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Kinds of Mortgage and their features under Transfer of Property Act

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Introduction

Transfer of Property Act, 1882 is the statutory law in India that contains provisions for mortgage laws. In simple terms, mortgage is transferring interest of an immovable property for securing a loan or for a performance of an engagement.

Section 58(a) of the Act defines the term mortgage as follows: ***"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."***

The person who mortgages the property is the 'mortgagor' and the person to whom the property is mortgaged is the 'mortgagee'. The instrument used by the parties involved in such transfer is known as the 'mortgage deed'. The different types of mortgages under Transfer of Property Act can be divided into 6 types as detailed below per Section 58.

Types of Mortgage

1. Simple Mortgage – Section 58(b)

Where the mortgagor promises to pay the mortgage-money (loan) without delivering possession of the mortgagor property and agrees expressly or impliedly that in case of non-payment of the loan, the mortgagee shall have the right to cause the mortgaged property to be sold through a decree or order from the Court, the mortgage is a simple mortgage.

In ***Maharaja Ram Narayan Singh v. Adhindra Nath Mukhurji***, the Court held that the fact that some immovable property has been mentioned as security for its repayment does not displace the personal liability of mortgagor to repay the loan with interest.

Characteristics of a Simple Mortgage

- The possession of the mortgagee-property is not given to the mortgage.
- In the case of non-payment of the loan, the mortgagee has the right to have the mortgage-property sold through the intervention of the Court.

2. Mortgage by Conditional Sale – Section 58(c)

The sale with a condition that upon repayment of the consideration amount, the purchaser shall retransfer the property to the seller is known as Mortgage by conditional sale. Although the whole transaction looks like a conditional sale, yet, the intention of the parties is to secure the money (an essential ingredient of the mortgage) which the seller takes as a loan from the purchaser.

Characteristics of Mortgage by Conditional Sale

- On non-payment of mortgage-money (price) the sale would become absolute or,
- The condition must be embodied in the same document.

3. Usufructuary Mortgage – Section 58(d)

When the mortgagor gives possession of the property to the mortgagee, then the mortgage is called a usufructuary mortgage. Since possession is with the mortgagee, he enjoys the fruits of the property i.e. produce, benefits, rents or profits of the mortgaged property in lieu of interest on the principal money (debt) advanced by him. Therefore, on the payment of a debt (principal money), the mortgagee has no right of possession.

Characteristics of Usufructuary Mortgage

- Delivery of possession of the mortgage-property or, an express or implied undertaking by the mortgagor to deliver such possession.
- Enjoyment or use of the property by the mortgagee is until his dues are paid off.

4. English Mortgage – Section 58(e)

There is an absolute transfer of property to mortgagee with a condition that when the debt is paid off on a certain date, he (mortgagee) shall re-transfer the property to the mortgagor. According to section 58 (e) of this Act, where mortgagor binds himself to repay the money (debt) on a certain date and transfers the mortgage-property absolutely subject to the proviso that mortgagee will re-transfer it to mortgagor on payment of debt as agreed, the mortgage is English mortgage.

Characteristics of English Mortgage

- The mortgagor binds himself to repay the mortgage money (debt) on a certain date.
- The mortgage-property is transferred absolutely to the mortgagee.

5. Mortgage by Deposit of Title Deeds – Section 58(f)

This type of mortgage is also called an equitable mortgage. Here the mortgage loan is given by the mortgagee upon the deposit of title deeds of the property by the mortgagor.

In ***Jethibai v. Putlibai*** case, the Court held that there is no equitable mortgage unless there is a connecting link between the debt and the possession of title-deeds suggesting a definite intention on the part of the debtor that deeds are in possession of the creditor as security for the debt.

Characteristics of Mortgage by Deposit of Title deeds

- Existence of a debt. The debt may be an existing or future debt.
- Intention to create security.

6. Anomalous Mortgage – Section 58(g)

When a transaction is a mortgage in all respects i.e. there is the existence of debt and security of immovable property for repayment of that debt but the agreement between the debtor and creditor is of such nature that it cannot be included in any specific category of mortgage; the transaction is an anomalous mortgage.

Conclusion

The Transfer of Property Act, 1882 deals with the transfer of property among the living beings. The concept of mortgage has played a very important role in the Indian legal system. The right of the mortgagor and mortgagee were originally governed entirely by the terms of the contract between the parties. After the enactment of the Act, it paved the way for the mortgages providing the kinds, rights and liabilities of the mortgagor and mortgagee.