

7. THE TRANSFER OF PROPERTY ACT

CONTRIBUTION

1. Suppose two properties are mortgaged and they belong to different persons. Suppose for the realization of the mortgage money only one property is sold and the proceeds are found to be sufficient to pay the amount. The result is that one mortgagor has lost his property while the other gets it back without having to pay any thing.

This is a gross injustice. To remedy this injustice Equity invented the doctrine of Contribution which is embodied in Section 82.

2. According to this Section, the different owners are liable to contribute rateably to the debt secured by the mortgage.

3. For determining the rate at which each should contribute the value therefore shall be taken as the value at the date of the mortgage deducting the amount of mortgage, if any, to which it was subject on that date.

1. The claim for contribution can arise only when the whole of the mortgage debt has been satisfied—26 *All. 407 (426, 27) T.B.*

2. The right to contribution is subject to the rule of marshalling. That is where marshalling comes into conflict with contribution, the rule of marshalling shall prevail—This is the meaning of the last para of Section 82.

WHO CAN CLAIM THE RIGHTS OF THE MORTGAGOR

Section 91.

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HOW CAN CLAIM THE RIGHTS OF THE MORTGAGEE

Section 92.

Any person *other than the mortgagor* who pays the mortgagee becomes entitled to the rights of the mortgagee.

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Such persons are—

1. Subsequent mortgagee.
2. Surety.
3. Any person having an interest in the property.
4. A co-mortgagor.
5. Any other person with whose money the mortgage has been redeemed if the mortgagor has by a registered deed agreed to this.

This is called the rule of subrogation.

II. DOES THE LAW OF SALE PRESCRIBE ANY PARTICULAR MODE OF TRANSFER ?

1. The Law of Sale of Immovable Property does prescribe a mode of transfer. The mode of transfer is either *Registration* or *Delivery of Possession*.

2. Whether the appropriate mode of transfer in any particular case is Registration or Delivery of Possession depends upon two considerations—

- (i) Whether the immoveable property is tangible or intangible.
- (ii) Whether the Immoveable Property is worth more than Rs. 100 or is less than Rs. 100.

3. If the property is *Intangible* then the transfer can take place only by registration, no matter what the value of the property is.

4. If the property is *Tangible* property then

- (i) If it is worth more than Rs. 100 then the transfer must be by registration.
- (ii) If it is worth less than Rs. 100 then the transfer may be either by Registration or by delivery of possession.

5. It is clear that in all cases except one, Registration is the only method of effecting a sale. The case where option is given either to register or deliver possession is the case where the property is tangible and is less than Rs. 100 in value.

6. *Registration and Delivery as alternative complimentary modes.*—In this connection the following points may be noted :—

- (i) Where Registration is prescribed as the *only* mode of transfer, delivery of Possession is neither necessary nor enough to complete the transaction of sale.

(ii) Where delivery of possession is prescribed, Registration is not necessary to complete the sale. However, Registration without delivery will be enough to complete the sale.

7. *No other mode of Transfer.*—The provisions as to modes of transfer are exhaustive and a sale cannot be effected in any other way. Title cannot pass by admissin or by recitals in a deed or petitions to officers or entry in the record of rights. Admission that land has been sold, will not operate as an estoppel so as to do, away with the sale for a registered conveyance or delivery. 43 Cal. 790.

8. It is necessary to observe the prescribed modes of transfer :—

(i) Ownership does not pass except by a transfer in the prescribed form.

(ii) An unregistered deed *is not enough*

(a) In cases where Registration is compulsory.

(b) Also in cases where the value is less than Rs. 100 and the transfer is not made by delivery.

9. *Meaning of tangible and intangible*

(i) Immoveable Property is either *tangible* or *intangible*.

(ii) The distinction between tangible and intangible is analogous to the distinction made in English Law between a corporeal hereditament and incorporeal hreditament.

(iii) A corporeal hereditament is an interest in land in possession i.e. a present right to enjoy the possession of land. An incorporeal hereditament is a right over land in the possession of another, which may be a future right to possession, or a right to use for a special purpose the land in the possession of another e. g. a right of way.

(iv) The contract between tangible and intangible is a contract between the estate of one who is possessed of the land, the tangible thing and that of a man who has the mere right, the intangible thing, without possession of anything tangible.

(v) A thing to be tangible must be capable of actual delivery.

Sulaiman C.J. 50 All. 986.

10. *Meaning of Delivery of Possession*

(i) Delivery takes place when the seller places the buyer, or such other person as he directs, in possession of the property.

(ii) Delivery is an act which has the effect of putting the buyer in the possesssion of property.

(iii) What amounts to Possession? The question remains unanswered. Is it actual possession? or Is it symbolical possession?

(iv) One view is that since delivery is prescribed for tangible property only what the Legislature intends is actual possession.

(v) The other view is that it is used in a wider and ordinary sense because in the great majority of cases, land is in the occupation of a tenant or the buyer and physical delivery is therefore impossible.

(vi) The latter view is the generally accepted view, so that there is physical delivery, when the owner of property places the buyer in such relation to the land and its actual occupants as he himself occupies.

11. *Ownership when transferred*

(i) Ownership passes upon delivery or registration.

(ii) With regard to registration, the following points should be noted:—

(a) Once registration is effected, the title relates back to the date of the execution.

(b) A Registered sale-deed will not be defeated by another deed executed later but registered earlier.

(c) The transfer will not be subject to *lis pendens* if the deed was executed before the suit but registered after the suit.

(d) Although it is true that property does not pass i. e. ownership is not transferred until Registration is effected, it is not true to say that property passes as soon as the instrument is registered, for the true test is the intention of the parties.

3. Section 55 (3)— *To deliver title-deeds :—*

1. Title-deeds are accessory to the estate. They pass with the conveyance without being named.

2. This includes *all* deeds relating to the property conveyed in possession as well as in power.

3. The liability to deliver title-deeds also includes the liability to bear the cost of obtaining them.

4. Counterparts leases and Kabulayets are deeds of title accessory to the estate.

5. The duty to deliver title-deeds is not dependent upon the completion of the conveyance. This duty does not arise until the price has been paid.

EXCEPTIONS :

(i) When the seller retains parts of the property comprised in the deeds, he may retain the deeds but is under an obligation for

their safe custody and to produce them or give true copies when required.

(ii) When property is sold in different lots—the purchaser of the lot of the *greatest lot is* entitled to the documents—subject to the same obligations as above.

By an express covenant, it may be given to the purchaser of the *largest lot* i.e. in area.

6. The sub-section does not say what is to happen if the sales are at different times.

BUYER'S LIABILITIES

I. BEFORE CONVEYANCE

1. Section 55 (5) (a)— *To disclose facts relating to the interest of the seller in the property materially increasing value.*

1. Every purchaser is bound to observe good faith in all that he says or does in relation to the contract and must abstain from all deceit, whether by suppression of truth or by suggestion of falsehood.

2. The buyer, however, is under *no* duty to disclose latent advantages as the seller is to disclose latent defects.

3. To this rule, matters of title are an exception. Although the seller's title is ordinarily a matter exclusively within his knowledge, yet there may be cases where the buyer has information which the seller lacks. In such cases he must not make an unfair use of it.

Illustration 1.—Summers vs. Griffiths.

An old woman sold property at an undervalue believing that she could not make out a good title to it while the buyer knew that she could. The sale was set aside.

Illustration 2.—Ellard vs. Llandaff (Lord)

The lessee obtained a renewal of a lease, in consideration of a surrender of the old lease, suppressing the fact (that)* the person on whose life the old lease depended was on his death-bed.

* Inserted—ed.

2. Section 55 (5) (6)—*To pay the Price.*

1. The buyer is not bound to pay the price except on a complete conveyance to himself of the whole interest that he has purchased.

2. If the property is sold free from incumbrances and these are not discharged at the time of conveyance, the buyer is not bound to pay.

3. His remedies for getting rid of incumbrances are—

(i) Under Section 18 (c) of the Specific Relief Act to compel the vendor to discharge them,

(ii) He may discharge it himself and set off the amount against purchase money.

(iii) Recover it by subsequent suit against the vendor.

4. This sub-section imposes a personal liability on the buyer apart from the liability imposed by Section 55 (4) (b) on the property—52 *All. 901*.

BUYER'S LIABILITIES

II. AFTER CONVEYANCE

1. Section 55 (5) (c)—*To bear loss, etc.*

1. Under sub-section 55 (1) (c) the seller is to bear the loss between Contract and Conveyance.

2. After conveyance the buyer is the owner and the property is at his risk. He must therefore bear the loss.

3. This is different from English Law under which the contract for sale transfers an equitable estate and with it liability for loss or destruction.

4. The seller is liable for waste and if the seller has insured the property, the buyer can compel him to apply it for restoration.

2. Section 55 (5) (d)—*To pay outgoings.*

1. Before conveyance this liability falls upon the seller—55 (1) (g) after conveyance it falls on the buyer— Public charges, Rent, Interest and Incumbrances.

2. The liability is statutory and not merely contractual and therefore it is binding on a minor vendor on whose behalf the property is sold—46 *Mad. L. J. 464*.

3. If property is sold free from incumbrances, the seller must discharge it. If sold, subject to incumbrances, then the interest on incumbrances *upto sale* must also be paid by the buyer—26 Bom. S. R. 942.

RIGHTS OF BUYER AND SELLER

RIGHTS OF THE SELLER

I. BEFORE CONVEYANCE

1. Section 55 (4) (a)—*To take rents and profits.*

1. Until conveyance, the seller continues to be the owner. Therefore, he has a right to take rents and profits of the property.

II. AFTER CONVEYANCE

1. Section 55 (4) (b)—*To claim charge on property for price not paid.*

1. If the sale is completed by conveyance and the price or any part of it is unpaid, the seller has under this subsection a charge for the price or for the balance.

2. The charge is a non-possessory charge i. e. it does not give a right to retain possession. As the ownership has passed, the charge gives the seller no right to refuse possession—30 Mad. 524 ; 43 Mad. 712 ; 23 Bom. 525 ; 34 Mad. 543.

3. The charge being on the property, it does not matter if there are several purchasers who had agreed among themselves to pay in a certain proportion.

4. The claim for a charge for unpaid price, not only subsists against the original buyer, but is also available against a transferee *without consideration* or a transferee with notice of non-payment.

5. The charge is not only for the purchase money but also for interest on the purchase money.

6. The right to a charge for interest commences only from the date on which possession has been delivered. The right to include interest for the purposes of a charge on the property *before*

possession has been delivered depends upon the equities and circumstances of the case.

Illustration.—If the purchaser retains part of the purchase money as security for the seller discharging an incumbrance, he is not liable to pay interest.

7. *English and Indian Law.*

(i) Under the English Law the seller has a lien from the date of the Contract.

(ii) Under the Indian Law the charge begins from the date of the conveyance.

(iii) The reasons for this difference :—

(a) Under the English Law, the seller parts with the estate as a result of the contract.

(b) Under the Indian Law, the seller parts with it as a result of conveyance.

(c) The result is the same, for both give the right to proceed against the property. The only difference is that the English lien being equitable, can be moulded by equity to suit circumstances. While the Indian charge being statutory, is rigid and must conform to the terms of the statute.

BUYER'S RIGHTS

I. BEFORE CONVEYANCE

1. Section 55 (6) (b)—*To claim a charge on the property for purchase money paid before conveyance.*

1. The clause as worded makes no sense. It is in two parts. If the clause “unless he has improperly declined to take delivery” which is negatively put was put positively to read “if he has properly declined” then there is no distinction between the two clauses.

2. But there is a distinction between the two parts which is a distinction arising from burden of proof. Under the first part, the purchaser is entitled to certain rights which he can enforce “unless he has improperly declined to take delivery” which means that he is to lose those rights if the seller proves that he, the

purchaser, has improperly declined to accept delivery. Under the second part of the clause, the purchaser gets certain additional rights which he can claim, only if, he can show that “he has properly declined to take delivery” and the burden of showing it will be upon him.

3. Under this clause, a buyer has a right to a charge for three things :—

- (i) for the amount of purchase money properly paid,
- (ii) for the earnest if any,
- (iii) for the costs awarded to him.

4. *Charge for Purchase money paid.*

1. This charge attaches from the moment the buyer pays any part of the purchase money.

2. Charge for purchase money is lost *only* when the seller proves that the buyer has improperly declined to take delivery. The burden of proof is upon the seller.

5. *Charge for earnest and cost.*

(1) There is a possibility for a charge in respect of these two. But this possibility will be realized only if the buyer proves that he has properly declined to take delivery. The burden of proof is upon the buyer.

6. *Earnest and Part Payment of Purchase money.*

(1) What is stated above about charge in respect of earnest applies only if the money paid is paid as earnest.

(2) Money paid by a buyer before conveyance serves two purposes: (1) It goes in part payment of the purchase money for which it is deposited. (2) It is security for the performance of the contract. In the latter case it is earnest. In the former case it is instalment.

(3) This difference is important because whether there would be a charge or personal liability or there would not be, would depend upon whether the payment made is *Instalment* or *Earnest*.

- (i) If it is earnest—There is no charge (except in the case of a buyer who proves that he has properly declined to take delivery). Earnest is

wholly lost and there is not only no charge but there is even no personal liability.

(ii) If it is part payment—There is a charge unless seller shows that the buyer has improperly refused to take delivery. Part payment is never wholly lost. If it fails to create a charge, it remains as a personal liability of the seller.

(4) Whether it is part payment or earnest is matter of contract or intention.

7. The purchaser's charge can be enforced against the seller and all persons claiming under him.

8. (1) The buyer loses his charge :—

(i) By his own subsequent default.

(ii) By his improperly refusing to take delivery.

(2) Earnest money—There are two purposes underlying Earnest:—

(i) It goes in part payment of the purchase money.

(ii) It is a security for the performance of the contract. It becomes part of the purchase money if the contract goes through. It is forfeited, if the contract falls through by reason of the fault or failure of the purchaser.

II. AFTER CONVEYANCE

1. Section 55 (6) (a)—*To claim increment.*

1. This must be so, because, after conveyance he is the owner.

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Sales free Incumbrances

1. As far as possible, a sale ought to be free from incumbrances. To provide sales being made free from incumbrances T. P. Act contains two sections which make it possible. They are Section 56 and Section 57.

SECTION I

THE NATURE OF A MORTGAGE

I. DEFINITION.

1. Section 58 defines what is a mortgage. According to the section, there are three ingredients of a mortgage transaction :—

- (i) The transfer of interest.
- (ii) In specific immoveable property.
- (iii) For the purpose of securing the payment of money advanced by way of a loan.

II. EXPLANATION OF THESE INGREDIENTS.

(i) Immoveable property is not an essential ingredient of mortgage :

(1) Under the English Law, all kinds of property, personal or real, can be made the subject of a mortgage. The Real estate may be corporeal or incorporeal and the personal estate may be in possession or in action. The Estate may be absolute or determinable i.e. for life: it may be legal or equitable. Not only any kind of property may be the subject-matter of a mortgage but any interest in it may be mortgaged, whether such interest is vested, expectant or contingent.

(2) The Transfer of Property speaks only of immoveable property in relation to mortgages. This gives the impression that the law does not recognize the mortgage of a moveable property. This would be a mistake. The Transfer of Property Act merely *defines* and *amends* the law relating to property. It does not consolidate the law. It is, therefore, not a complete or exhaustive code of law relating to mortgage.

(3) Mortgages of moveables are recognized in India.

9 C. W. N. 14 : 8 Bom. S.R. 344.

(4) *Law by which mortgages of moveables are governed.*

The Transfer of Property Act makes no provision: The Indian Contract Act makes no provision. Consequently the principles of English Law will be applicable to such mortgages.

34 Cal. 223 (228) : 27 Bom. S.R. 1449.

(5) Mortgage of moveable property may be effected without writing.

(6) Mortgage of an actionable claim—in writing—though moveable by reason of Section 130 T.P.—*37 Bom. 198. (P. C.)* Deposit of insurance policy.

(ii) Transfer of an Interest:

1. It means the transfer of *some* right belonging to the mortgagor in respect of the property.

2. Ownership consists of a bundle of rights, such as, right to possess, right to enjoy, sell, etc.

3. It is enough if one of these rights is transferred. The right transferred may vary :—

(i) It may be the right to sell.

(ii) It may be the right to enjoy.

(iii) It may be the right to own.

4. The nature of the right transferred is matter of no consequence so long as some right is transferred.

III. THE PURPOSE MUST BE SECURING THE PAYMENT OF MONEY ADVANCED.

1. The transfer of interest is by way of *Security*. The idea of a Security involves two things. There must be a debt or pecuniary liability and secondly there must be some property pledged for the meeting of that liability.

2. The purpose of the transfer must be securing of the debt. A transfer made for the purpose of securing a debt must be distinguished from a transfer, the purpose of which is to discharge a debt.

25 All. 115=30 I. A. 54.

11 Bom. 462.

3. The right transferred must be to enable the man to recover the debt. The transfer must not extinguish the debt. If the effect of the transfer is to extinguish the debt then there is no mortgage.

Illustration.—

11 Bom. 462 *Abdulbhai vs. Kashi*

In 1862, *A* in consideration of Rs. 150 passed to *B* a writing called *Karz Rokha* (or debt-note). It proved (*inter alia*) that *B* should hold and enjoy a certain piece of land belonging to *A* for twenty years, that at the end the land should be restored to *A* free from all claims in respect of principal or interest.

Held, not a mortgage.

25 All. 115.

MORTGAGE COMPARED WITH OTHER FORMS OF ALIENATIONS

MORTGAGE AND SALE

1. Sale is defined in Section 54—It is a transfer of ownership for a price. The price is not a loan and the transfer is not a transfer of an interest but is an absolute transfer of ownership.

2. In a mortgage, the money paid is a loan and the transfer is a transfer of an interest only.

3. In a breach of a contract of sale, the rights are the rights of a vendor and purchaser while the contract is a contract of mortgage the rights are those of a mortgagor and mortgagee.

4. In sale, the property is transferred absolutely. In mortgage, the property serves only as a security for the repayment of a debt.

MORTGAGE AND OTHER KINDS OF SECURITIES

1. There are four kinds of securities (1) mortgage, (2) pledge, (3) lien and (4) hypothecation or charge.

It is important to note the distinction between mortgage and other kinds of securities.

I. MORTGAGE AND PLEDGE

1. The bailment of good as security for payment of debt or performance of a promise is called a 'pledge' —*Section 172 Indian Contract Act.*

2. In a mortgage, general ownership in the property passes to the mortgagee and the mortgagor has only a right to redeem. In a pledge, only 'a qualified or special property' passes to the pledgee, the general ownership remains in the pledgor.

3. Delivery of possession of the property pledged to the pledgee is essential. But delivery of possession is not essential to a mortgage.

4. The property which is once pledged cannot be pledged a second time, because, no possession can be granted to the second pledgee, while property which is mortgaged once to one person can be mortgaged again to others subsequently.

5. Pledge can only be of *personal* property. Mortgage can be of both personal as well as real property.

Mortgage and Liens

1. A lien is a kind of security which is created by the operation of the law. Lien is a right created by law and not by contract to retain possession of the property belonging to another until certain demands are satisfied.

2. The law on the subject of lien is scattered in many statutes of the Indian Legislature. E.g. Contract Act Sections 170-General-171-Bankers Solicitors, etc., 221-Agent's lien. Sale of goods 47, unpaid Vendor's lien. T. P. 554 : 55 (6) seller's and buyer's lien.

3. Lien does not create general ownership as a mortgage does, not even qualified property as in a pledge—only right to retain possession.

4. Both mortgagee and pledgee can sell: but lien holder cannot.

Mortgage and a charge

1. A charge is defined in Section 100. There are two elements in a charge :

(1) There is a pecuniary liability.

(2) Immoveable property is made security for the discharge of that pecuniary liability.

2. In a mortgage there are three elements :—

(i) There is pecuniary liability.

(ii) Immoveable property is made security for the discharge of that pecuniary liability.

(iii) There is a transfer of an interest in that property in favour of the creditor.

3. In a charge there is no transfer of interest. There is only burden.

35 Cal. 837 (844) ; 13 Lah. 660 T. B.

35 Cal. 985.

4. The difference between mortgage and charge is material.

1. A mortgagee can follow the mortgaged property in the hands of any transferee from the mortgagor. While a charge can be enforced only against transferee with notice—

33 Cal. 985.

§ DIFFERENT CLASSES OF MORTGAGE

1. The section enumerates six classes of mortgage :—

- (i) Simple mortgage.
- (ii) Mortgage by conditional sale.
- (iii) Usufructuary mortgage.
- (iv) English mortgage.
- (v) Equitable mortgage.
- (vi) Anomalous mortgage.

2. Characteristics of the different classes of mortgage.

(i) Simple Mortgage

1. A Simple mortgage involves two things :

- (i) A personal obligation, express or implied, to pay.
- (ii) The transfer of a right to cause the property to be sold.

Personal obligation

1. When a person accepts a loan, there is involved a personal liability to pay, unless there is a covenant to pay out of a particular fund.

*10 Cal. 740 ; 22 Cal. 434 ; 16 Cal. 540 ; 13 Mad. 192 ;
15 Mad. 304 ; 27 Mad. 526 : 86.*

1. A loan may be a secured loan or unsecured loan.

2. Every unsecured loan involves a personal obligation to pay.

44 I. A. 87.

3. The only case of a loan in which a personal obligation to pay is negatived, is where there is a covenant to pay out of a particular fund.

Cases. *10 Cal. 740 ; 22 Cal. 434 ; 16 Cal. 540 ; 13 Mad. 192
15 Mad. 304 ; 27 Mad. 526 : 86.*

4. Whether a loan, for which there is security, involves a personal obligation to pay is a question of construction. Two propositions may be stated as those of law :—

(i) Personal liability is not displaced by the mere fact that security is given for the repayment of the loan with interest.

(ii) The nature and terms of security may negative any personal liability on the part of the borrower.

5. In a simple mortgage, there is always security given for the loan. The loan is a secured loan. But nature and terms of the security must not negative the personal liability of the mortgagor. A personal covenant to pay is implied in and is an essential part of every simple mortgage.

Cases. 22 All. 453 (461); 29 Mad. 491 ; 30 All. 388.

6. In the absence of such a covenant, the security would be a mere charge.

Cases. 42 All. 158 (164)=46 I. A. 228 ; 52 All. 901.

II. Right to cause the property to be sold.

1. This is a right in rem although it can only be enforced by the intervention of the Court, as the words, 'cause to be sold' indicate.

2. The transfer of this right may be express or it may be implied.

(ii) Mortgage by Conditional Sale

1. Characteristics.

(1) The transfer is by way of sale. It is a transfer of ownership.

(2) The difference between sale and mortgage by conditional sale is that, in sale the transfer is absolute while in mortgage by conditional sale, it is not absolute but is subject to a condition.

(3) The condition may take three forms :—

(i) That on default of payment of mortgage money *on a certain day*, the sale shall become absolute.

(ii) Then on such payment being made, the sale shall become void.

(iii) That on such payment being made, the buyer shall transfer such property to the seller.