MARSHALLING

1. INTRODUCTION:

If the owner of two or more properties mortgages them to one person and then mortgages one or more of there properties to another person, the subsequent mortgagee has the right to throw the first mortgagee requiring him to be satisfied out of the property not mortgaged to the subsequent mortgagee, so far as that property will go, and to keep the second property for his benefit if the first property is sufficient to satisfy the first mortgagee's claims. But if the first property be not sufficient to meet the prior mortgagee's claim, the subsequent mortgagee cannot marshal or arrange the securities

MEANING OF MARSHALLING:

2\. The term marshal means to arrange and marshalling securities means to arrange securities.

RELEVANT SECTION:

3\. Section 81 of the Transfer of Property Act deals with the marshalling securities.

MARSHILLING SECURITIES; SECTION 81:

4\. ***Section 81 of the Transfer of Property Act says that,***

"If the owner of two or more properties mortgages them to one person and then mortgages one or more of there properties to another person, the subsequent mortgagee has the right, in the absence to the contract to the contrary, to throw the first mortgagee requiring him to be satisfied out of the property not mortgaged to the subsequent mortgagee, so far as that property will go, and to keep the second property for his benefit if the first property is sufficient to satisfy the first mortgagee's claims. But if the first property be not sufficient to meet the prior mortgagee's claim, the subsequent mortgagee can not marshal or arrange the securities "

Illustration: If A, having two real estates X and Y, mortgages both estates to B, and afterwards mortgages one of the estates, X to C, the rule of marshalling of securities directs B to realize his mortgage debt out of the estate Y which is not in mortgage to C leaving the estate X in mortgage to C to satisfy C so far as it goes to satisfy B's claim.

5. DOCTRINE IS BASED UPON MAXIM:

"Suum Cnique Tribuere"

"Disappoint none, give to each creditor what is his due as far as possible."

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The above principle is based on equity which intervene to restrain the first creditor from resorting to the later security until the other which he alone possession is exhausted.

6. ESSENTIALS OF MARSHALLING:

Following are the essentials of marshalling:

(i) The right to subsequent mortgagee

(ii) Against the mortgagor

(iii) Not against mortgagee

(iv) The first mortgagee has more securities than the subsequent mortgagee

(v) Mortgage must be for immovable property

(vi) There must be common debtor which means that the mortgages should have been created by same owner:

- He must have mortgaged to or more properties to one person
- Subsequently must have mortgaged one or more of such properties to another person.

7. APPLICABILITY:

This section is applied only to mortgages of immovable property.

8. NON APPLICATION:

This section can not be applied in the following cases:

(i) Not applied on hypothecation of movable property

(ii) Can not apply to the cases where the prior mortgage is of both immovable and movable properties

(iii) Person other than subsequent mortgagee can not claim marshalling.

(iv) A lessee of property has no right of marshalling.

9. IMPOSSIBILITY OF MARSHALLING:

If all the properties mortgaged except one are situate out of Pakistan, the court would not allow marshalling.

10. LIMITATION TO THE DOCTRINE OF MARSHALLING:

That the claim to marshal must be suffered to prejudice the rights of the first mortgagee or of others who have for consideration acquired an interest in any of the properties.

Illustration: If two estates, W and Y belonging to the same person are first mortgaged to B and then X is mortgaged to C and Y to D, C would not be permitted to compel B to marshal in his favour, for the course would prejudice D.

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11. WHEN THIS RIGHT MAY BE EXERCISED:

This right may be exercised when the prior mortgagee seeks to realize his mortgage amount.

To conclude that in order to marshal the securities there d be right to subsequent mortgagee against the mortgagor not st mortgagee. The first mortgagee has more securities than the equent mortgagee. Mortgage must be for immovable property. e must be common debtor which means that the mortgages ild have been created by same owner: He must have mortgaged r more properties to one person and subsequently must have tgaged one or more of such properties to another person.

CONTRIBUTION TO MORTGAGED DEBT

1. INTRODUCTION:

The doctrine of contribution is that as between persons who may be liable with respect to the same debt, their liability will be only in proportion to the quantum of their interest in the property offered as security for the debt. This doctrine is based on the maxim Equality is Equity.

2. RELEVANT PROVISION:

Section 82 of the Transfer of Property Act deals with the contribution to mortgage debt.

3. CONTRIBUTION TO MORTGAGE; SECTION 82:

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.

4. BASIC PRINCIPLE OF:

It is a basic principle of

(I) The unity of the mortgage debt

(II) Common burden shared by many people, but discharged by one with the result that the remaining shares enjoyed the benefit of the discharge.

(III) Principle applies in many situations as between:

- (i) Co sharers
- (ii) Co tenants
- (iii) Partners
- (iv) Co owners and so on.

5. EXPLANATION:

Where several properties, whether of one or several owners are mortgaged for one debt, they shall contribute rateably to its discharge. The rule is based upon the principle that a fund which is equally liable with another to pay a debt shall not escape because the creditor has been paid out of the other fund alone, but that both should rateably contribute to the debt.

(I) **ILLUSTRATION:** X and Y are mortgaged to M. X belongs to A and Y to B. The value of X is Rs. 100000 and the value of Y is Rs. 20000. X and Y must contribute to payment of M's mortgage in the ratio of 1:2.

(II) **ACCORDING TO FISCHER'S VIEWS:**

Fisher says that, "If several estates be mortgaged for a subject equally to one debt, the several estates shall continue rateably to that debt, being valued for that purpose after deduction from each estate any other encumbrance by which it is affected.

6. LIABILITY OF PROPERTY:

The obligation to contribute is not personal but attached to the properties. It only referred the liability of the property which has borne the burden of more than one mortgaged debt.

7. SECTION 43 OF CONTRACT ACT:

(I) **ANY ONE OF JOINT PROMISOR MAY BE COMPELLED TO PERFORM:**

When two or more persons make a joint promise, the promisee may in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise.

(II) **EACH PROMISOR MAY COMPEL CONTRIBUTION:**

ILLUSTRATION: A, B and C jointly promise to pay D 3000 rupees. D may compel either A or B or C to pay him rupees 3000. Any one of them may compel the other to contribute.

8. APPLICATION OF SECTION 82:

Section 82 applies to mortgages and excludes section 43 of the contract Act which also deals with the question of contribution.

Section 43 of the Contract Act is general in nature. So where three person jointly mortgaged their three properties in the absence to the contract to the contrary, the remedy of the mortgagor is to use for redemption under section 92 and then to claim contribution from his other co mortgagor under this section.

PERSON PAYING MORE THAN HIS SHARE:

No contribution can be claimed against a person who has paid more than his share of the liability.

CONCLUSION:

To conclude that where several properties, whether of one or eral owners are mortgaged for one debt, they shall contribute ably to its discharge. The rule is based upon the principle that a d which is equally liable with another to pay a debt shall not cape because the creditor has been paid out of the other fund ne, but that both should rateably contribute to the debt.