An Analysis of the Term Mortgage under the Transfer of Property act, 1882

Jitin Kumar Gambhir, Department of Law,
Galgotias University, Yamuna Expressway,
Greater Noida, Uttar Pradesh.
Email ID: jitin.gambhir@Galgotiasuniversity.edu.in

Abstract: Article 21 of the Constitution of India requires the right to privacy, which is a condition of the right to life liberty. It is a complex definition that needs to be elucidated, emphasising the word "PRIVACY". Under its Indian Constitution, the context of article 21 is intra. In this article, the dimensions of a legal mortgage and indeed the different ways in which a mortgage deed may be implemented have been explained. It ends by addressing the commendable step of making the reach of the mortgage as broad as it is in the act that allows the mortgage process to be covered in a large number of cases. The article also addresses how the right is really not unrestricted and is sensitive to fair constraints.

Keywords: Immovable property, Movable Property, Transfer of Property, Constitution of India.

INTRODUCTION

The Transfer of Property Act is one of the original 19th century codes. It is possible to describe the word property as something that has any value and has the capacity to be owned by anyone. While the Transfer of Property Act deals with real estate, it does not provide a description of it. "It only states, "Immovable property also doesn't include standing timber, growing crops or grass." The definition of immovable property can even be found in the Act of General Clauses, which distinguishes it as "Immovable property including land, land resources and objects attaching to the earth. Standing timber, crop cultivation or grass have never been removed from the immovable property scope, since they are only useful until they have been cut off from the ground, that really is, when they are no longer immovable [1].

The property may be transferred by various modes or processes, viz. Sale, mortgage, rental, donation, swap, etc. Each of the above modes of transfer of property has its own importance, benefits and disadvantages [2]. A mortgage is a transmission of land or a chattel grant as a collateral to secure of a loan or the release of any other duty for which it is assigned. Mortgage is now the transfer of interest in real immovable property to secure advanced or advanced payment by means of a loan, a current or potential debt or the accomplishment of an undertaking that may give rise to a pecuniary liability.

A special characteristic of a mortgage is that it is not a conversion of full landowners, but rather a transfer of certain interest in the property. The interest thus transferred acts as either the loan protection [3]. The person who borrows under a mortgage, i.e., transfers investment in his immovable property, is referred to as a mortgage. The person in whose favour the property is mortgaged is considered a mortgage, i.e. the person who supports the loan. The sum of money and the transfer instrument or deed are referred to as mortgage-deeds [4].

INGREDIENTS OF A VALID MORTGAGE

Transfer of interest:

In a mortgage, only the interest but it's not the full interest or possession are transferred. This transfer interest gives the mortgagee the right to recover the loan he has provided the mortgagee with. A mortgage is not a redistribution of all concerns. Following the transition of this interest in lieu of a mortgage, the mortgage becomes a vested remnant.

The property must be specific:

It is required that the property that is being invested wisely is specified in the deed. For the purpose of complying, the property should explicitly be identified in the deed. The property ought not, in general terms, be defined [5].

The consideration of mortgage:

The object of a mortgage lies in the fact that because a loan has to be repaid. The mortgage consideration will be met as soon as the loan is secured. Mortgagor passes to the mortgagee the interest in its property in lieu of the protection for payment of a loan and some kind of taken from him.

TYPES OF MORTGAGE

Simple mortgage

The simple mortgage referred to in point (b) of Section 58 is where there is no provision of ownership of the mortgage-property, but the mortgage-property accepts that in the absence of repayment of the loan, the property into which the landed money is recouped shall be sold. The fact that only some immovable property is already listed as a security for its loan does not destroy the mortgagor's personal responsibility to repay the loan of interest [6]

Mortgage by Conditional Sale:

As the title indicates, the conditional mortgage has a provision that the mortgaged property be returned to the mortgage lender as soon as even the payment is done to either the mortgagee on the auction including its immovable property. In the absence of a mortgage payment, your sale becomes unconditional.

Usufructuary Mortgage:

In this situation, the mortgage property possession is distributed to the mortgagee which needs the asset before the dues are paid off. The mortgage is not vicariously responsible and it is not necessary to sue the mortgage only for selling of the house [7].

If the mortgage-property is a creditor, the only solution to grant the mortgagee possession is to give him the right to receive the rents and attach them to that same debt. In a usufructuary mortgage, the mortgagee is permitted, instead of interest on the principal amount (debt) advanced by him, to enjoy the value of down payment. Therefore, the mortgagee will have no right of possession for paying interest (principal money).

English mortgage:

This form of mortgage allows for an outright transfer of the mortgage property on behalf of the mortgagee, provided that, if the loan is repaid beyond a certain date, the mortgage property is repaid more by mortgagee.

In Ramkinkar v. Satyacharan the Privy Council observed:

'Section 58(e) is concerned with shape, not through substance. Considerable rights are discussed in section 58(a) and section 60. Which method is used, nothing more than an interest is shifted and the right to recovery is attached to that interest".

Mortgage by Deposit of Title-Deeds

There seems to be no execution of the mortgage deed by the mortgage agent for this form of mortgage [8]. He merely deposits the immovable property legal documents to something like the mortgagee, and that is ample evidence of a legal mortgage. The law describes the cities in which this form of transaction is applicable.

Title-deeds to secure an overdraft account can also be deposited with banks. In the trading community or individuals involved in industry, this is a common practise. In order to cover a general payment that can be found due on a running account, title-deeds can sometimes be deposited.

Anomalous Mortgage

The type of mortgage that has had the aspects of different types of mortgages would be an anomalous mortgage, as specified under Section 58 (g). If it is not a simple mortgage, a mortgage by conditional sale through usufructuary mortgage, an English mortgage or, a mortgage by deposit of title-deeds, a mortgage is an unusual mortgage [9].

Doctrine of Priority

The doctrine of Priority is provided under Section 78 and 79 of the Trasfer of Property Act, 1882.

This doctrine is based on the principle “quite prior est tempore est jure”.

It means that first in time prevails over the other.

Where the immovable property is transferred by the mortgagor to different mortgagees the successive mortgagee is paid only after the prior mortgagee is satisfied.

Section 48 of the Transfer of Property Act, 1882 in case a prior mortgage suffers from fraud, misrepresentation or gross neglect then the subsequent mortgage shall have priority over the *prior mortgage.*

Doctrine of Marshalling

Marshalling is defined under Section 81 of the Transfer of the Property Act, 1882.

In simple terms, marshalling means arranging things.

If there are two or more properties belonging to the mortgage and the mortgages, the manoeuvring doctrine implies that those properties belong to one mortgage and afterwards mortgage those properties that have also been mortgaged to yet another mortgagee [10].

No merger in case of subsequent encumbrance

According to Section 101 of that same Transfer of Property Act, 1882, the warranty deed of immovable property or just the agent who also is paid for the immovable property or the transferee of that mortgagee or charge-holder may retain the rights of its mortgagee's property through combining the mortgage or the fee as follows:

- Himself and the subsequent mortgagee of the same property
- Himself and person having charge upon the same property

Such subsequent mortgage or charge cannot be sold or foreclose without redeeming the prior mortgage or charge.

CONCLUSION

The language of mortgage under the Transfer of Property Act, Immovable Property, is always to be read in the light of Article 19(1)(f) omitted by the Constitution (44th Amendment) Act, 1978, i.e. the right to purchase, keep and dispose of property and also the community Right to Property under Article 31. The consequence of this shift is that a constitutional right is no longer a right to land.

In Part XII of the Constitution, a new chapter IV was added and now the clause in Article 31 was moved to Article 300A. The right to property is also not a human right, although it is a civil right. If the right is intruded, the aggrieved party cannot have direct access to the Supreme Court pursuant to Article 32. The person who borrows under a mortgage, i.e., transfers investment in his immovable property, is referred to as a mortgage. The person in whose favour the property is mortgaged is considered a mortgage, i.e. the person who supports the loan. The sum of money and even the transfer instrument or deed are referred to as mortgage-deeds.

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