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Mortgages under Banking Law

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ABSTRACT

Mortgage is a conditional conveyance of land designed as a security for the payment of money, the fulfilment of some contract, or the performance of some act, and to be void upon such payment, fulfilment or performance¹. Mortgage is the translation of vadiummortuum - dead pledge, so named because the land was turned over to the mortgagee or lender of the money, who received the profits or revenues of it without applying them in satisfaction of his debt, and the land thus became dead to the mortgagor or borrower who derived no benefit from it. This was regarded as in the nature of usury on the part of the lender and was looked upon with disfavour, in modern phrase as contrary to public policy. A mortgage is a disposition of property as security for a debt, the security being redeemable on repayment or discharge of the debt or other obligation. Generally, whenever a disposition of an estate or interest is originally intended as security for money, whether this intention appears from the deed itself or from any other instrument or from parol evidence, it is considered as a mortgage and redeemable. Every mortgage implies a debt and a personal obligation by the mortgagor to pay it. This paper further explains three aspects of mortgages and intends to cover all aspects which related to mortgages in general.

Keywords: *Mortgages, Definition of mortgage, Mortgage under Banking Law.*

I. INTRODUCTION

A **mortgage** is a legal instrument which is used to create a security interest in real property held by a lender as a security for a debt, usually a loan of money. A mortgage in itself is not a debt, it is the lender's security for a debt. It is a transfer of an interest in land (or the equivalent) from the owner to the mortgage lender, on the condition that this interest will be returned to the owner when the terms of the mortgage have been satisfied or performed. In other words, the mortgage is a security for the loan that the lender makes to the borrower.

Section 58 (a) of the TRANSFER OF PROPERTY ACT, 1882, defines mortgage as, “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

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liability. “The bold letters signifies the essential elements for the creation of valid mortgage in favor of the lender over the immoveable property.

A mortgage is the transfer of an interest in the specific immovable property to secure 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. There are six kinds of mortgages and in it mortgage by the deposit of title deeds is an important one which is related to the banking law.

II. CHARACTERISTICS OF MORTGAGE

- a) A mortgage can be effected only on immovable property, the immovable property includes land, benefits that arise out of things attached to the earth like trees, buildings, and machinery. But a machine that is not permanently fixed to the earth and is shiftable from one place to another is not considered to be immovable property.
- b) A mortgage is the transfer of an interest in the specific immovable property and differs from sale wherein the ownership of the property is transferred. Transfer of an interest in the property means that the owner transfers some of the rights of ownership to the mortgagee and retains the remaining rights with himself. For example, a mortgagor retains the right to redeem the property mortgaged.
- c) The object of transfer of an interest in the property must be to secure a loan or performance of a contract which results in monetary obligation. Transfer of property for purposes other than the above will not amount to the mortgage. For example, a property transferred to liquidate prior debt will not constitute a mortgage.
- d) The property to be mortgaged must be a specific one, i.e., it can be identified by its size, location, boundaries, etc.
- e) The actual possession of the mortgaged property need not always be transferred to the mortgagee.
- f) The interest in the mortgaged property is re-conveyed to the mortgagor on repayment of the loan with interest due on.
- g) In case the mortgagor fails to repay the loan, the mortgagee gets the right to recover the debt out of the sale proceeds of the mortgaged property².

In **KedarnathDutt v. ShamlalKhetry**³, In that case the court held that a memorandum is not the indumenta by which the equitable mortgage is created, nor is it the evidence of the contract,

²DR SR MYNENI, ‘law of banking’, Asian law house publication, second edition, p.354

³(1873)2k Suth WR150

and, therefore, it does not come under Section 17 of the Registration Act. However, if the memorandum is such that it could be treated as a contract for the mortgage it would be the instrument by which the mortgage was created and would come within Section 17 of the Registration Act.

No memorandum can be within Section 17 of the Registration Act unless on its face it embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit is concerned, it constitutes the agreement between the parties.

III. DIFFERENT TYPES OF MORTGAGES

Simple Mortgage

A simple mortgage is one 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 may be necessary, the payment of the mortgage money.

Usufructuary Mortgage

A usufructuary mortgage is one where the mortgagor delivers or agrees to deliver the possession of the mortgaged property to the mortgagee and authorizes him –

- To retain such possession until payment of the mortgage money,
- To receive the whole or any part of the rents and profits accruing from the property, and
- To appropriate such rents or profits; (i) in lieu of interest, or (ii) in payment of the mortgage money, or (iii) partly in lieu of interest and partly in lieu of the mortgage money.

English Mortgage

English mortgage has the following characteristics:

- The mortgagor makes a personal promise to repay the mortgage money on a certain day.
- The property mortgaged is transferred to the mortgagee. The mortgagee, therefore, is entitled to take immediate possession of the property. He/She may, under certain

circumstances sell the mortgaged property without the intervention of the court.

- The transfer is subject to this condition that the mortgagee will re-transfer the property to the mortgagor upon making payment of the mortgage money as agreed.

Anomalous Mortgage

A mortgage other than any of the mortgages explained so far. It is an anomalous mortgage.

Such a mortgage includes a mortgage formed by the combination of two or more types of mortgages as explained above.

It may, therefore, take various forms depending upon custom, local usage, or contract.

IV. MORTGAGE BY THE DEPOSIT OF TITLE DEEDS

A mortgage by deposit of title deeds is a form of mortgage recognised by S. 58 (f), T. P. Act, which provides that it may be effected in certain towns (including Calcutta) by a person “delivering to his creditor or his agent documents of title to immovable property with intent to create a security thereon.”

That is to say, when the debtor deposits with the creditor the title deeds of his property with intent to create a security, the law implies a contract between the parties to create a mortgage, and no registered instrument is required under S. 59 as in other forms of mortgage. But if the parties choose to reduce the contract to writing, the implication is excluded by their express bargain, and the document will be the sole Evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. As the deposit alone is not intended to create the charge and the document, which constitutes the bargain regarding the security, is also necessary and operates to create the charge in conjunction with the deposit, it requires registration under S. 17, Registration Act, 1903, as a non-testamentary instrument creating an interest in immovable property, where the value of such Property is one hundred rupees and upwards⁴.

In **Hari Sankar vs. KedarNath**,⁵ the title deeds were deposited accompanied by a memorandum when part of the advance arranged for was made. Some days later when the balance was advanced, another memorandum was delivered superseding the earlier one, and this was a formal document stating the essential terms of the transaction “hereby agreed” and referred to the moneys “hereby secured.” It also conferred an express power of sale on the mortgagee.

⁴S.N.GUPTA, ‘The Banking Law In Theory and Practise’, Universal Law Publications, Third edition, p.243

⁵(1939) 41 BOMLR 1144

Mortgage is, in English Law, a disposition of property to another in security of a debt, in supplement of a personal contract for payment of the debt. Mortgage (Mortuum Vadium, dead pledge) is so - called because, in many cases, the mortgagor does not perform the condition in the provision for redemption and the pledge is forfeited.

The following are the two kinds of mortgages in English Law after the enactment of the Law of Property Act, 1925:

1. Legal mortgage
2. Equitable mortgage

Legal Mortgage

A legal mortgage in England is a conveyance or assignment of the whole or part of the estate or interest of the debtor in real or personal property of which he is the legal owner or of some legal estate or interest which he has the power to transfer. In other words, legal mortgage is the conveyance of a legal estate in real or personal property as security for a debt or for discharge of an obligation. A legal mortgage of a freehold land is accomplished by a charge by deed expressed to be by way of legal mortgage, or by the demise of a term of years absolute. After 1925, a legal mortgage cannot be created by a conveyance with a proviso for reconveyance. The legislation introduced the "charge by deed expressed to be by way of legal mortgage" more usually referred to as the "legal charge". A legal mortgage of a freehold can now only be created by demise or by a legal charge. An attempt to create a mortgage by conveyance results in the mortgagee taking a term of three thousand years⁸. Similarly, a legal mortgage of a leasehold is only capable of being effected either by a subdemise or a legal charge⁹. The legislation tidied up the former disadvantage of mortgage by demise by making it clear that the mortgagee had the right to the title deeds¹⁰ and could dispose of the reversionary interest if he ever came to enforce his security.

Equitable Mortgage

Where a borrower gives to a lender, as security, the title deeds of his property, without any document of charge, or the deeds with a memorandum of deposit, or even a memorandum of charge without the deeds, it is an equitable mortgage in England. An equitable mortgage does not vest a legal estate in the lender, as does a legal mortgage, but in the memorandum which usually accompanies the deposit of deeds, the borrower, as a rule, promises to grant a legal mortgage when requested to do so. An equitable mortgage is a contract which operates as a security and is enforceable under the equitable jurisdiction of the court. It may be created by general words and even with regard to future acquired property. Under section 101 of the Law

of Property Act, 1925 (England), it is essential that an equitable mortgage be by deed if the mortgagee is to have the power of sale and other powers conferred on a mortgagee by statute. Equitable security is frequently regarded as simpler to create than legal security and is deemed more appropriate as a short term measure. An agreement to create a legal mortgage will be enough to constitute an equitable mortgage as long as the agreement is itself enforceable. To be enforceable it is necessary to have a note or memorandum in writing evidencing the agreement. The depositing of deeds by the borrower with the lender will be sufficient act of part performance but the purpose of making the deposit must be clear. There is no need for a document under seal or otherwise.

In **Kottayva v Annapumamma**⁶, a debtor who was not able to repay the amount of the debt granted to the creditor a right to occupy and enjoy certain land for a period of 20 years. It was held that the transaction was not a mortgage but a lease. A sale with a condition of retransfer is not mortgage, for the relationship of debtor and creditor does not subsist and there is no debt for which the transfer is a security.

In **NatesaPathar v Pakkirisamy Pathar**⁷, before the Madras High Court, the condition of sale and resale was engrafted in the same document, wherein the purchaser was specifically prohibited from encumbering the property within a period of five years stipulated for repurchase. There were also substantial differences between the actual value of the property and consideration as stipulated in the deed. It was held that it was a mortgage by conditional sale and not a sale with a condition for re-transfer. An agreement to mortgage may, in English law, amount to an equitable mortgage, which can be enforced according to its terms, but no such mortgage is recognised in Indian Law. An agreement to mortgage gives rise only to a personal obligation, which does not constitute either a mortgage or a charge. An agreement to mortgage is not capable of specific performance, for the court will not enforce an agreement to make a loan of money, whether on security or not.

V. CONCLUSION

The real test to find out whether a memorandum recording handing over title deeds requires registration or not is to ascertain whether the memorandum represents the bargain between the parties⁹. The question, therefore, which must be posed is, did the parties intend to reduce their bargain regarding the deposit of title deeds to the form of a document? If so, the document requires registration. If, on the other hand, its proper construction and the surrounding

⁶ AIR 1945 Madras 189

⁷ AIR 1997 Madras 105

circumstances lead to the conclusion that the parties did not intend to do so, then there being no express bargain, the contract to create the mortgage arises by implication of the law from the deposit itself with the requisite intention, and the document, being merely evidential does not require registration.

It is clear, that if the parties did not intend thereby to create the charge. The document purports only to record a transaction which had been concluded and under which the rights and liabilities had been orally agreed upon. No doubt it was taken by the respondents to show that the title deeds of the appellant's properties were deposited with them as security for the moneys advanced by them, and to obviate a possible plea that the deeds were left with them for other purposes, as indeed was contended by the appellant in his written statement, taking advantage of the non-registration of the memorandum in question. But that is far from intending to reduce the bargain to writing and make the document the basis of the rights and liabilities of the parties.

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