AILET

Mortgage under Transfer of Property Act

Harshita Gulati · 20 Oct 2021

A mortgage is a kind of security given by the borrower for repayment of the loan to the lender. The object of a mortgage is to secure the debt or other obligation. It protects a lender for even if the borrower becomes insolvent the money can be realized from the property given by way of security.

Section 58 (a) of the Transfer of Property Act states that a mortgage is the transfer of an interest in the 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 transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

Unlike sale or gift, a mortgage is not the transfer of an absolute interest in the property. In a mortgage, a right of possession and enjoyment of the usufruct may not necessarily be given.

Kinds of Mortgage

The nature of right transferred in a mortgage depends upon the form or kind of the mortgage. There are six kinds of mortgage:

a. Simple mortgage

Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failure to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold

and the proceeds of the sale to be applied, so far as may be necessary, in payment of the mortgage money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

However, there is no transfer of possession of the property to the mortgagee i.e. there is no transfer of ownership in a simple mortgage. The mortgagee acquires only right to sale and that too through the court. The mortgagee may also sue on the personal covenant, in as much as the simple mortgagor binds himself to repay

b. Mortgage by conditional sale

Where the mortgagor ostensibly sells the mortgaged Property on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void,

or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called mortgage by conditional sale and the mortgagee a mortgagee by conditional sale.

The transaction shall be deemed to be a mortgage unless the condition is embodied in the document which effects or purports to affect the sale.

The word ‘ostensible’ means that it has an appearance of sale but is really not a sale. The ostensible sale need not be accompanied with possession.

In this form of mortgage, there is no personal liability on the part of the mortgagor to pay the debt. The remedy of the mortgagee is by foreclosure only.

c. Usufructuary mortgage

Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage money,

and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage money, or partly in lieu of interest or partly in payment of the mortgage-money,

the transaction is called a usufructuary mortgage and the mortgagee a usufructuary mortgagee

If the mortgagee is not in possession or if he loses such possession he may sue to obtain possession and also mense profits; he may also sue for mortgage money.

In a usufructuary mortgage, the mortgagee has the advantage to repay himself.

d. English mortgage

Where the mortgagor binds himself to repay the mortgage money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

The word ‘absolutely’ emphasizes that the characteristics of a sale are more pronounced in the case of an English mortgage but it does not suggest that there is absolute transfer in the nature of a sale. An absolute transfer can never be a mortgage. What really passes is only an interest in the property and not the whole property.

e. Mortgage by deposit of title-deeds (Equitable Mortgage)

Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf,

delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.

There is no writing or formalities required. The object of the legislature in providing for this kind of mortgage is to give facility to the mercantile communities. Physical delivery of documents by the debtor to the creditor is not the only mode of deposit. There may be a constructive delivery.

f. Anomalous mortgage

A mortgage which is not a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.

In such a mortgage the possession may or may not be delivered. The mortgagee’s remedy is by sale, and also foreclosure if the terms of the mortgage permit it.

Sub Mortgage

A mortgage debt being an immovable property the mortgagee can assign his interest in the mortgaged property. A mortgage by the mortgagee of his interest under the original mortgage is called a sub mortgage. A sub mortgagee is entitled to a decree for sale of the mortgage rights of his mortgagor.

Rights and Liabilities of Mortgagor

At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee-

(a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee,

(b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and

(c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been affected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished.

Provided that the right conferred by this section has not been extinguished by act of the parties or by decree of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Visit our complete collection of legal reasoning questions and posts.

Read our legal reasoning post on void agreements and the practice questions here.

Read CLATapult's post on offer and acceptance here. Also, try their mocks for more legal reasoning practice questions.

Visit CLATalogue for more legal reasoning practice questions for CLAT 2022.

First published on January 10, 2021.