

In the latter case, if they *stand alone*, merely give the obligee the ordinary right of a creditor to levy execution on the property of his debtor and do not create any pledge.

Supposing the case to fall under the first head, is such hypothecation good to create a mortgage.

In India, the validity of such securities has been questioned on the ground that a general hypothecation is too indefinite to be acted upon.

(1) It is said that such hypothecations sin against the canon that a contract form must be definite and reliance is placed upon Section 29 of the Contract Act and Section 93 of the Evidence Act.

(2) Vagueness is a misleading term. It may mean (1) either that the language is so indistinct that it cannot be understood or (2) that the property to which it relates is not specified in the contract.

(3) Indefiniteness is, however, frequently confounded with what has been called wideness.

The subject-matter of a contract may be *wide and yet definite*. On the other hand it may be narrow and yet indefinite.

If a man says "I mortgage all my landed property", it is wide but definite.

If a man, who has several houses, says 'I mortgage one of my houses', the description is not wide but is still indefinite.

(4) The word 'specific' in the T. P. Act is used to distinguish it from general and unless the property is specified in the deed, there can be no mortgage in Law.

(5) The property must be specified although the Law does not say that it must be specified in any particular way.

SECTION II

**THE RIGHTS AND LIABILITIES OF
THE MORTGAGE**

INTRODUCTION

1. The property which is the subject-matter of the mortgage is subject to the rights of the mortgagor and the mortgagee.

2. There are two questions to be considered—

- (i) What are the rights of the mortgagor and mortgagee ?
- (ii) What is the *nature* of those rights ?

§ What is the nature of the rights

1. The English Law divides :—the interests of the mortgagor is spoken of as an equitable estate, while the interests of the mortgagee is spoken of as a legal estate. The Indian Law does not recognize this distinction between legal and equitable estate.

(1872) I.A. Supp. 47 (71).

30 I.A. 238.

2. Even under the Trust Act this distinction is not recognized.

58 I. A. 279.

3. Both have legal rights—there is nothing equitable as opposed to legal.

II. Under the English Law mortgagee is owner while the mortgagor has a bare right of reconveyance.

1. Under the Indian Law it is just the reverse. The mortgagor is the owner and the mortgagee has only a right in re *abena*.

Rights of the Mortgagor

1. The Rights of the mortgagor fall into three divisions—

- I. The Right to redeem.
- II. The Right to manage the property.
- III. The Right to obtain re-transfer.

§ Right to redeem

Section 60

1. The right to redeem entitles the mortgagor to require the mortgagee to do three things—

- (i) To deliver to the mortgagor the mortgage-deed.
- (ii) To deliver possession if the mortgagee is in possession.
- (iii) To have executed and registered an acknowledgement in writing that the right (is redeemed)*

2. This right to redeem he can exercise on the following conditions:—

- (i) On payment or tender of the mortgage money.
- (ii) At any time *after* the principal money has become *due*.
- (iii) If the right to redeem is not extinguished by act of parties or by decree of a Court
- (iv) If the mortgagor is prepared to redeem the whole.

I. RIGHT TO REDEEM

1. The section is not prefaced by any such words as in the absence of a contract to the contrary.

2. The right of redemption is therefore a statutory right which cannot be fettered by any condition which impedes or prevents redemption.

49 I.A. 60.

3. Any such condition is void as a clog on redemption.

II. CLOG ON REDEMPTION—Any provision inserted in the mortgage transaction to prevent redemption by a mortgagor is void :

(1) The principle underlying the rule against clog is that, mortgage is a conveyance as a security for the payment of a debt. Nothing ought to prevent a man from getting back his *security*.

(2) There is a difference between *sale* and *security*. If sale, there is no right to get back property. If security, there is a right to get back property.

(3) This right cannot be taken away by a contract. If it does, it will be treated as a clog and will not be enforced.

* inserted—ed.

III. INSTANCES OF CLOG ON REDEMPTION

I. The following clauses are clogs on Redemption :—

- (1) Redeem during the life of the mortgagor.
- (2) Redeem with his own money—not from any other person.
- (3) Redeem by payment on due debt or the mortgage will become sale.
- (4) Redeem on condition that mortgagor shall grant permanent lease to the mortgagee.

II. The following clauses are not deemed to be clogs on Redemption:—

- (1) Not to redeem unless prior mortgages are redeemed.
- (2) Not to redeem an usufructuary mortgage until after the expiry of 15 years.
- (3) Postponement of the right to take possession after redemption for a reasonable and necessary period.

III. No hard and fast rule as to what is a clog and what is not:—

- (1) The mere fact that the terms of a mortgage are hard, does not make the clause a clog.
- (2) The test is whether it hampers the mortgagor in the exercise of his right to redeem in such a way as to place the right to redeem beyond his reach.
- (3) If the clause is a clog, then it will not be enforced, even though it may be contained in a consent decree. The right to redeem cannot be said to have been waived by consent.

IV. The doctrine of clog on redemption relates only to the dealings which take place between the parties to the mortgage at *the time* when the contract of mortgage has been entered into. It does not apply to a contract made subsequently with each other.

1. That means that parties are not free at the time when the contract of mortgage is made to take away the right of the mortgagor to redeem.

2. But they are at liberty subsequently to alter the terms of the contract of mortgage and any clause which fetters the right to redeem will not be treated as a clog.

V. *Due*.

1. Must be distinguished from payable. Money may be payable but not due.

2. Due = demandable.

3. If it is not paid on due date, the right to redemption is not lost. Mortgage remains a mortgage—only it can be exercised.

VI. Payment.

(i) Payment must be to *all* if there are more than one mortgagee.

(ii) Mode of payment—legal tender or any other medium acceptable to the creditor,

(iii) Place of payment—(Page left blank in Ms—ed.)

Redemption and Improvements

Section 63 A.

1. The mortgagor on redemption is entitled to improvements in the absence of a contract to the contrary.

2. The mortgagor shall be liable to pay the cost of improvements if the improvement was—

(i) necessary to preserve the property from destination.

(ii) necessary to prevent security from being insufficient.

(iii) made in compliance with lawful order of a public authority.

3. This also is subject to a contract to the contrary.

4. Section 63 A lays down the general rule that ordinarily a mortgagee is not at liberty to effect improvements and charge the mortgagor therewith. The object of the law is to prevent a mortgagee from laying out large sums of money and thereby increasing his debt to such an extent as to cripple the power of redemption. The mortgagee cannot be allowed to make redemption impossible by making improvements—This is called improving a mortgagor out of his estate.

5. The mere *consent* of the mortgagor to improvements is not enough to make him liable, unless it amounts to a promise to re-imburse.

Right of Redemption and the benefit of the renewal of a lease

Section 64

The renewal of a lease is a kind of an accession to the original interest of the mortgagor.

1. If the mortgagee obtains a renewal of the lease, the mortgagor is entitled to the benefit of the renewed lease on redemption.

2. This is subject to a contract to the contrary.

Right of the Mortgagor to manage

Section 66

1. As long as the mortgagor remains in possession, he is at liberty to exercise the ordinary rights of property and to receive the rents and profits without accounting for them.

2. Question is whether the mortgagor is liable for waste ?

3. This is a Section which deals with the doctrine of waste. Waste is either voluntary or permissive. *Voluntary waste* implies the doing of some act which tends to the destruction of the premises, as by pulling down houses, or removing fixtures; or to the changing of their nature as the conversion of pasture land into arable or pulling down buildings.

Permissive Waste implies an omission whereby damage result to the premises, where for instance houses are suffered to fall into decay.

To constitute voluntary waste by destruction of the premises, the destruction must be wilful or negligent; it is not waste if the premises are destroyed in the course of reasonable user and any user is reasonable if it is for the purposes for which it is intended to be used, and if the mode and extent of the user is apparently proper, having regard to the nature of the property and what the tenant knows of it.

4. According to Section 66 the mortgagor is not liable for permissive waste. He is liable for voluntary waste which renders the security insufficient.

5. A security is insufficient if the value is less than $\frac{1}{3}$ of the money due and less than $\frac{1}{2}$ if the security is buildings.

For Section 65 A.—Please see page No. 523

Liabilities of the mortgagor

Section 65.

1. The liabilities consists of certain statutory covenants.

2. They are warranties for the breach of which the mortgagor is liable.

I. GENERALLY—

(a) *Covenant for title.*

(i) There is a title in the mortgagor in the interest transferred.

(ii) That he had the right to transfer.

Substituted Security

Where the owner of an undivided share in a joint and undivided estate mortgages his undivided share, the person who takes the security i.e. the mortgagee takes it subject to the right of these co-sharers to enforce a partition and thereby convert what is an undivided share of the whole into a defined portion held in severally—*11. A. 106*. After partition the security will be the separate share allotted in place of the undivided share. Proceed against the share allotted and not against share originally mortgaged.

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(a) *Covenant to deferred title.*

(b) *Covenant to pay public dues—if the mortgagee is not in possession.*

(c) *Covenant to pay prior incumbrance (debt) on its being due.*

II. WHEN THE MORTGAGED PROPERTY IS LEASEHOLD.

(i) Covenant that all conditions have been performed down to the commencement of the mortgage.

(ii) Covenant to pay rent reserved by the lease if the mortgagee is not in possession.

(iii) Covenant to perform all the conditions if the lease is renewed.

These covenants are not personal covenants. They run with the mortgaged property and can be availed of by a transferee from the mortgagee.

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Rights of the Mortgagee

1. They fall into two divisions—

- (1) Right to realize the mortgage money.
- (2) Right to have the security maintained in tact during the continuance of the mortgage.

I. RIGHT TO REALIZE THE MORTGAGE MONEY.

1. Under this fall the following rights—

- (1) Right to foreclose 67.
- (2) Right to sell 67/69.
- (3) Right to sue for mortgage money 68.
- (4) Right to claim money on sale and acquisition 73.

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

NOTE.—

1. Mortgage money does not mean the whole of the mortgage money. If a mortgage is payable by instalments, it is open to the mortgagee to bring a suit for foreclosure for an instalment of the principal and interest. *13 M.L.I.2.*

2. In the absence of an express stipulation, a mortgagee is not bound to receive payment by instalments—*24 All. 461.*

3. A suit for interest is maintainable even before the principal money became due unless there is a covenant prohibiting him from doing so.

4. The three rights are not available to every mortgagee.

I. THE RIGHT TO SUE FOR MONEY.

Section 68.

This is available only where the mortgagor binds himself to repay the same.

Question.—When can it be said that a mortgagor *personally* binds himself to pay ?

There are two views on the matter.

(a) A personal covenant is presumed in all mortgages of whatever form. According to this view, the only difference that can arise is that the Court might in the absence of an express covenant, demand more clearly implied covenants than it might require in other case—*13 Lah. 259.*

(b) The other view is that a covenant can arise only where there is an express covenant the words are *binds* himself. This clause would be unnecessary if personal covenant was implied in all cases.

By definition

Section 58.

1. The mortgagor in a simple mortgage *binds* himself to repay the money.

2. In a mortgage by conditional sale, he says that “if he pays he will recover his property”.

3. In a usufructuary mortgage he does not even make this qualified covenant. It is therefore clear that a mortgagor can sue for a money decree in the case of a simple mortgage but not in the case of other kinds of mortgages unless there is an express covenant to that effect.

Exceptions.

The mortgagor can sue for a money decree from the mortgagee. But he cannot sue for a money decree from a transferee from the mortgagor or from his legal representative.—

Other cases in which he can sue for a money decree.

Generally a mortgagee can sue for a money decree when there is a personal covenant by the mortgagor to pay.

2. There are cases where a mortgagee can sue although there is no personal covenant to pay—

Section 68.

(i) Where by accidental causes, not due to the act of either party such as fire, flood or *vis major* the property is destroyed, wholly or partly, or is rendered insufficient and the mortgagor on being given an opportunity fails to give further security.

(ii) Where the mortgagee is deprived of the whole or part of his security by the wrongful conduct of the mortgagor.

(iii) Where the mortgagee being entitled to possession, the mortgagor fails to deliver possession or fails to secure the mortgagee in his possession.

Right to sell

1. This right belongs only to—

(i) Simple mortgagee.

- (ii) English mortgagee.
- (iii) Equitable mortgagee.

2. They cannot sue to obtain possession. They can only sue for sale. If the Court erroneously gives him possession, that possession does not amount to foreclosure and the mortgagor can subsequently redeem the mortgage.

19 Mad. 249 (252-53) P. C.

CONDITIONS FOR THE EXERCISE OF THE RIGHT OF SALE AND
FORECLOSURE.

1. After the mortgage-money has become due and before decree for redemption is made.

2. Suit must be for the whole of the mortgage-money. There cannot be a suit for the realization of a part of the mortgage-money by sale or foreclosure of a part of the mortgage property.

Exception.—If there is a severance of the interests of the mortgagee with the consent of the mortgagor, a suit for a part may be brought by the mortgagee.

Section 67 A.

3. A mortgagee who holds *many* mortgages against the same mortgagor must bring *one* suit on those mortgages in respect of which—

- (i) A right to sue has accrued to him and
- (ii) In respect of which he has a right to obtain the same kind of decree.

Section 65 A.

4. If the mortgagor could not only manage the property but, if he is *lawfully* in possession of the mortgaged property, he shall have the power to make leases thereof which would be binding upon the mortgagee.

5. After the mortgage this power of the mortgagor to deal with the property is limited. He has not anything like general authority.

6. The power to lease is circumscribed by certain condition.

- (i) He may lease it in accordance with local law, custom or usage.

(ii) Every lease shall reserve lest rent can reasonably be obtained—rent shall not be paid in advance.

(iii) The lease must not contain a covenant for renewal.

(iv) Lease shall take effect from a date not later than 6 months from the date on which it was made.

(v) In the case of a lease of a building, the duration of the lease shall not exceed three years.

7. The general power of the lease is subject to a contract to the contrary. The other provisions are subject to variations.

Right to foreclose. This right belongs to—

(1) Mortgagee by conditional sale.

(2) Mortgagee by anomalous mortgage by the terms of which he is entitled to foreclose.

Mortgagees who can neither sue for sale nor for foreclosure.

(1) Usufructuary mortgagee.

(2) Mortgagee of a Railway and canal or other work in the maintenance of which the public are interested.

Case of a mortgagor who may become a trustee or executor of the mortgagee or the mortgagee may become a trustee or executor of the mortgagor.

Can such a mortgagor or mortgagee foreclose sale ?

Sub-clause (b) of Section 67 provides for the case of a mortgagor who has become a trustee for the mortgagee. According to this clause a mortgagor trustee, who may sue for sale, is not allowed to foreclose.

In the other case the foreclosure is equally prohibited according to English practice on the principle that it is the duty of the trustee to consult the interests of the mortgagor and that it is for the mortgagor's interests that a sale and not foreclosure, should take place.

EXERCISE OF THE POWER OF SALE WITHOUT THE INTERVENTION OF THE COURT

1. As a rule, a mortgagee can bring the property to sale only through the Court.

2. Section 69 provides exceptions to this rule.

(i) Where the mortgage is an English mortgage and neither the mortgagor or the mortgagee is a Hindu, Mohamedan or Buddhist or a member of a community notified in Gazette,

(ii) Where a power of sale is expressly given by the deed and the mortgagee is the S. of S.

(iii) Where a power of sale is expressly given by the deed and the property or any part of it was on the day of the execution of the deed situated in the towns of Bombay, etc.

Section 69 A.

3. The mortgagee who has the *power* (as distinguished from the right) to sell without the intervention of the Court is also entitled to appoint a receiver by writing signed by him or on his behalf.

4. The exercise of this power of sale or power of appointing a receiver is to notice to the mortgagor.

5. The notice must be in writing requiring payment of the principal money and default for three months.

Section 73.

I Mortgage's Right to proceeds of sale

1. When property is sold for failure to pay arrears of revenue or other public charges and such failure is not due to default by the mortgagee, the mortgagee is entitled to claim the balance of the sale proceeds.

2. Similarly if he mortgage property is compulsorily acquired, the mortgagee shall be entitled to claim payment of the mortgage money out of the amount due to the mortgagor as compensation.

3. His claim shall prevail against all except those of the prior encumbrances.

4. The claim may be enforced although mortgage money has not become due.

II. Rights of the mortgagee to the maintenance of the Security in tact during the continuance of the mortgage.

I. Right to accession—Section 70.

II. Right to renewed lease—Section 71.

III. Right to preserve property—Section 72.

Section 70

1. § Right to accession.

1. The mortgagee is entitled to the accession for the purpose of his security *if* the accession is made after the date of the mortgage. *29 Cal. 803*. Where two mortgages were executed on a land on which there was a house and thereafter two new houses were built by the mortgagor on the land held that they were accessions on which a mortgagor could rely for security.

If the house was built *before* mortgage, he could not.

He could not if it was built after decree although the section does not say so.

This is subject to a contract to the contrary.

Section 71.

2. § Right to the benefit of a renewed lease.

He will be entitled to the benefit of the new lease for the purposes of his security.

This is subject to a contract to the contrary.

Section 72.

3. § Right to preserve the property.

1. A mortgagee may spend such money as is necessary—

(i) for the preservation of the mortgage property from destruction, forfeiture or sale.

(ii) for supporting the mortgagor's title to the property.

(iii) for making his own title thereto good against the mortgagor.

(iv) when the mortgaged property is a renewable leasehold, for the renewal of the lease.

(v) he may insure if the property is insurable and add the cost to the principal money.

Right of mortgage to Priority

I. PRIORITY BY TIME.

1. The general rule regarding priority in the matter of transfers of interests in immovable property is laid down in Section 48 of the T. P. Act.

2. The same rule applies to questions in regard to mortgages, so that priority of mortgages in India depends upon the respective dates of their creation, the earlier in date having precedence over the latter—*56 Cal. 868*.

3. Section 78 is an exception to this rule. It lays down that the Court would postpone the prior mortgagee to the subsequent mortgagee where the prior mortgagee has, through fraud, misrepresentation or gross neglect, induced the subsequent mortgagee to advance money on the security of the mortgaged property.

Misrepresentation:

1. Is defined in Section 18 of the Indian Contract Act.

2. It does not necessarily mean fraudulent misrepresentation.

Fraud

Gross Negligence.

There is a difference between English and Indian Law. According to English Law gross negligence means negligence *amounting to fraud*.

According to Indian Law gross negligence is different from fraud.

II. PRIORITY BY PAYMENT.

Q.—Can a mortgagee acquire priority over an intermediate mortgagee by buying the rights of an earlier mortgagee?

Section 93

1. A mortgagee cannot acquire priority over an intermediate mortgagee by paying off a prior mortgagee whether he pays with or without knowledge of the intermediate mortgagee.

2. A mortgagee making a subsequent advance to the mortgagor, shall not acquire priority in respect of such subsequent advance over an intermediate mortgagee, whether he makes the advance with or without the knowledge of the intermediate mortgagee.

Section 79

This Section forms an exception to the second rule laid down in Section 93.

Under Section 79. A subsequent mortgagee having notice of the prior mortgage is postponed in respect of any subsequent advance if the prior mortgage is made to secure future advances and the subsequent advance does not exceed the maximum.

Right of Mortgagee to Marshalling

Section 81.

Section 82.

Question of Marshalling

1. This arises when two or more properties are mortgaged to two *different* mortgagees in such a way that both properties are subject to the mortgage rights of one mortgagee while only one is subject to the mortgage rights of the other.

Illus.

A is the owner of two estates—Whiteacre and Blackacre. A mortgages Whiteacre and Blackacre to *B* and thereafter mortgages Blackacre to *C*.

The position that arises is this. *B* has a mortgage over Whiteacre as well as Blackacre. *C* has a mortgage over Blackacre only. From the standpoint of realizing the mortgage money *B* has a right to sell both Whiteacre as well as Blackacre. While *C* has a right to sell only Blackacre.

If *B* were allowed to exercise his rights as a mortgagee it would result in prejudice to the rights of *C*.

In order to protect *C* equity invented the doctrine of marshalling—under this equity compelled *B* to proceed first against that property which is not the subject-matter of security for the debt of another mortgagee. This is embodied in Section 81.

Note.—1. It is unnecessary for the mortgagee to have had no notice of the former mortgage in order that he may be able to claim the benefit of marshalling.

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