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# Rights and Liabilities of Mortgagor

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## ABSTRACT

*A mortgage is a famous and old concept. It is focused on the principle of equity and good conscience. Sec. 58 of the Transfer of Property Act (TOPA) 1882 explains a mortgage. A mortgage is particularly the transfer of an interest in some immovable property by a person termed called mortgagor to another person called the mortgagee. Transfer of property act recognizes seven rights and five liabilities of the mortgagor. This research paper attempts to study the rights and liabilities of the mortgagor under the Transfer of Property Act along with some important judgments delivered by the Supreme Court on such rights of the mortgagor. Lastly, the aim of the research is to compare the rights and liabilities of the mortgagor in the present modern world and to realize the need for an amendment in mortgage law under the Transfer of Property Act for stricter implementation of laws.*

**Keywords:** *Mortgagor, Mortgage, Rights, Property, Mortgagee, Redemption.*

## I. MORTGAGE

The transfer of an interest in some immovable property is called a mortgage.<sup>2</sup> Not all the interest has to be transferred, but only some of the interest which is enjoyed by mortgagor in the property is transferred for the objective of security for repayment of the loan.<sup>3</sup>

### (A) Important terms under mortgage

- **Mortgagor:** He is the one who transfers the interest in specific immovable property is called as a mortgagor.
- **Mortgagee:** To whom that interest in specific immovable property is transferred, is known as mortgagee.
- **Mortgage-money:** It is the principal amount that is given as a loan and the interest amount which the mortgagor will pay to the mortgagee along with the principal amount.

*The principal amount + interest = mortgage-money.*

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<sup>2</sup> Dr. R.K. Sinha, The Transfer Of Property Act, 307, (21<sup>st</sup> ed. 2021).

<sup>3</sup> Transfer of Property Act, § 58, No. 4, Imperial Legislative Council, 1882, (India).

- Mortgage-deed: If at all there is an instrument by which transfer of an interest in a specific immovable property is affected, then it is known as mortgage-deed.

### **(B) Forms of Mortgage**

Transfer of Property Act recognizes six kinds of mortgage.<sup>4</sup>

1. Simple Mortgage [section-58(b)]
2. Mortgage by conditional sale [section-58(c)]
3. Usufructuary Mortgage [section-58(d)]
4. English Mortgage [section-58(e)]
5. Mortgage by deposit of title deeds [section-58(f)]
6. Anomalous Mortgage [section-58(g)]

## **II. RIGHTS OF MORTGAGOR**

As we have discussed, what does mortgage mean, and who is a mortgagor. To understand it in simple terms, a mortgage is the transfer of an interest in some immovable property, and the person who transfers such interest is called a mortgagor, and if there is any instrument by which such transfer is affected, then it is called mortgage-deed. However, the Transfer of Property Act does not leave the mortgagor uncovered, that means every mortgage-deed leaves a right to the mortgagor and a corresponding liability for the mortgagee and vice versa. The rights of mortgagor are as follows:

1. Right to redemption
2. Obligation to transfer to the third party rather than re-transferring it to the mortgagor
3. Right to inspection and production of documents.
4. Right to redeem separately or simultaneously.
5. Right to accession
6. Right to Renewed Lease
7. Right to grant a lease

### **(A) Three important provisions under section 60.<sup>5</sup>**

- Right of redemption

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<sup>4</sup> Transfer of Property Act, § 58, No. 4, Imperial Legislative Council, 1882, (India).

<sup>5</sup> Transfer of Property Act, § 60, No. 4, Imperial Legislative Council, 1882, (India).

- Once mortgage, always a mortgage
- Clog on Redemption

### 1. Right to redemption

The word redemption means to get back the mortgaged property by paying mortgage Debt. It is the right to recover something by making certain payments. So, in terms of the mortgage, it is the right of the mortgagor to recover or get back the property after he made the payment of the loan.<sup>6</sup> The right of redemption pre-supposes the existence of a mortgage which is at the time of redemption is security for the money that is due on the mortgagee.<sup>7</sup> This right can be exercised by the mortgagor as long as the mortgage is alive.<sup>8</sup>

#### (a) Modes of Exercise of Right of Redemption

- **Legal validity of mortgage-** The mortgage must be legally valid.
- **Due to principle-** The mortgagor can redeem the mortgage anytime after the mortgage money is paid, and he cannot be avoided from it except the decree of the court.
- **Payment of dues money –** The payment of dues money can be made to the mortgagee directly or to his agent. However, such payment must be done at the proper time and place without condition.
- **By filing a suit for redemption-** The mortgagor can make the payment to the mortgagee directly or by depositing the money in court. However, the third option is to file a suit in court for the redemption. The suit has to be filed by the mortgagor after the principal money has become due.

The mortgagor has the right to ask the mortgagee to (i) deliver to him the mortgage deed and other documents relating to the mortgaged property; (ii) deliver possession to the mortgagor if the mortgagee is in possession; and (iii) re-transfer the mortgaged property in compliance with the mortgagor's preferences after paying or tendering the mortgage money to the mortgagee.<sup>9</sup>

The mortgagor's right of redemption co-exists with the mortgagee's right of sale or foreclosure in default of repayment of loan on the due date.<sup>10</sup> It means if the mortgagor has the right to get back his property on payment of the loan, then the mortgagee has the right as well to take back his money by foreclosure of the mortgage. A reasonable balance is maintained between these

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<sup>6</sup> Dr. R.K. Sinha, *The Transfer Of Property Act*, 316, (21<sup>st</sup> ed. 2021).

<sup>7</sup> *Muhammad Mahmud Ali v. Kalyan Das*, ILR 18 All 189, 192.

<sup>8</sup> *Thota China Subba Rao v Thota China Subha Rao vs Mattapalli Raju*, (1949) FCR 484.

<sup>9</sup> *Prithi Nath Singh v. Suraj Ahir*, (1963) 3 SCR 302.

<sup>10</sup> *Ram Kishun Prasad v Manohar Lal Gupta*, AIR 2008 NOC 845.

two rights.

## **2. Once a mortgage always a mortgage.**

This maxim means that a transaction that at one time is mortgage would always be a mortgage. A revision or change can be done, but it should not affect the right of redemption. The purpose of this doctrine is to protect the interest of the mortgagor. When the mortgagor is unable to repay the money on the due date, then if the mortgagee, by taking advantage of his position, makes an agreement that the mortgagor cannot exercise his right of redemption after the expiry of the due date, then it would be void. The doctrine is based on the principle of equity.

The well-known rule that the agreement of the parties overrides the law does not apply to a mortgage. That means even if there is an agreement between the mortgagor and mortgagee to which the mortgagor himself has agreed that the mortgagor cannot exercise his right of redemption, which equity provided him would not be valid.

The mortgage and right of redemption are coextensive whether the right of redemption is described or not. The right to seek redemption does not arise on the date of the mortgage. Instead, it arises when the payment is made by the mortgagor to the mortgagee in the court.<sup>11</sup>

## **3. Clog on Redemption**

It is a condition or stipulation which prevents the mortgagor from redeeming his right to redeem the mortgage-property on payment of mortgage-money. Even the mortgagor cannot stipulate against his own right of redemption. In India, a clog on mortgagor's right of redemption is void under section 60.<sup>12</sup>

### **i. Obligation to transfer to the third party rather than re-transferring it to the mortgagor.<sup>13</sup>**

This section was not initially in the act. It was added after the amending act of 1929.<sup>14</sup> The object of this section is to enable the mortgagor to pay off the debt of the mortgagee by further taking a loan from some other person on the same property.<sup>15</sup> Thus, the mortgage as such is not extinguished. It remains alive, and just the mortgage-debt is assigned by the mortgagee to such another person. The other person has to be nominated by the mortgagor. However, the mortgagor can do this only when the debt has become payable and the mortgage-money is paid

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<sup>11</sup> Ram Kishan v Sheo Ram, AIR 2009 P&H 77 (FB).

<sup>12</sup> Transfer of Property Act, § 60, No. 4, Imperial Legislative Council, 1882, (India)..

<sup>13</sup> Transfer of Property Act, § 60A, No. 4, Imperial Legislative Council, 1882, (India).

<sup>14</sup> Transfer Of Property (amendment) Act, 1929, No. 20, 1929 (India).

<sup>15</sup> Dr. R.K. Sinha, The Transfer Of Property Act, 339, (21<sup>st</sup> ed. 2021).

by the mortgagor as required under section 60<sup>16</sup> of this act.

**ii. Right to inspection and production of documents.<sup>17</sup>**

This section was also inserted by the amending act of 1929<sup>18</sup>. According to it, in a mortgage, the mortgagor has to hand over the title-deeds and other documents of the mortgaged property to the mortgagee. The documents remain in the custody of the mortgagee as long as the mortgage subsists. The mortgagor has the right to ask the mortgagee to produce those documents to the mortgagor for inspection within a reasonable time and at his (mortgagor's) own cost.

**iii. Right to redeem separately or simultaneously.<sup>19</sup>**

A mortgagor who has executed two or more separate mortgage in favour of the same mortgagee then mortgagor has the right to redeem either any one of them or all of the mortgages together. The right is subject to any contract to the contrary.

The section gives the mortgagor a right to redeem the mortgages separately or simultaneously. This right is also applicable where there are two mortgages on the same property, and mortgagees are different persons.<sup>20</sup>

**iv. Right to accession<sup>21</sup>**

It means during the mortgage when the mortgagee has possession of the mortgaged property and if during that duration there is an increase/accession in the property, then in the absence of any contract to the contrary, the mortgagor is entitled to get that accession. Accession means any kind of addition in the property which increases its value so that the property becomes more advantageous.

**(a) Types of accession**

**1. Natural accession:** These are those accessions that are not made by parties to the mortgage, and they arise by the course of nature. Natural accessions that occur during the term of the mortgage may be redeemed by the mortgagor together with the mortgaged property. When the mortgagor redeems the mortgage, the mortgagee has no right to keep or claim those accessions.

**2. Acquired accessions:** These types of accessions are those accessories or additions to the

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<sup>16</sup> Transfer of Property Act, § 60, No. 4, Imperial Legislative Council, 1882, (India).

<sup>17</sup> Transfer of Property Act, § 60B, No. 4, Imperial Legislative Council, 1882, (India).

<sup>18</sup> Transfer Of Property (amendment) Act, 1929, No. 20, 1929 (India).

<sup>19</sup> Transfer of Property Act, § 61, No. 4, Imperial Legislative Council, 1882, (India).

<sup>20</sup> Dr. R.K. Sinha, The Transfer Of Property Act, 341, (21<sup>st</sup> ed. 2021).

<sup>21</sup> Transfer of Property Act, § 63, No. 4, Imperial Legislative Council, 1882, (India).

property that are made by the mortgagee during the period of a mortgage. It is further classified into:

- (a) **Separable acquired accessions:** Where the acquired accession is separable from the property and upon redemption of the mortgage by the mortgagor, the mortgagee would remove those accessions. If the mortgagor desires to take those accessions from the mortgagee, then he must pay the cost of accessions to the mortgagee.
- (b) **Inseparable acquired accessions:** Where the acquired accession is permanent and cannot be separated from the mortgaged property, then the mortgagor shall take these acquisitions together with the mortgaged property. However, the mortgagor is liable to pay the mortgagee the expenses incurred by him in making the acquisition.

v. **Right to Renewed Lease**<sup>22</sup>

When a mortgaged property is a lease hold property, and during the duration of the mortgage, the mortgagee obtains the lease renewal, then upon the redemption, the mortgagor is entitled to get the benefits of the new lease. This is subjected to any contract contrary.

vi. **Right to grant a lease**<sup>23</sup>

This section was added by the amending act of 1929. Before this amendment, there was an uncertainty regarding the mortgagor's right to transfer the mortgaged property by way of lease. However, now, a mortgagor has the right to lease out the mortgaged property in his possession, and it is subjected to certain conditions. Those conditions are:

- To avoid any fraudulent transactions, all leases are made in the ordinary course of management of property, and conditions should be in accordance with local laws and customs.
- No rent shall be paid in advance, and no premium shall be paid in advance or promised by the lessee.
- There must be no provision in the contract for the lease to be renewed.
- Any such lease must take effect within six months of the date of execution.
- The last condition is that when the mortgaged property is a building, the lease should not exceed more than three years.

When the lease is made without fulfilling any of the conditions, the mortgagee is not bound by

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<sup>22</sup> Transfer of Property Act, § 64, No. 4, Imperial Legislative Council, 1882, (India).

<sup>23</sup> Transfer of Property Act, § 65A, No. 4, Imperial Legislative Council, 1882, (India).

that lease. Parties may also consent to limit the mortgagor's ability to execute any lease under the mortgage-deed.<sup>24</sup>

### III. LIABILITIES/DUTY OF MORTGAGOR

#### 1. Duty to avoid waste<sup>25</sup>

This section imposes liability on the mortgager not to do anything which is destructive or injurious to the mortgaged property and leads to the waste of the property.

Waste is of two types:

- *Permissive waste*– When the mortgagor having the possession of the mortgaged property is not held liable to the mortgagee for any minor waste, then it is called Permissive waste.
- *Active waste*– A mortgagor is liable to the mortgagee if he or she commits an act that results in a substantial waste of property or a reduction in the value of the mortgaged property.

#### 2. Duty to indemnify for defective title<sup>26</sup>

A situation when a third party starts claiming or interferes with mortgaged property is referred to as a defective title. It is the liability for the mortgagor to compensate the mortgagee for the expenses incurred by him for protecting his title of that property.

#### 3. Duty to pay public charges<sup>27</sup>

After execution of the mortgage, it is the duty of the mortgagor to continue paying revenue, taxes, or other public charges as before. This liability of the mortgagor continues even if he transfers his equity of redemption. However, when the equity of redemption is extinguished, the duty of the mortgagor to pay such public charges also ends.<sup>28</sup>

#### 4. Duty to pay rents<sup>29</sup>

If in case, the mortgaged property is a lease hold property, then the mortgagor has to pay its rents. There is an implied covenant that the mortgagor has already paid the rents of that property, and no rents are due on the date of execution of the mortgage.

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<sup>24</sup> Sree Lakshmi Products v. SBI, AIR 2007 Mad. 148

<sup>25</sup> Transfer of Property Act 1882, § 66, No. 4, Imperial Legislative Council, 1882, (India).

<sup>26</sup> Transfer of Property Act, § 65 (b), No. 4, Imperial Legislative Council, 1882, (India).

<sup>27</sup> Transfer of Property Act, § 65 (c), No. 4, Imperial Legislative Council, 1882, (India).

<sup>28</sup> Dr. R.K. Sinha, The Transfer Of Property Act, 353, (21<sup>st</sup> ed. 2021).

<sup>29</sup> Transfer of Property Act, § 65 (d), No. 4, Imperial Legislative Council, 1882, (India).



### 5. Duty to the discharge of prior mortgage<sup>30</sup>

An implied liability is imposed on the mortgagor that he has discharged the prior mortgage if any.

## IV. CONCLUSION/COMMENTS

Section 58 of the property act define a mortgage and other important terms. When a mortgage-deed is executed by the mortgagor in favour of the mortgagee then this act cover rights and liabilities of the mortgagor. A mortgagor has 7 rights and 5 liabilities against the mortgagee.

*Need of amendment in mortgage laws:* The Transfer of Property Act was enacted in 1882 since then it has undergone only one amendment i.e. Transfer Of Property (amendment) Act, 1929. Many rights which were not included in the original act were added through this amendment.e.g. section 63-A, 65-A etc. However, the social and financial conditions of people in 1882 and 1929 were much different than now in modern world of technology. The world has changed and so does the law need to be. Law should not be static. It should be amended with changing times. It is nearly going to be a century since the last amendment was made in Transfer of Property Act. The mortgager and mortgagee now have found new ways of deceiving each other in mortgage. Stricter laws need to be made for effective execution of mortgage. Hence, the amendment is the need of the hour.

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<sup>30</sup> Transfer of Property Act, § 65 (e), No. 4, Imperial Legislative Council, 1882, (India).