section.

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33. (1936) 71 MLJ 607: AIR 1937 Mad 293.
34. ILR (1967) 3 Mad 161.
35. (1935) Chancery 310.
36. (1968) LR Chancery 94.
37. *Gudamsmal* v. *Bansilal*, AIR 1971 Raj 175; *Raj Narain* v. *Sant Prasad*, (1973) 2 SCC 35: AIR 1973 SC 291; *Nabi Rasool* v. *Md. Maqshood*, AIR 1982 All 503.
38. (1921) 47 IA 207; *Parichhan Mistry* v. *Achhiabar Mistry*, (1996) 5 SCC 526; *Beli Ram* v. *Salig Ram*, AIR 1996 SC 757; *State of Punjab* v. *Ram Rakha*, AIR 1997 SC 2151.

The object of Section 83 is to enable a mortgagor to discharge the mortgage without litigation. If however there is a dispute as to who is the mortgagee the court will refer the parties to a regular suit.

In *Ram Chandra Marwari* v. *Ram Keshobati*[39], the mortgagor after tendering the amount, according to him due to the mortgagee, deposited it in court, because the mortgagee refused to deliver the bond. It was then, by some manoeuvre or contrivance upon which the mortgagee for reasons best known to him, has deliberately abstained from letting in light, drawn out by the mortgagee's agent. Thereafter, the mortgagee filed a suit for a sum which according to him represented the balance due and interest. It was held:

> The Act provides that money lodged, as this was, "in full discharge" of a liability can only be drawn out by a creditor in full discharge of that liability. The agent of the appellant appointed *ad hoc* drew out this money. It is for them to show that he acted under such conditions that the statutory result does not follow from his act. If they fail to do this, as they have failed in the present case, then there is nothing to defeat or modify the operation of the statute, and the consequences must be those which it prescribes.

The money drawn out must therefore be held to have been drawn out in full discharge of the mortgagor's liability.

In *Hewanchal* v. *Jawahir*[40], one of the conditions of the mortgage was that interest shall be paid year after year and if there was default the mortgagee was at liberty to realise it by suit. The mortgagor made default at the end of the first year and the mortgagee sued and recovered the interest. Before the end of the second year, the mortgagor deposited the principal amount into court but the court dismissed the application to issue notice to the mortgagee, because, the mortgagor could redeem only *at the end* of the second year. At the end of the second year, the mortgagee sued for the interest, and obtained a decree. The mortgagor then filed a suit and contended that since he had deposited the principal money, no interest was due for the second year under Section 84. It was held that as the interest due at the end of the second year had not been paid, nor tendered, nor placed at the mortgagee's disposal by deposit in court, the condition relating to redemption had not been fulfilled at the

39. (1909) LR 36 IA 85.
40. ILR (1888) 16 Cal 307 (PC).

close of the second year, when the suit was brought, and that it ought to be dismissed.

Section 84 provides:

When the mortgagor or such other person as aforesaid has tendered or deposited in court under Section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or in the case of a deposit, where no previous tender of such amount has been made as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of court, and the notice required by Section 83 has been served on the mortgagee:

Provided that, where the mortgagor has deposited such amount without having made a previous tender thereof and has subsequently withdrawn the same or any part thereof, interest on the principal money shall be payable from the date of such withdrawal.

Nothing in this section or in Section 83 shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money and such notice has not been given before the making of the tender or deposit as the case may be.

In *Chelikani Venkatarayanim* v. *Zamindar of Tuni*[41], it was also held:

> It is very difficult indeed to say whether or not a man will be able to have control of money at a future date, and the real question to be determined here is not whether the money was within the power of the appellants but whether the mortgagee in the letter he sent in answer to the offer definitely and unequivocally refused to accept the money, were it tendered. Before reading this reply it is well to bear in mind what has been stated by Vice-Chancellor Wigram in the case of *Hunter* v. *Daniel*[42], as to the true position in such a case. He there says, 'The practice of the courts, is not to require a party to make a formal tender where from the facts stated in the Bill or from the evidence, it appears the tender would have been a mere form and that the party to whom it was made would have refused to accept the money'. Their Lordships think that, that is a true and accurate expression of the law, and the question, therefore, is whether the answer that was sent on behalf of the mortgagee amounted to a clear refusal to accept the money.... Their Lordships are unable to construe the letter as equivalent to any such clear

41. (1923) LR 50 IA 41.
42. 4 Hare's Reports 420.

release to the mortgagor of his obligation to tender the money as is required in order to justify him in not having presented it for receipt. From that time to this nothing has in fact been tendered. No money has been paid into court, and no effort on the part of the mortgagor has been made to satisfy his obligations under the deed. Their Lordships, therefore, think that the appellant must fail upon that part of his appeal.

The necessity for the return of the title deeds under Section 60 arises because if the mortgagor is not in possession of his title deeds a presumption may be raised that the mortgage is not discharged.

As regards the delivery of the property is concerned this arises in the case of a usufructuary mortgage and a further provision is made in this connection in Sections 62 and 63.

A reconveyance under Section 60 is necessary only when the mortgage is an English mortgage. Closely connected with this matter, there are two other Sections 60-A and 60-B. Section 60-A reads as follows:

(1) 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; and the mortgagee shall be bound to assign and transfer accordingly.

(2) The rights conferred by the section belong to and may be enforced by the mortgagor or by any encumbrancer notwithstanding an intermediate encumbrance; but the requisition of any encumbrancer shall prevail over a requisition of the mortgagor and, as between encumbrancers, the requisition of a prior encumbrancer shall prevail over that of a subsequent encumbrancer.

(3) The provisions of this section do not apply in the case of a mortgagee who is or has been in possession.

Clause 1

This deals with the right of the mortgagor to require the mortgagee to assign the mortgage to a third person.

Clause 2

Encumbrancer is a person who has an encumbrance over another's property, such as a puisne mortgagee.

Clause 3

If a mortgagee in possession is allowed to transfer the mortgage to a third party, he will have to transfer the possession also and questions of accounts between such mortgagees and the mortgagor would arise and complicate matters. That is the reason for the exception. Section 60-B reads as follows:

> 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's costs 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.

One other point may be noticed which arises as a result of the repeal of Section 99 by Order 34, Rule 14, Civil Procedure Code. The legal position is as follows: A mortgagee can have the mortgage property sold in satisfaction of any claim of his against the mortgagor which is not connected with the mortgage. Therefore, if the mortgagee purchases the property in a sale in execution of the money decree, unconnected with the mortgage, he will get the right with mortgagor's right to redeem extinguished, provided the purchase is with leave of Court.[43] But if the decree is on the personal covenant in the mortgage, then it is a claim under the mortgage, and the mortgagee cannot deprive the mortgagor of his right to redeem.[44] This prohibition does not however apply where the mortgagee purchases in execution of a decree by a third person, irrespective of whether the decree is a decree of mortgage or a money decree.

The rules as to partial redemption may be summarised as below (last part of Section 60):

(1) The general rule is that a mortgage should be regarded as one, entire and indivisible, that is, one of the several mortgagors cannot redeem his share of the property on payment of his share of the debt.

(2) Such a co-mortgagor may however redeem the *entire* property by paying the *entire* debt.

(3) He may then ask for contribution from other co-mortgagors.

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43. *Mahabir Prasad* v. *McNaghten*, ILR 16 Cal 682 (PC).
44. *Khiarajmal* v. *Daim*, ILR 32 Cal 296 (PC).

(4) If a mortgagee acquires a share in the property, the indivisibility of the mortgage comes to an end. (The word 'mort gagee' includes all the mortgagees if there is more than one). The result is that the debt is reduced to the extent of such acquisition and the rest of the properties are liable only for the balance of the debt.

(5) Once the indivisibility is gone, one co-mortgagor can redeem his share only.

(6) If a mortgagee releases a portion of the property or releases one of the co-mortgagors, the indivisibility does not cease.

(7) If the mortgagee consents—the consent being given to all co-mortgagors, if there is more than one—a partial redemption is allowed.

(8) Partial foreclosure and partial redemption are thus allowed if the mortgagor consents in one case and the mortgagee in the other.

Section 61 provides for another right of the mortgagor. It provides:

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.

Scope

The section applies to any number of mortgages by the same mortgagor to the same mortgagee, and after the amendment in 1929, not only to cases where different properties are mortgaged but also where the same property is mortgaged under successive mortgages. If a mortgagor came to court, *prior to the passing of the Act*, for redeeming mortgaged property he had to discharge *all* the mortgage debts due to the mortgagee from the mortgagor, that is, the mortgagee was entitled to consolidate the mortgages. This doctrine of consolidation was abolished in England and by the Act in India. There can however be an express contract to the contrary permitting consolidation. (*See also* Section 67-A)

Consolidation of secured and unsecured debts

This is not ordinarily possible. Any agreement by which the mortgagee tries to get a personal loan and a mortgage loan paid at the same

time would be considered a clog. If the money debt however creates a charge on the property, an express contract of consolidation is enforceable. In a case where, after incurring a simple money debt, the debtor executes a mortgage in which he agrees not to redeem the mortgage without paying off the debt, it could be treated as an express covenant for consolidation on the ground that the subsequent mortgage is also a security for the earlier debt.

Tacking

One other rule namely prohibition of tacking by the mortgagee, except to a limited extent, may be dealt with in this chapter as a right of the mortgagor. Suppose the mortgagor borrows Rs 1000 from *A* and mortgages his property. On the security of the same property, suppose he borrows Rs 200 and Rs 300 from *B* and *C* respectively and thereafter borrows another sum of Rs 200 from *A*. If *A* did not know of the advances made by *B* and *C*, he could 'tack' his subsequent loan of Rs 200 to the first loan of Rs 1000 and claim preference over *B* and *C*, but the right to tack is now modified by Sections 93 and 79.

Section 93 provides:

No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security; and, except in the case provided for by Section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

When a third mortgagee, pays off the first mortgage, by Section 92, he is subrogated to the first mortgagee's rights; but the third mortgagee cannot tack on his own mortgage to the first and claim priority over the intermediate mortgage. The only extent to which tacking is permitted is set out in Section 79 which deals with further advances.

And Section 79 provides:

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 debts 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 5000, *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*.

English law

The English rule is slightly different. In the illustration *B* was entitled to priority because *C* had notice of *B's* mortgage. Under the English rule, *B* would have priority only if he had no notice of the mortgage in *C's* favour.

Scope

In *Dalip Narayan* v. *Chait Narayan*[45], it was said:

> The general rule laid down (in Sections 79 and 80) is that a mortgagee, making a further advance, shall not in respect of that advance acquire any priority as against an intermediate mortgagee; but this is subject to the exception that the intermediate mortgagee *who has notice* of the prior mortgage is postponed in respect of advances subsequently made on the security of that mortgage, provided it expresses the maximum to be secured thereby and that maximum is not exceeded. (In the present case the prior mortgage was registered on 11th October, 1900 and the subsequent mortgage on 12th October, 1900). Even if, therefore, the view taken, namely, that registration is equivalent to notice, were adopted, it could not be said that the subsequent mortgagee had *notice* of the prior mortgage; before the puisne encumbrancer negotiated for the advance of his money, he could not have discovered by the most diligent search in the registration office, the fact of the prior mortgage.

In *Imperial Bank of India* v. *U. Rai Gyaw*[46], the mortgagor deposited title deeds of his property with the Bank, to secure advances to be made by the Bank, but later mortgaged the property to the respondent without

45. (1912) 16 Cal LJ 394.
46. (1923) 50 IA 283.

notice to the Bank. The later mortgage was registered but the respondent did not ask for the title-deeds. On the question of priority between the appellant and the respondent, it was held:

> It is to be observed that there is here no distinction between legal and equitable mortgages as in English law, where the legal mortgage will always prevail against the equitable unless the holder of the legal has done or omitted to do something which prevents him in equity from asserting his paramount rights.
>
> The various classes of mortgages are merely described, and then as regards mortgage by deposit of title-deeds, that is spoken of as a known method. That known method had consisted in applying the doctrine of English law that such deposit effected a mortgage good against the mortgagor, although no actual conveyance of the property had been made, may be taken as certain,...and consequently priority sections had application.
>
> Priority is dealt with in general terms by Section 48, and this is what is expressed in the old maxim *qui prior est tempore potior est jure.* But priority is specifically dealt with in Sections 78, 79 and 80.... The two points which arise are:
>
> (1) Whether the registration of the respondent's mortgage was *ipso facto* notice to the Bank, thus preventing the Bank from making further advances upon the doctrine of *Hopkinson* v. *Rolt*[47], and (2) whether the fact that the respondent in taking the mortgage did not ask for the title-deeds, brought into play Section 78....
>
> Their Lordships think that the words of Section 79 mean that the mortgage there referred to must express a maximum. The opening words denominate the different classes of mortgages, but to bring them under Section 79, they must have the common feature of a maximum expressed....'Future' from the context must mean subsequent to the intermediate mortgage and if that is so, then in the sense of the section an advance when made after another mortgage is granted becomes a 'future' advance....The Bank which had no maximum expressed so as to get the benefit of Section 79 took the risk of there being an intermediate mortgage. Their further advances

47. 9 HLC 514.

could not in any sense be said to have been induced by any action of the respondents and Section 78 does not apply.

Considerations as to the exigencies of business, while founded on views as to business which are obviously of the greatest practical importance would, in their Lordships' opinion, be rather arguments for the invocation of the Legislature than an incentive to the putting of a forced construction on sections of an Act which in themselves were, in their Lordships' judgment, capable of only one interpretation. It may however be not amiss to point out that, in their Lordships' view the remedy is given in the Act itself, and that is by the insertion in the arrangements for such mortgages of a maximum as indicated by Section 79. The insertion of such a maximum elides the result which otherwise would obtain in the case of *Hopkinson* v. *Rolt*. It is true that the subsequent mortgage must be made with notice of the prior mortgage which includes the maximum. But a case like the present, where the lender took the subsequent mortgage without asking for the title-deeds, would be met by Section 3 of the Act...for a mortgagee taking a mortgage in a place where he knew the mortgages by deposit of title-deeds were legal and usual and not to ascertain whether the title-deeds were already pledged was such abstention from an enquiry which he ought to have made or such negligence as to infer notice in terms of the section... If there had been a maximum then the case would have fallen under Section 79.

Exercises

1. Explain 'Once a mortgage always a mortgage'. (pp. 247-257)
2. Can a mortgage be made irredeemable after a period? (pp. 248-250)
3. What are the rules regarding partial redemption? (p. 268)
4. What is consolidation? (pp. 269-270)
5. What is the rule of priority between mortgagees? (pp. 270-273)
6. How can a mortgagor stop the running of interest after his debt has become due? (pp. 261-264 & 266)
7. Explain 'tacking'. (pp. 270-273)

15
Rights of a Mortgagee Against Other Mortgagees

These can be dealt with under three heads namely, priorities, subrogation and marshalling and contribution.

Priorities

The general rule is in Section 48. It is subject to two exceptions, namely, Sections 78 and 94. Section 78 provides:

> 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.

See Section 48, for the general rule. For 'fraud' and 'misrepresentation' *see* Sections 17 and 18 of the Contract Act.

In *Raman Chetty* v. *Steel Bros*[1], a mortgagee (appellant) induced the respondent to advance money to the mortgagor by representing that the mortgaged property was free from encumbrances. It was held:

> The appellant, having thus concurred in inducing the respondents to advance their money, as a first charge, cannot now turn round and claim priority over that charge in favour of their own mortgage subsisting from an earlier date.

In *Cathiresam* v. *Natchiappa*[2], relief was claimed against the appellant on the footing of his being a subsequent encumbrancer. The appellant claimed priority on the basis of an agreement between himself and the respondent, the evidence regarding which was unsatisfactory. It was held:

> The appellant's bond is later than that of the respondent, which being duly registered confers, unless displaced, a valid security in priority to all of a later date. The onus lies on the appellant to displace that priority....The appellant had failed to prove the

1. (1911) 2 MLJ 936 (PC).
2. AIR 1933 PC 191; *State Bank of India* v. *Kerala Financial Corpn.*, AIR 1983 Ker 38.

agreement, which it was essential for him to prove for the purpose of establishing the priority which he claimed.

If a mortgagor deposits his title deeds with a bank to secure a debt or an overdraft, but the manager of the bank allows the mortgagor to take back the title deeds and thus enables the mortgagor to create another mortgage by deposit of title deeds, it would be a case of gross neglect on the part of the manager of the first bank and the mortgage in favour of his bank will lose it's priority.

Section 94 provides:

> Where a property is mortgaged for successive debts to successive mortgagees, a mesne mortgagee has the same rights against mortgagees posterior to himself as he has against the mortgagor.

This section together with Section 91(*a*) embodies the rule picturesquely stated as 'redeem up and foreclose down'. Suppose a mortgagor mortgages his property successively one after the other in favour of *A*, *B* and *C*, *B* as the assignee of the equity of redemption can redeem *A* under Section 91. Similarly, *C* can redeem both *A* and *B*. Under this section (Section 94) *B* can foreclose *C* who is an assignee of the equity of redemption and the mortgagor; and *A* can foreclose both *B* and *C* who are only transferees of the equity of redemption and of course the mortgagor.[3]

There is also another English rule which states that you can foreclose without redeeming, but you cannot redeem without foreclosing. For example, in the above illustration, *B* can foreclose *C* and the mortgagor without redeeming *A*. But this rule does not apply strictly in India, because under Order XXXIV, Rule 1 of Code of Civil Procedure all persons having interest in the mortgage security or in the right of redemption are required to be made parties; and though under its Explanation a prior mortgagee is not a necessary party to certain suits, in practice, to avoid multiplicity of suits and complications regarding the taking of accounts, all interested persons are made parties.

As a result of the Explanation to O. XXXIV, R. 1, CPC, there is another possibility: there can be foreclosure without redemption, but

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3. *Chelamanna* v. *Parameswaran*, AIR 1971 Ker 3 (FB); *Ramamohanrao* v. *Kanakacharjulu*, AIR 1980 AP 305; *C.V. Raghavdhar* v. *Lakshminarasamma*, 1980 Supp SCC 610; AIR 1981 SC 160; *Mohaddin* v. *Hasab*, AIR 1983 Kant 13; *Anar Ali* v. *Baijnath*, AIR 1983 All 197; *Jago Devi* v. *Widow*, AIR 1984 Pat 362; *Jamiat* v. *Punjab*, AIR 1984 P&H 311.

there cannot be redemption without foreclosure. Suppose *M*, the owner of a property mortgages it to *A*, *B* and *C* in that order. *A* is entitled to foreclose (in the general sense i.e. bring to sale) as against *M*, *B* and *C*. Similarly, *B* is entitled to foreclose *M* and *C* without impleading *A*. Therefore, there can be foreclosure without redemption. But, if *B* files a suit for redemption against *A*, *M* and *C* are necessary parties to that suit and so *B* will be foreclosing *M* and *C*. That is, there cannot be redemption of *A* without foreclosing *M* and *C*.

Subrogation

Subrogation means substitution. When a person pays off a mortgagee, in certain circumstances, that person is entitled to the rights of the mortgagee, that is, entitled to be substituted for the mortgagee. The right of subrogation is dealt with in Section 92.

This section deals with two kinds of subrogation: one, by operation of law or legal subrogation and the other by agreement or conventional subrogation. The former arises when the person discharges the mortgage because he has some interest of his own in the property to protect, or an obligation, express or implied, to repay. The latter arises when there is an *agreement in writing registered* that the person paying off should be subrogated.

The section provides as follows:

Any of the persons referred to in Section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

The principles underlying subrogation are fully explained in the following cases, though some of them arose before the Act was passed and some under the Act before amendment.

In *Ram Tuhul Singh* v. *Biseswar Lall Sahoo*[4], the appellant was a shareholder in a certain estate which was sold for arrears of Government revenue, and the surplus was left in the hands of Collector. The appellant's share in the surplus was about Rs 35,000. A creditor of the appellant attached this interest and obtained an order for its sale and it was bought by the respondent for Rs 8000 and the sale was confirmed in spite of protests and objections by the appellant. The respondent thereafter petitioned the Collector for payment to him of Rs 35,000 and odd; but as in the meanwhile the revenue sale was set aside the Collector refused to pay. The respondent then instituted a suit for recovery of Rs 8000 with interest. It was held:

> What was the real nature of their purchase at the execution sale? What did they buy? They bought the appellant's interest in the surplus proceeds, subject to the contingency of his succeeding in his suit to set aside the revenue sale, in which event that interest would become nil. They did this with their eyes open, since, at least before the sale was confirmed, they had notice that the suit had been commenced. There was no warranty or contract on his part. The sale was held under proceedings *in invitum*, and indeed against his express protest. The parties were at arms length. The appellant was free to prosecute his suit; the respondents free to impose their rights, should he fail, to the uttermost farthing. What they bought, then, was the chance of getting Rs 35,000 for Rs 8000 dependent on the happening or non-happening of a certain event, and a substantial chance it must be taken to have been, since the construction of the clause on which the right to annul the sale depended was doubtful, and the court of first instance determined the question against the appellant. If that judgment had stood, he would have lost his land; and the respondents would have taken from him all its proceeds except the Rs 8000 applied in satisfaction of his debts. It is difficult to see upon what general equity existing between parties thus situated the appellant ought to be compelled to restore the respondents to their original position, because the event on which they speculated has ultimately gone against them.

4. (1875) LR 2 IA 131.

Then it is said that if the respondents fail in the present suit the appellant will not only keep the estate which he has recovered, but will get debts to the amount of Rs 8000 for which his property was liable to be attached and sold, paid with the plaintiff's money.

But, even if this were true, *it is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper, according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay. It is well settled that there is no such obligation in the case of a voluntary payment by* A *of* B's *debt.* Still less will the action lie when the money has been paid, as here, against the will of the party for whose use it is supposed to have been paid. *Stakes* v. *Lemis*[5].

The same principle in regard to voluntary payment applies in the case of subrogation also.

In *Gokuldoss* v. *Rambux*[6], the appellant purchased the equity of redemption in property mortgaged and paid off the first mortgage with notice of a second mortgage. The second mortgagee instituted a suit to enforce his mortgage. It was held:

The doctrine in *Toulmin* v. *Steere*[7], is that in the case of a purchase from the owner of an equity of redemption, the purchaser with notice, whether actual or constructive, of other encumbrances, is not, in the absence of any contemporaneous expression of intention, entitled as against the other encumbrancers of whose securities he has notice, to say afterwards that the encumbrances so paid off are not extinguished....In India the art of conveyancing has been and is of a very simple character. Their Lordships cannot find that a formal transfer of a mortgage is ever made, or an intention to keep it alive ever formally expressed. To apply to such a practice the doctrine of *Toulmin* v. *Steere*[8] seems to them likely not to promote justice and equity, but to lead to confusion, to multiplication of documents, to useless technicalities, to expense, and to litigation.

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5. 2 ITR 20.
6. (1884) LR 11 IA 126: ILR 10 Cal 1035 (PC).
7. 3 Mer 210.
8. *Ibid.*

The obvious question to ask in the interest of justice, equity and good conscience, is what was the intention of the party paying off the charge. He had a right to extinguish it and a right to keep it alive. If there is no express evidence of the intention, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest. Therefore the purchaser must be assumed to have intended to keep the first mortgage alive, *and therefore, he was entitled to stand in the place of the first mortgagee and to retain possession against the second mortgagee.*

In this case, property was sold subject to two mortgages. The purchaser paid off the first mortgage in favour of a Bank, and, in a suit by the second mortgagee claimed that he has subrogated to the rights of the first mortgagee. The Judicial Committee observed:

The debt to the Bank was not paid out of the purchase money. The appellant purchased the interest of the mortgagor only, and did not in any way bind himself to pay off the debt. When he paid the Bank, some six months afterwards, it was not because he was under an obligation to do so.

Two points follow from these observations:

(1) A purchaser who pays the mortgage *from the purchase money* will not be allowed to claim subrogation. The reason is, it is really the vendor-mortgagor who is paying in such a case through the hands of the purchaser, and there is no question of a mortgagor claiming right of subrogation. He is surely doing his duty and is not entitled to any security. 'There is nobody against whom he need to enforce the security thus set free by himself'. The test in such cases is to see whose money has been paid. Is it in addition to the purchase money or *out of* the purchase money?

(2) If there is a covenant under which the purchaser undertakes to pay, he will not be allowed the right of subrogation, because there is no difference between himself and the mortgagor.

This case arose before the Act was passed and subrogation was made a matter of intention and presumed intention.

Further the intention to keep alive the first mortgage is obvious.

In *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi*[9], property was attached in execution of a decree, and the owner of the property in ignorance of the attachment and in pursuance of a fair arrangement with the respondent paid off an earlier mortgage from money borrowed from the respondent and mortgaged the property to the respondent. The intention of the parties was to give the respondent a first charge on the property. Thereafter, in pursuance of the attachment, the property was sold and the appellant purchased it. The appellant was informed of the discharge of the earlier mortgage and of the mortgage in respondent's favour before he purchased it. He however, claimed that he was entitled to the property free from encumbrances on the ground that the respondent's mortgage was after the property was attached. It was held:

> The law upon this subject and its application to transactions in India will be found in *Mohesh Lal* v. *Mohunt Bawan Das*[10], and *Gokuldoss* v. *Rambux*[11]. The subordinate judge has summed it up correctly thus. 'When the owner of an estate pays charges on the estate which he is not personally liable to pay, *the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention.* The intention may be found in the circumstances attending the transaction, or may be presumed from a consideration of the fact whether it is or is not for his benefit that the charge should be kept on foot'. Here the mortgagor was paying off his own debts, but he was doing so for the benefit of the respondent and in performance of the agreement with him. The respondent was intended to have the first and only charge, and it is idle to contend that there was any intention to extinguish the old mortgages for the benefit of the execution creditor or any purchaser at the sale.

This case arose after the Act was passed but before the present section was enacted in 1929. The law of subrogation was continued to be considered as a matter of intention.

In *Mohd. Ibrahim Hossain Khan* v. *Ambika Pershad Singh*[12], there was a *zurpeshgi* mortgage of 1874 and the properties comprised therein were mortgaged under a simple mortgage to one Mst. Alfan in 1888; the

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9. (1902) LR 29 IA 9.
10. (1883) LR 10 IA 162.
11. (1884) LR 11 IA 126: ILR 10 Cal 1035 (PC).
12. (1912) LR 39 IA 68.

mortgage money was applied for discharging the *zurpeshgi* mortgage, and the *zurpeshgi* deed was handed over to the later mortgagee. In a suit by the simple mortgagee to enforce the mortgage by sale of the properties, it was held:

> It has been held by this Board in *Mohesh Lal* v. *Mohunt Bawan Das*[13], that whether a mortgage paid off is extinguished or kept alive depends upon the intention of the parties. It has also been held by this Board in *Gokuldoss* v. *Rambux*[14], that the ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interests. In the last-mentioned case it was held by this Board that the purchaser of an equity of redemption in immovable property situated in India, who, having notice of a second mortgage, paid off a first mortgage upon the property without an assignment of the first mortgage to him, must be assumed, according to the rule of justice, equity and good conscience, to have intended to keep the first mortgage alive, and consequently was entitled to stand in the place of the first mortgagee and to retain possession against the second mortgagee until repayment. In that case this Board was pressed to apply the doctrine of *Toulmin* v. *Steere*[15], but this Board observed that: "In India the art of conveyancing has been and is of a very simple character. Their Lordships cannot find that formal transfer of a mortgage is ever made, or an intention to keep it alive ever formally expressed. To apply to such a practice the doctrine of *Toulmin* v. *Steere*[16] seems to them likely, not to promote justice and equity, but to lead to confusion, to multiplication of documents, to useless technicalities, to expense and to litigation". And their Lordships in that case held that *the obvious question to ask, in the interests of justice, equity, and good conscience, is what was the intention of the party paying off the charge*? What this Board said in 1884 as to the art of conveyancing in India, and the practice in such cases, is true as to the art of conveyancing and the practice in such cases at the present day. The law on these points applied in the judgments of this Board in *Mohesh Lal* v. *Mohunt Bawan Das*[17] and *Gokuldoss* v. *Rambux*[18] was

13. (1883) LR 10 IA 62.
14. (1884) LR 11 IA 126: ILR 10 Cal 1035 (PC).
15. 3 Mer 210.
16. 3 Mer 210.
17. (1883) LR 10 IA 62.

subsequently applied by this Board in *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi*[19]. Applying the rule of justice, equity, and good conscience, their Lordships in this appeal hold that the charge created by the *zurpeshgi* deed of 1874, was kept alive for the benefit of Mst. Alfan.

In *Malireddi Ayyareddi* v. *Gopalakrishnayya*[20], certain lands were subject to three mortgages. The first and third were upon the lands merely, but the second was on the crops as well as the land. The purchaser from the mortgagor paid to the second mortgagee money to save the crops from sales in execution of the decree which he obtained on his mortgage. On the question of priority between the purchaser and the third mortgagee, it was held:

> It is now settled law that where in India there are several mortgages on a property, the owner of the property subject to the mortgages may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor, or to put it in another way, he may keep the encumbrance alive for his benefit and thus come in before a later mortgagee. This rule would not apply if the owner of the property had covenanted to pay the *later* mortgage debt, but in this case, there was no such personal covenant. *It is further to be presumed, and indeed the statute so enacts (Transfer of Property Act, Section 101) that if there is no indication to the contrary the owner has intended to have kept alive the previous charge if it would be for his benefit.*

In *Nasiruddin* v. *Ahmad Husain*[21], there was a suit for specific performance of a contract to sell land. The defendants were subsequent purchasers with knowledge of the contract. As purchasers they discharged mortgages upon the property. The suit was decreed. It was also held:

> It seems the appellants (defendants) have, in virtue of their claim to be purchasers, discharged mortgages upon the property. In respect of any money paid by way of such discharge they are entitled to stand in the shoes of the mortgagees whom they have paid off.

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18. (1884) LR 11 IA 126: ILR 10 Cal 1035 (PC).
19. (1902) LR 29 IA 9.
20. (1924) LR 51 IA 140.
21. AIR 1926 PC 109.

Under the present law, if subrogation is specifically provided for in favour of the person paying, *by a registered instrument*, then such a person would be entitled to subrogation. [*See* Sec. 92(3)]

In *Janaki Nath Roy* v. *Pramatha Nath Malia*[22], the mortgagor executed four mortgages in favour of the appellant on four different items of property, *A*, *B*, *C* and *D* on different dates successively. The terms of the mortgages were so worded that each mortgage was a mortgage of the item dealt with as well as an additional security for the earlier mortgages. Thereafter, he mortgaged all the properties to the respondent for money to be advanced by him to pay off the mortgages in favour of the appellant, the respondent being subrogated to the rights of the appellant. The respondent paid off the amount due on mortgages relating to properties *A*, *B* and *C* but not on *D*. In a suit by the appellant to enforce the rights under the 4th mortgage with respect to item *D* and in default of payment, for sale of all the properties of *A*, *B*, *C* and *D*, the respondent contended that he had a priority with respect to the items, *A*, *B*, and *C* having been subrogated to the position of the appellant as first mortgagee. It was held:

> The doctrine of consolidation has nothing to do with the case. That doctrine can only apply when a mortgagee holds (say) a mortgage on property *A* and also a separate mortgage on property *B* belonging to the same mortgagor. In such a case after the expiry of the legal right of redemption the mortgagor in cases where the right of consolidation is still applicable is only allowed to exercise his equitable right of redemption of the one property on the terms of redeeming the other. In the cases however of a mortgagee holding a first mortgage on property *A* and also a second mortgage on the same property, the mortgagor cannot on payment of the first mortgage redeem the property, that is to say, claim a reconveyance and delivery of the title-deeds, and so forth, unless he repays what is due on the second mortgage. But this is not because of the doctrine of consolidation but by reason of fact that he has a second mortgage on the property....
>
> (In the present case), the properties (*A*, *B* and *C*) themselves could not be wholly redeemed because of the charge thereon of the sum advanced under the 4th mortgage, a position that was

22. (1939) LR 67 IA 82.

recognised by the express terms of that mortgage. This did not however in any way affect the right of a person other than the mortgagor himself on paying or providing for the payment of the sums due under the first three mortgages to be subrogated to the rights of the appellant....

Taking first the law as it stood in December 1927, it has nowhere been better expressed than it was by Mookerjee, J., in *Gurdeo Singh* v. *Chandrikah Singh*[23]. That learned Judge said thus 'It may be said in general that to entitle one to invoke the equitable right of subrogation he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected'....Mookerjee, J., however went on to point out that a person who claims to be subrogated to the rights of a mortgagee must pay the entire amount of the encumbrance in question. Payment of a portion only of the encumbrance is not sufficient. It is obvious, he said, that the contrary views would lead to endless difficulties. With these observations of the learned judge, their Lordships desire to express their entire agreement. It is indeed to be observed that such a qualification of the right of subrogation applies whether the right be claimed under the statute or under the pre-existing law.

Turning now to the statute the first thing to be observed is that para 3 of Section 92 only applies where the mortgage has been redeemed. In the present case it is said that the mortgage has not been redeemed inasmuch as there has been no reconveyance, or what in India takes the place of a reconveyance. This contention however loses sight of the distinction between the redemption of a mortgage and the redemption of the property mortgaged. In their Lordships' opinion it is clear that the words in the section 'mortgage has been redeemed' refer merely to the payment of the mortgage money and not to an extinction of the mortgagee's rights over the mortgaged property. If such rights had become extinguished there would be none to which the person advancing the money could be subrogated. Para 4 moreover seems to contemplate that a mortgage may be redeemed in part, and this clearly shows that by redemption is meant

23. (1909) ILR 36 Cal 193.

> no more than payment of the mortgage money. That being so, and the mortgage of the respondent having been duly registered he is entitled to be subrogated to the rights of the appellant under the first three mortgages by virtue of the plain terms of Section 92 if such section be applicable....

(On the terms of the mortgage it was held that the 4th mortgage was not a comprehensive mortgage of all the properties, and therefore there was a complete redemption of the independent mortgages on items, *A*, *B* and *C* and therefore the respondent was entitled to be subrogated to the appellant's rights with respect to those three mortgages.)

In *Lala Manmohan Das* v. *Janki Prasad*[24], a suit was instituted against an idol claiming money on a mortgage. The appellant loaned money to the respondent, who was one of managers of the idol and with that money the decree debt in the suit was discharged and in consequence the idol was benefited and the trust freed from the burden of the decree debt. On the question whether the appellant by discharging the mortgage debt by loan had subrogated himself to the rights of the decree-holder in the suit against the idol, it was held:

> The doctrine of subrogation is in essence a simple matter. It means the substitution of one creditor for another. The law of subrogation in India is contained in Section 92, T.P. Act. This section is new and was inserted by Section 47 of the Act 20 of 1929. By Section 39 of the Amending Act, Sections 74 and 75, T.P. Act, which contained only in an imperfect form the law of subrogation, were repealed. The new section deals with the rights of subrogation of two different classes of persons. Paragraph 1 deals with the rights of persons who have an *existing interest in the property*. Paragraph 3 with reference to which the case of the appellant was argued deals with the rights of strangers who *acquire an interest in the property*.
>
> The right mentioned in paragraph 3, referred to usually as 'conventional or contractual' subrogation is founded upon the principle of an agreement between a borrower and a lender, that the lender shall be subrogated to the rights of the original creditor. As Section 92 was not in force at the time of the suit mortgage, the question was raised whether or not it has retrospective operation....Their Lordships, however, do not think it necessary to

24. (1945) LR 72 IA 39.

decide the question whether the section has or has not retrospective effect as in their opinion the appellant is not entitled to the right of subrogation whether the case is governed by Section 92 or by the previous law....

The appellant in order to succeed must prove that the money was advanced by him to the mortgagor. In the present case, that has not been proved as the money was advanced, not to the idol through its trustees, but to respondent 1 personally who could not by himself represent the idol; nor is any registered instrument executed by both the trustees forthcoming; the only document is that signed by respondent alone....The defect which has proved fatal to the appellant's claim under the document has proved equally fatal to his claim based on the statute also.

The decision in *Butler* v. *Rice*[25], would seem to support the view that a mere volunteer who discharges a mortgage debt binding on the property, as in the present case, could claim to be subrogated to the rights of the creditor on the mortgaged property for the amount paid by him. Whatever force such a doctrine may possess in England, the Board has negatived such a plea as regards India: *Ram Tuhul Singh* v. *Biseswar Lall Sahoo*[26]. Even before the amendment of the Act, to support a claim to subrogation by one who has lent money to a mortgagor to redeem a mortgage, an agreement express or implied that the lender shall be subrogated to the rights of the creditor was necessary to be proved. In this connection reference may be made to the Board's decision in *Janaki Nath Roy* v. *Pramatha Nath Malia*[27], where in considering what was the law as to partial subrogation before the Act was amended by Act 20 of 1929, it was observed as follows: 'Taking the law as it stood in December 1927, it has been nowhere better expressed than it was by Mookerjee, J., in 36 Cal 193. That learned Judge said thus: "It may be said in general that to entitle one to invoke the equitable right of subrogation he must either occupy the position of a surety of the debt, or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security or must

25. (1910) 2 Ch 277.
26. (1875) LR 2 IA 131.
27. (1939) LR 67 IA 82.

stand in such a relation to the mortgaged premises that his interest cannot otherwise be protected''.'.

....It is clear from the above statement of the previous state of the law that the appellant being a mere stranger—neither being a surety of the debt, nor being otherwise interested in the property—has in order to succeed on the equitable doctrine of subrogation to prove that there was an agreement between him and the debtor or creditor that he should receive and hold an assignment of the debt as security. As he has not been able to prove such an agreement his appeal fails even under the previous state of the law.

After the amendment of the Act the right of subrogation can be claimed by the lender only if the mortgagor has by a registered instrument agreed that he shall be so subrogated. The right can no longer be claimed or granted as before, on very slight evidence or what may be described as the semblance of an agreement. In the present case, in their Lordships' view, there is no such evidence or semblance even of an agreement between the appellant and the idol, or the creditor. The mere fact that money borrowed from him was used for paying off a previous charge does not entitle the appellant to the benefit of the discharged security. Lastly, it was argued forcibly, that if the appellant fails in the present suit the idol gets the property freed from liability with the aid of the appellant's money; and that therefore relief should be given to him on general principles of justice and equity, but as observed by their Lordships in LR 2 IA 131; 'It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation express or implied to repay. It is well settled that there is no such obligation in the case of a voluntary payment by *A* of *B's* debts'.

In *Ganeshi Lal* v. *Joti Pershad*[28], a co-mortgagor in Punjab paid to the mortgagee less than the amount due and redeemed the mortgaged property. He however, claimed from the co-mortgagor, contribution, on the basis of the full amount. It was held:

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28. (1953) SCR 243; *Daulat Ram* v. *Saroop*, AIR 1996 SC 2421; *Keshavanchari* v. *Velu*, AIR 1996 SC 1075; *Vallikat* v. *Vallikat*, AIR 1997 SC 1909.

It is not denied that the appellant who redeemed the prior mortgage is subrogated to the mortgagee's rights, but the controversy is about the extent of his rights as subrogee. By virtue of redemption, does he get all the rights of the mortgagee and hold the mortgage as a shield against the co-mortgagors for the full amount due on the mortgage on the date of redemption whatever he may have himself paid to get it discharged, or does he stand in the mortgagee's shoes only to the extent of getting reimbursed from the co-mortgagors for their shares in the amount actually paid by him?

Section 92 is a new section and was inserted by the Amending Act 20 of 1929. The original Sections 74 and 75 conferred the right to redeem in express terms only on the second or other subsequent mortgagees, though the co-mortgagor's right to subrogation on redemption was recognised even before the Act. As the Transfer of Property Act has not been extended to the State of Punjab, it is unnecessary to decide whether Section 92 is retrospective in its operation, on which point there has been a conflict of opinion between the several High Courts. Section 95 of the Act which removed the confusion caused by the old section which, conferring on the co-mortgagor what was called a charge, and thus seeming to negative the application of the doctrine of subrogation, is also inapplicable in the present case. We therefore steer clear of Sections 74 and 75 of the old Act and Sections 92 and 95 of the present Act, and we are free to decide the question on principles of justice, equity and good conscience.

If we remember that the doctrine of subrogation which means substitution of one person in place of another and giving him the rights of the latter is essentially an equitable doctrine in its origin and application, and if we examine the reason behind it, the answer to the question which we have to decide in this appeal is not difficult. Equity insists on the ultimate payment of a debt by one who in justice and good conscience is bound to pay it, and it is well recognised that when there are several joint debtors, the person making the payment is a principal debtor as regards part of the liability he is to discharge and a surety in respect of the shares of the rest of the debtors. Such being the legal position as among the co-mortgagors, if one of them redeems a mortgage over the property which belongs jointly to himself and the rest, equity confers on him a right to reimburse himself for the amount spent in excess by him in

the matter of redemption; he can call upon the co-mortgagors to contribute towards the excess which he has paid over his own share. This proposition is postulated in several authorities. In the early case of *Hodgson* v. *Shaw*[29], Lord Brougham said: 'The rule is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor, and have all the rights which he has, for the purpose of obtaining his *reimbursement*' ... .

The redeeming co-mortgagor being only a surety for the other co-mortgagors, his right is, strictly speaking, a right of reimbursement or contribution, and in law, when we have regard to the principles of equity and justice, there should be no difference between a case where he discharges an unsecured debt and a case where he discharges a secured debt. It is unnecessary for us to decide in this appeal whether Section 92 of the Transfer of Property Act was intended to strike a departure from this position when it states that the co-mortgagor shall have the same rights as the mortgagee whose mortgage he redeems, and *whether it was intended to abrogate the rule of equity as between co-debtors, and provide for the enforcement of the liability on the amount due* under the mortgage; and this is because, as has been already stated, we are governed not by the statute but by general principles of equity and justice. If it is equitable that the redeeming co-mortgagor should be substituted in the mortgagee's place, it is equally equitable that the other co-mortgagors should not be called upon to pay more than he paid in discharge of the encumbrance.

The following principles relating to subrogation can be derived from the decisions discussed above:

(1) Subrogation could be legal or conventional.

(2) Before the enactment of Section 92 as it now stands, whether a person paying off a mortgagee was subrogated to the rights of the mortgagee, depended on intentions and presumptions. The law now is, if it is a matter of conventional subrogation, there must be an express agreement and it should be contained in a registered instrument.[30]

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29. 40 ER 70.

30. *Krishna* v. *V. K. Velayudhan*, AIR 1979 Ker 47.

(3) Subrogation enables the person paying off a creditor to stand in his shoes with respect to the rights, remedies and securities which the creditor had, the reason for recognising such a right being, that if he is not so subrogated, subsequent encumbrancers will have priority over him.

(4) The right arises only when the mortgage to which it relates has been *fully* discharged.[31]

(5) Such a principle of reimbursement is also recognised by Section 69 of the Contract Act, but that section gives only a personal right, whereas this section (Section 92 of the Transfer of Property Act) gives a charge on property.

(6) Just as in Section 69 of the Contract Act, a volunteer cannot claim subrogation, the person paying off a creditor must have a pre-existing interest in the property, that is, he must have some interest in the property even *before* he makes his payment. If he has no such interest and the interest arises only because of his payment to the creditor then he can claim to be subrogated only on the basis of conventional subrogation which involves an express agreement in a registered instrument.

(7) Where there is a covenant to discharge or the discharge of the mortgage was out of the purchase money, there cannot be subrogation unless there is a registered instrument providing for it.

(8) If a person enters into a covenant to pay off a certain mortgage *A* he cannot discharge an earlier mortgage *B* and claim to be subrogated to the rights of the mortgagee of mortgage *B* as against *A*. There is one exception however, and that arises in a case when the earlier mortgage was not disclosed to the person who had entered into the covenant.

(9) There is one exception where a mortgagor would be entitled to subrogation. Suppose he is an owner of property worth Rs 1000 and there is a mortgage on it for Rs 500. A purchaser may purchase the property for Rs 500, promising to pay the balance of Rs 500 to the mortgagee. If the mortgagee is not paid the amount, he has a right to sue the mortgagor on the personal covenant under Section 68 and recover the money

31. *Kundan* v. *Fauja*, AIR 1979 P&H 212.

from the mortgagor. It is only fair that the mortgagor should get the money from the purchaser.

(10) If more than one person advances money to the mortgagor and the entire mortgage is paid off, all such persons would be subrogated to the rights of the mortgagee in proportion to the amount of money advanced by each.

It may be mentioned that the Section is not exhaustive and there may be cases of what one may term equitable subrogation. Suppose a property is sold in execution of a decree. The purchaser pays off a mortgage on the property. Suppose the sale is subsequently set aside. In such a situation it is equitable that the purchaser is subrogated to the rights of the mortgagee.

Section 95 provides:

Where one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under Section 92 against his co-mortgagors be entitled to add to the mortgage-money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property.

Under Section 92 it is already stated that a redeeming co-mortgagor is subrogated to the rights of the mortgagee. This section provides for expenses also as against the co-mortgagors, on such redemption.[32]

Marshalling and Contribution

Marshalling is provided for in Section 81. It says:

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.

The section may be compared with Section 56.

Marshalling cannot be claimed if one of the properties is released by the prior mortgagee, but in such a case, the subsequent mortgagee can claim proportionate contribution against the mortgagor. Marshalling also cannot be claimed if there is a contract to the contrary. Marshalling can

32. *A.N.R. Naidu* v. *Senthamurthi*, AIR 1979 Mad 26; *Valliamma* v. *Sivathanu*, (1979) 4 SCC 429: AIR 1979 SC 1937; *Sushil Kumar* v. *Ramachandra*, AIR 1982 All 129; *Sisram* v. *Sakhal*, AIR 1982 P&H 185 (Art. 61, Limitation Act).

be claimed not only by subsequent mortgagees, but also by a purchaser in execution of the mortgage decree of the subsequent mortgagee; but a lessee cannot claim the right. One condition for claiming marshalling is that there must be a common debtor. Marshalling is available only if there are *two* properties involved and *not if portions of* a property are dealt with. Question of the notice of the prior mortgage is irrelevant under the section as it now stands.

The law relating to Contribution is stated in Section 82 which is as follows:

> Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date.
>
> Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.
>
> Nothing in this section applies to a property liable under Section 81 to the claim of the subsequent mortgagee.

Contract to the contrary

Such a contract may be express or implied.

In *Kidar Lall Seal* v. *Hari Lal Seal*[33], the plaintiff sued on a mortgage and claimed that the three mortgagors were to contribute in equal shares. The mortgagors did not deny their liability to contribute but contended that their respective liabilities should be proportionate to the benefit derived by each. It was held:

> The sections of the Transfer of Property Act which concern us are Sections 82 and 92. The first confers a right of contribution and the second a right of subrogation....The Privy Council pointed out in *Rani Chhatra Kumari* v. *Mohan Bikram*[34], that the doctrine of equitable estates has no application in India....In the case of Section

33. (1952) SCR 179; *Subodh* v. *Satish*, AIR 1978 All 412.
34. (1931) 58 IA 279: AIR 1931 PC 196: (1931) ILR 10 Pat 851 (PC).

82 the Privy Council held in *Ganeshlal* v. *Charan Singh*[35], that, that section prescribes the conditions in which contribution is payable and that it is not proper to introduce into the matter any extrinsic principle to modify statutory provisions. These matters have been dealt with by statute and we are now only concerned with the statutory rights and cannot in the face of statutory provisions have recourse to equitable principles however fair they may appear at first sight. (But there is) a competition between Sections 82 and 92 of the Transfer of Property Act (on the one hand) and Section 43 of the Contract Act (on the other). So far as Section 43 is concerned, I am not prepared to apply it unless Sections 82 and 92 can be excluded. Both Sections 43 and 82 deal with the question of contribution. Section 43 is a provision of the Contract Act dealing with contracts generally. Section 82 applies to mortgages. As the right to contribution here arises out of a mortgage, I am clear that Section 82 must exclude Section 43 because where there is a general law and a special law dealing with a particular matter, the special excludes the general. In my opinion the whole law of mortgage in India, including the law of contribution arising out of a transaction of mortgage, is now statutory and is embodied in the Transfer of Property Act, read with the Civil Procedure Code. Now, when parties enter into a mortgage they know, or must be taken to know, that the law of mortgage provides for this very question of contribution. It confers rights on the mortgagor who redeems and directs that, in the absence of a contract to the contrary, he shall be reimbursed in a particular way out of particular properties....There being no contract to the contrary the plaintiff's only remedy is under Section 92 of the Transfer of Property Act, read with Section 82:

In this case the Supreme Court held that the contract to the contrary should be express. But in *Muthialo Bhagavathar* v. *Venkatarama*[36], it was held that a contract may be implied from the manner in which the mortgage money was shared, was not cited.

It is only mortgagors who would be bound by a contract between them, but not the mortgagee, unless he is also a party to the contract. If there is contract between *A* and *B*, the mortgagors, regarding the rate of contribution, and if *A* transfers his property to *C*, *C* also would not be

35. (1922) LR 49 IA 60.
36. ILR 59 Mad 121.

bound by the contract between the mortgagors unless he expressly consents.[37] It is respectfully submitted that *C* should be held to be bound if he had notice of the contract between *A* and *B*. If the mortgagee, who was a party to the contract between *A* and *B* transfers his right to *D*, *D* would be bound by such a contract.

In *Ramachand* v. *Prabhu Dayal* (*see* p. 260), it was also held that the release of a part of the property by the mortgagee does not take away as regards that part the liability to contribute which Section 82 imposes upon the different parts.

Where two mortgagees claim to be satisfied out of the same property, the rule to be applied is marshalling under Section 81. But where one mortgagor, who has only a share in the mortgaged property, pays off the entire mortgage his rights as against the other shares depends on the rule of contribution set out in this section. If a property is equally liable with another to pay a debt, it shall not escape, merely because the debt was paid out of the other property.

In *Bohra Thakur Das* v. *Collector of Aligarh*[38], two items of property *A* and *K* were mortgaged to one *N*. The mortgagor earlier (1868) executed a simple mortgage of *K* in favour of *N* and another. In execution of a decree on that mortgage *N* and the other mortgagee brought the property *K* to sale, purchased it themselves and became absolute owners thereof. The appellant, who was the representative in interest of the mortgagor filed a suit claiming *inter alia* that he was entitled to redeem *A* upon payment of the proportionate share of the mortgage money; his contention being that as *N* purchased *K* on which the mortgage debt was secured, it was *pro tanto* satisfied and *A* was only liable for the share legitimately chargeable on it. It was held:

> As *K* was sold and purchased by *N* in execution and part satisfaction of a decree obtained on the prior mortgage of 1868, the courts in India properly overruled the appellant's contention which has not been pressed before this Board.

The principle of this decision is that there is no personal liability, the liability to contribute being laid on the items of property mortgaged. Where therefore, one of the items, in the present case *K*, is sold to discharge a prior mortgage, it is no longer liable for contribution, be-

37. *Damodara Sami* v. *Govindarajulu Naidu*, AIR 1943 Mad 531 (FB).
38. (1910) LR 57 IA 182.

cause, the prior debt has exhausted it completely and it is no longer available, as per the second paragraph of the section.

In *Narayan* v. *Nallammal*[39], the eastern portion of a property mortgaged to the plaintiff's grandfather was transferred by the mortgagor and was eventually purchased by the first defendant. There was a second mortgage in favour of the same mortgagee on the western portion which was ultimately purchased by the second defendant. The first mortgage was assigned to one *C* and the second mortgage in a partition fell to the share of the plaintiff. *C* filed a suit on his mortgage and in execution of the decree brought the western portion of the property to sale and it was purchased by the first defendant. In a suit for contribution against the first defendant by the plaintiff, it was held:

> The right of contribution rests upon the principle that a property which is equally liable with another to pay a debt shall not be relieved of the entire burden of the debt because the creditor has been paid out of that property alone....The section expressly refers to a case where the mortgaged property is subsequently divided into shares held separately and not merely to a case where several properties are mortgaged and it is placed beyond question that the valuation for purposes of contribution shall be that at the date of the mortgage. Both before the amendment and now the liability to contribute is a liability which is imposed upon the land and therefore is not a personal liability....A second mortgagee does not stand in the shoes of a mortgagor. Where there is a second mortgage, the second mortgagee holds a mortgagee's interest in the property and the fact that some other person has previously received a mortgagee's interest does not detract from the nature of his interest. When a person agrees to lend money on the security of a second mortgage of a portion of the property he knows that the first mortgagee has the benefit of the whole of the property, and that the first mortgagee, if he calls in the mortgage loan, will have the right to cause the whole of the hypotheca to be sold. If the first mortgagee does cause the whole of the hypotheca to be sold, the second mortgagee has the right, *as the section stands* to call upon the holder of the unsold portion to contribute his share of the principal debt.

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39. (1942) 2 MLJ 525 (FB).

The principle of this decision may be stated thus: Suppose two properties *P* and *Q* are mortgaged to *A* and one of the properties, say *P* and another property *R* are mortgaged to *B*. If *A* obtains a decree on his mortgage and obtains satisfaction by the sale of *P*, *B* can only proceed against the property *R* (See *Bohra Thakur Das case*, page 294). The further question that if *R* is insufficient to satisfy *B*'s mortgage, whether he could proceed against *Q* is answered by the above decision in the affirmative.

If a mortgagor sells a part of the mortgaged property and the mortgagee realises his debt by the sale of the portion retained by the mortgagor, the question arises whether the mortgagor can claim contribution from the purchaser in a case where the mortgagee proceeds against the portion retained by the mortgagor and the debt is satisfied. If the sale is subject to the mortgage then the purchaser is in the position of a mortgagor and his portion would be liable for contribution under the section. If however the sale was not subject to mortgage, the purchaser is not a person having a distinct and separate right in the mortgaged property, and so the section does not apply and such purchaser cannot be called upon to contribute.

If the purchaser is the mortgagee himself, the question of contribution again depends upon whether the mortgagee purchased the full share of the property or only the equity of redemption. Suppose a mortgagor mortgages his properties and subsequently mortgages the same properties together with other properties to the same mortgagee. Suppose further, the mortgagee obtains a mortgage decree in respect of the second mortgage and in execution purchases all the properties except one item which was subject to the first mortgage and that item was purchased by a third party, and the purchases were subject to the first mortgage. If the mortgagee files a suit against that purchaser for contribution he is entitled to succeed. The debt, to the extent of the same proportion that the property purchased by the mortgagee bears to the entire property mortgaged, is discharged by the mortgagee's purchase. But the proportion which the property purchased by the third party bears to the entire property mortgaged remains, and to that extent the property purchased by the third party would be liable to contribute. The mortgagee purchased a share in the equity of redemption and the integrity of the mortgage is split up as laid down in Section 60 and the mortgagor should redeem the proportionate part of the debt.

If, however, the mortgagee purchases in entirety one of the properties mortgaged to him, the mortgagor's liability attributable to that property continues to be on the mortgagor. In such a case, there is no question of contribution and the mortgagee may proceed against the other properties in order to enforce his entire mortgage debt.

Since the liability to contribute is on the property, if the mortgagee releases his claim on a distinct share of the mortgaged property, the owners of the other shares may still enforce contribution against the share released.

If a co-mortgagor *pays off* the entire mortgage amount and redeems the mortgaged property, he can either claim contribution from the other co-mortgagors under Section 82, or claim to be subrogated to the rights of the mortgagee under Section 92.

But, if more than the rateable proportion was realised from a co-mortgagor, but the entire mortgage *was not satisfied*, it is respectfully submitted that such co-mortgagor cannot maintain a suit for contribution against the other co-mortgagors, even though the requirement that the mortgage should be redeemed in full is not found in Section 82 as it is found in Section 92.

In *Faqir Chand* v. *Aziz Ahmad*[40], in 1911, a mortgagee sued upon his mortgage and a puisne mortgagee in respect of one of the properties mortgaged satisfied the decree, with the object of freeing the property from further liability and for the purpose of realising the money from two other properties. He transferred his rights to the respondent who filed a suit claiming the amount paid, from the two properties and in the alternative for account and contribution. It was held:

> The right to contribution in this case is governed by Section 82 of the T. P. Act, 1882. A new section has now been substituted by an amending Act (20 of 1929) but *it is not necessary for their Lordships to refer to the changes which have been effected by it* (because the amended section would not apply to pending proceedings)....To arrive at the value for contribution purposes of each of several properties on which a particular mortgage is secured, it is clear that the amount of all prior 'encumbrances' upon such properties must be ascertained and deducted. Their Lordships are in agreement with the

40. (1932) LR 59 IA 106.

High Court that 'encumbrance' is a term of wider connotation than 'mortgage', but they are unable to follow the learned Judges in the argument they base upon this proposition. Where properties *A*, *B* and *C* are all made security for one mortgage, if property *A* is subject to a prior encumbrance jointly with properties *X*, *Y* and *Z* their Lordships think that the rateable share to be attributed to *A* under the prior encumbrance must necessarily be assessed in order to ascertain its value for the purposes of the mortgage. In the view taken by the High Court all that would be necessary in such a case would be to see what was the total amount of the prior encumbrance to which *A* was liable, irrespective of the question whether that liability was to be shared by *X*, *Y* and *Z*. Their Lordships are unable to adopt this view of the meaning of Section 82. It would no doubt greatly simplify the inquiry in such a case as the present, but simplification would only be attained by a sacrifice of what they regard as the principle involved.

[The suit was dismissed on the ground that all the parties were not before the Court.]

Therefore, a co-mortgagor has three remedies in law:

(1) a suit for indemnity under Section 69, Contract Act, (2) a suit for contribution with a charge under Section 82, Transfer of Property Act, and (3) a suit on the basis of subrogation under Section 95, Transfer of Property Act.

The last paragraph declares that where marshalling and contribution might conflict, then marshalling is to prevail; or as it is sometimes said the right to contribution is controlled by the right to marshalling. Suppose the common owner of two villages mortgages the first to *A*, the second to *B*, then both to *C* and finally the first village to *D*. Under Section 82, both villages are liable to contribute to the mortgage of *C*. From the value of each village the amount of the debts due to *A* and *B* respectively are deducted, and the villages after such deduction are liable to contribute rateably. But under Section 81, *D* has a right to require *C* to proceed against the second village first.

Exercises

1. When does a subsequent mortgage take precedence over a prior one? (pp. 274-276)

2. Explain marshalling of securities. (pp. 291-292)
3. What is contribution and what are the rules in relation to a mortgage? (pp. 292-298)
4. What are the principles of subrogation? (pp. 276-291)
5. What are 'legal' and 'conventional' subrogation? (p. 276)
6. Can a volunteer claim subrogation? (pp. 277-279)
7. Explain 'Redeem up and Foreclose down'. (p. 275)