Assignment of

Law of Transfer of Property

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The Provisions of Transfer of Property Act, 1882 relating to mortgage: A Critical Appreciation

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Introduction:-
Mortgage is the one kind of transfer and it is the one kind of title transfer of specific immovable property. Section 5 of the Transfer of Property Act, 1882\(^1\) defines “transfer of property”. Transfer of property means an act by which a living person conveys property to one or more other living persons. Property means: (1) the thing itself, or (2) some or all the rights in a things. The provision of Section 3 of the Transfer of Property Act, 1882 does not provide for a comprehensive definition of ‘immovable Property’, however, it only mentions that ‘immovable property’ does not include standing timber, growing crops, or grass. According to Sec.3 (26) of the General Clauses Act, 1897 the “Immovable property shall include land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth”. “Attached to the earth” means:

- Rooted in the earth (like tree and shrubs)
- Imbedded in the earth (like walls etc)
- Attached in such a way which gives permanent beneficial enjoyment.

\(^1\) ACT NO. IV OF 1882
So, Immovable Property:

1. It includes land, benefits to arise out of land, and things attached to the earth.
2. If the thing is fixed to the land even slightly or it is caused to go deeper in the earth by external agency, then it is deemed to be immovable property.
3. If the purpose of annexation of a thing is to confer a permanent benefit to the land to which it is attached, then it is immovable property.

So, as against sale or gift, the mortgage is simply the transfer of an interest in the property mortgaged. The purpose of it to lend money and it may be immediately or later on. Mortgage creates pecuniary liability.

Meaning of mortgage:-

Mortgage is a conveyance of title to property that is given as security for the payment of a debt or the performance of a
duty and that will become void upon payment or performance according to the stipulated terms\(^2\).

According to section 58(a) of the Transfer of Property Act 1882,
“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 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.

According to section 53-D TP Act, 1882,

An immovable property under registered mortgage must not be re-mortgaged or sold without the written consent of the mortgagee, and any re-mortgage or sale made otherwise must be void. [Amended by the Act No. XXVI of 2004]

\(^2\) Black’s Law dictionary, 9th edition, page no. 1101
Consideration

Mortg -agor → Land → Mortgagee

In the words of Mahmood J.³, “mortgage as understood cannot be defined better than by the definition of adopted by the Legislature in Sec. 58 of the Transfer of Property act.”

Mortgage, mortgagor, mortgagee, mortgage-money and mortgage-deed defined in section 58 of the Transfer of Property Act, 1882. [HBFS v. A Mannan, 41 DLR (AD)].

In the case⁴ of

Salehon
V.
Muhammad

Held: A mortgage is a transfer of interest which comes into existence, when the contract of mortgage is entered into and not necessarily when the consideration is paid.

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³ Gopal v. Parsotam, (1883) 5 All 121 (137) (FB).
⁴ PLD 1958 (WP) Lah. 1023
Elements of Mortgage:-

- There must be a transfer of an interest;
- There must be specific immovable property intended to be mortgaged;
- The transfer must be made to secure the payment of a loan or to secure the performance of a contract.

1) Transfer of interest: A transaction of mortgage involves the transfer of an interest from the mortgagor to the mortgagee. On this point this differs from sale because in sale, on the contrary, there is complete transfer of all the interests in the property. The mortgage is transfer of interest less than ownership.

<table>
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<th>Mortgage (s.58)</th>
<th>V.</th>
<th>Sale (s.54)</th>
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<td>(1) Conditional transfer of property</td>
<td>(1) Actual transfer of Property.</td>
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<td>(2) Some rights transferred</td>
<td>(2) All rights transferred</td>
<td></td>
</tr>
<tr>
<td>(3) Ownership remains</td>
<td>(3) Ownership transferred</td>
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A sale with a condition of a repurchase is not a mortgage, for the relationship of debtor and creditor does not subsist and there is no debt for which the transfer is a security. It is not a partial transfer but transfer of all rights in perpetuity reserving
only the personal right of repurchase or pre-emption which is lost if not exercised within stipulated time. [Abdul Hafiz Chowdhury V. Aziz-ur-Rehman Badiuz, 4 DLR 162(8)].

The words “Transfer of Interest” also bring out distinction between “Mortgage and Charge”.

**Difference between Mortgage and Charge**

i. A mortgage is created by the act of the parties whereas a charge may be created either through the act of parties or by operation of law.

ii. A charge created by operation of law does not require the registration as prescribed for mortgage under the Transfer of Property Act. But a charge created by act of parties requires registration.

iii. A mortgage is for a fixed term whereas the charge may be in perpetuity.

iv. A simple mortgage carries personal liability unless excluded by express contract. But in case of charge, no personal liability is created. But where a charge is the result of a contract, there may be a personal remedy.

v. A charge only gives a right to receive payment out of a particular property, a mortgage is a transfer of an interest in specific immovable property.
vi. A mortgage is a transfer of an interest in a specific immovable property, but there is no such transfer of interest in the case of a charge. Charge does not operate as transfer of an interest in the property and a transferee of the property gets the property free from the charge provided he purchases it for value without notice of the charge.

vii. A mortgage is good against subsequent transferees, but a charge is good against subsequent transferees with notice.

2) **Specific immovable property:** The interest transferred is that of a specific immovable property. The property, which has to be mortgaged, must be defined specifically and not in general terms. The property must also be immovable property\(^5\). The property must be specifically mentioned in the mortgage deed. Where, for instance, the mortgagor stated “all of my property” in the mortgage deed, it was held by the Court that this was not a mortgage. The reason why the immovable property must be distinctly and specifically mentioned in the mortgage deed is that, in case the mortgagor fails to repay the loan the Court is in a position to grant a decree for the sale of any particular property on a suit by the mortgagee. It was accordingly held that no valid mortgage was created when the property mortgage was described as “the whole of my property”,\(^6\) or as “our house or landed property.”\(^7\)

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\(^5\) See introduction
\(^6\) Bheri Dorayya v. Modhipatu Ramayya, 3 Mad. 35
\(^7\) Darsona Singh v. Honwanta, 1 All. 274
The description is sufficiently specific if it renders the property identifiable or capable of being ascertained.

Thus, in

Dakkata

V.

Sasanapuri

Held: A valid mortgage was created though no boundaries of the land were specified and the property was described as “my jirayati and inam lands which I own at the village of my residence”.

3) Securing the payment of debt. The transaction involves the transfer of an interest for the purpose of securing the payment of a debt, which is in the nature 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 debt in lieu of the mortgaged property constitutes the consideration of the mortgage. The mortgagor may also execute the mortgage deed before he gets the full amount from the mortgagor. Mere ground that the mortgagee did not advance the money on the date of execution of the deed does not render the transaction of mortgage ineffective. There is thus a debt and the relationship between the mortgagor and the mortgagee is that of debtor and creditor. When A borrows 100 bags of paddy from B on a mortgage and agrees to return an equal quantity of paddy and a further quantity by way of interest, it

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8 1 L.W. 96
is a mortgage transaction for the performance of an obligation.

Where, however, a person borrows money and agrees with the creditor that till the debt is repaid he will not alienate his property, the transaction does not amount to a mortgage. Here the person merely says that he will not transfer his property till he has repaid the debt; he does not transfer any interest in the property to the creditor. In a sale, as distinguished from a mortgage, all the interests or rights or ownership are transferred to the purchaser. In a mortgage, as stated earlier, only part of the interest is transferred to the mortgagee, some of them remains vested in the mortgagor.

In the case of Ragunath V. Amir Baks (1922), it was held that in mortgage where deed is registered, property vested but consideration is not given; mortgage may not fail.

“Mere inadequacy of consideration is no ground to treat a document to be a mortgage”. [Somedullah V. Mahmud Ali, 44 DLR (AD) 83]
To sum up, it may be stated that there are three outstanding characteristics of a mortgage:

i. The mortgagee’s interest in the property mortgaged terminates upon the performance of the obligation secured by the mortgage.

ii. The mortgagee has a right of foreclosure upon the mortgagor’s failure to perform.

iii. The mortgagor has a right to redeem or regain the property on repayment of the debt or performance of the obligation.

➤ Types/ Forms of Mortgage:-

According to Section 58 of Transfer Of Property Act, 1882, the types of mortgage are discussed below:

☑ Simple mortgage
☑ Mortgage by conditional sale
☑ Usufructuary mortgage
☑ English mortgage
☑ Mortgage by deposit of title-deeds
☑ Anomalous mortgage

# Simple mortgage [Section: 58(b) of TP ACT 1882]:-

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 failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of 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.

So. A Simple mortgage has the following features:

i. No right of possession or foreclosure is available to the mortgagee.

ii. The mortgagor binds himself personally to pay debt and agrees in the event of his failure to pay the mortgage money.

iii. In case of failure the mortgagee can bring a personal action against the mortgagor and obtain a decree.

**No delivery of Possession**

The outstanding feature of a simple mortgage is that possession is not delivered to the mortgagee, but remains with the mortgagor. Since the mortgagee is not put into possession of the property, he has no right to satisfy the debt out of the rents or profits, nor can he acquire the absolute ownership of mortgaged property by foreclosure.

It will be seen that the mortgage, has, on default of the mortgagor a two fold of cause of action – One arising out of the breach of the covenant of repay and the other arising out of the mortgage. The mortgagee may, therefore, sue him for the mortgage-money or may proceed against the property or may combine both these
remedies in one suit. If he sues on personal undertaking only, he obtains a money decree but if he sues on the mortgage, he obtains an order for the sale of the property.

It was held in Shivaji Prasad Sahu v. Darsan Das, AIR 1963 Pat 87 (93) "In a Simple Mortgage the interest transferred is the right to have the property sold, and this need not be provided for in the deed in so many words; it may be inferred from the language so used".

# Mortgage by conditional sale  [Section: 58© of TP ACT 1882]:-

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,
- on condition that on such payment being made the sale shall become void,
- on condition that on such payment being made the buyer shall transfer the property to the seller,

The transaction is called a mortgage by conditional sale. However, no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to affect the sale.

In the case of Ganu Mia V. Abdul Jabbar, 10 DLR 638 it was held that “in order to determine that a document is a mortgage by
conditional sale, the following tests, though not exhaustive, should be applied:

- The existence of debt.
- The period of repayment, a short period being indicative of a sale and a long period of a mortgage.
- The continuance of the grantor in possession indicates a mortgage.
- A stipulation for interest on payment indicates a mortgage.
- A price below the true value indicates a mortgage.
- A contemporaneous deed stipulated for convenience indicates a mortgage, but one executed after a lapse of time points to a sale”.

In the case of Chandra Kanta Howladar V. Rama prasanna Ganguly, 5 DLR 29, it was held that the disputed mortgage is a mortgage by conditional sale under section 58© of the Transfer of Property Act, 1882.

# Usufructuary mortgage [Section: 58(d) of TP Act 1882]:-

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

10 Ganu Mia V. Abdul Jabbar, 10 DLR 638
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.

So, A Usufructuary mortgage has the following features:

→ Possession of the property must be delivered to the mortgagee.
→ There is no personal liability on the part of the mortgagor to pay
→ The mortgagee is entitled to rents and profits in lieu of interest or principal or both
→ The mortgagee however is not entitled to foreclosure the mortgagee or to sue for sale.

No personal liability.

The mortgagor cannot be sued personally for the debt. The mortgagee is only entitled to remain in possession of the mortgaged property till the principle and interest are defrayed according to the terms of the agreement.11 Since a usufructuary mortgagee is entitled to remain in possession until the debt is paid off, no time limit can be fixed expressly during which the mortgage is to subsist.12

# English mortgage [Section: 58(e) of TP Act 1882]:-

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

11 Atmaram V. Suryan, (1928) Lah. 355
12 Ram Narayan Singh V. Anhindra Nath, (1917);4411,A.87
re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

So, an English mortgage has the following features:

i. The mortgagor binds himself to repay the mortgage money on a certain day, in other words there should be a personal undertaking to pay.

ii. The mortgaged property is absolutely transferred to the mortgagee.

iii. Such absolute transfer is subject to a proviso that the mortgagee will reconvey the property to the mortgagor upon payment by him of the mortgage money on a fixed day.

An "English mortgage" has three essential ingredients. As decided as early as 1902 in Narayana Vs Venkataramana ILR (1902) 25 which is a full bench decision of Madras High court, the three essential ingredients are:-

1. The mortgagor binds himself personally to repay the mortgage debt on a certain day;

2. The property mortgaged is transferred "absolutely" to the mortgagee and

3. This transfer is subject to the proviso that the mortgagee will reconvey the property to the mortgagor upon payment of the mortgage money on the date fixed for repayment. Sec. 58(e) of the Transfer of Property Act which defines the English mortgage, cannot be construed as declaring an English mortgage to be an absolute transfer of the property, but as merely declaring that such
a mortgage would be absolute, were it not for the proviso to re-transfer.

# Mortgage by deposit of title-deeds [Section: 58(f) of TP Act 1882]:-

Where a person in the town of Dhaka, Narayanganj and Chittagong and in other town which the government, 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.

So, this mortgage requires four requisites:

1. A debt
2. Deposit of title deeds
3. Intention to create security thereon
4. Such a mortgage can be created only in specified towns. The mortgaged property need not be situate in any of the specified towns. What is necessary is that the deposit of title deeds must be in specified towns.

It is not necessary that all the title deeds delivered should show a complete title in the debtor. What is essential is that the instruments of title deeds deposited are a material part of the title. It is a misnomer to call this mortgage as "an equitable mortgage". It is only in the United Kingdom that a mortgage by deposit of title deeds is also known as an equitable mortgage; this is because there it does not operate as an actual conveyance. However, in
Bangladesh, deposit of title deeds to secure a loan constitutes an actual mortgage. The proviso to Sec. 48 of the Registration Act, 1908 specifically provides that a mortgage by deposit of title deeds shall take effect as against any mortgage deed subsequently executed and registered.

# Anomalous mortgage  [Section: 58(g) of TP Act 1882]:-

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 s 58 of the TP Act is called an anomalous mortgage.

So, it is-

i. A mortgage which does not falls in above category is called Anomalous mortgage.

ii. Basically it is combination of various other mortgages

❖ Sub-mortgage:

Where the mortgagee transfers by mortgage his interest in the mortgage property, or creates a mortgage of a mortgage of a mortgage the transaction is known as a sub mortgage.

Example- A mortgages his house to B for Taka.10000 and B mortgage his mortgagee right to C for Taka 8000. B creates a sub mortgage.
**Puisne mortgage:**

Where a mortgagor mortgage his property to another person to secure another loan, the second mortgage is called a Puisne mortgage.

Example- where A mortgages his house worth Taka.1 Lakh to B for Taka.40000 and mortgages the same house to C for a further sum of Taka.30000, the mortgage to B is first mortgage and that of C the second or Puisne mortgage.

**Registration Of Mortgage Deed:**

A mortgage does not become complete and enforceable until it is registered. A mortgagor cannot file a suit for redemption in the case of a mortgage which is invalid for want of registration. However, it has been held that when the mortgage and the terms of mortgage are admitted in the pleadings a suit for redemption will lie even though the mortgage is not registered. Sec. 49 of the Registration Act, 1908 specifically states that a document required to be registered under the said Act or the Transfer of Property Act shall not affect the immoveable property comprised therein or be received as evidence of any transaction affecting such property unless it has been registered. However, it has been held that an unregistered mortgage deed, though invalid as a mortgage may be used to prove the debt.

**Modes of Transfer in a mortgage:**

There are three ways in which property may be transferred by way of mortgage:
(1) Registered instrument.
(2) Delivery of Possession.
(3) Deposit of title-deeds.

As, section 59 of the Transfer of Property Act, 1882 states that-

“Where the principal money secured is one hundred taka or upwards, a mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Provided that a mortgage by deposit of title-deeds, where the mortgagee is the Government or a Scheduled Bank as defined in the Bangladesh Bank Order, 1972 or a financial institution as defined in the Financial Institutions Act, 1993, shall also be effected only by a registered instrument in the aforesaid manner:
Provided further that where in pursuance of a tripartite agreement between a buyer, a seller and a Scheduled Bank or financial institution, the buyer undertakes to buy a flat or floor space to be constructed or a plot of land to be developed by the seller (a real estate owner, firm or company), and the seller undertakes to transfer the flat or floor space or a plot of land, as the case may be, to the buyer by registered instrument upon construction or development, as the case may be, and the Scheduled Bank or financial institution undertakes to pay the price, or part of the price, of the flat or floor space or plot of land to the seller on behalf of the buyer, on condition, among others, that the flat or floor space to be constructed or the plot of land to be developed, and transferred to the buyer, shall be mortgaged to the Scheduled Bank or financial institution by deposit of title-deed as security against the money paid or to be paid to the seller on behalf of the buyer as loan, such mortgage by deposit of title-deed shall not be required to be effected by a registered instrument as aforesaid.

Where the principal money secured is less than one hundred taka, a mortgage may be effected either by a registered instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property."
Rights and Liabilities of Mortgagor  [Sections 60-62,83 of TP Act 1882]:-

- Right of mortgagor to redeem  [Section:60 of TP Act 1882];
- Redemption of portion of mortgaged property [Section:60 of TP Act 1882];
- Right to redeem separately or simultaneously [Section:61 of TP Act 1882];
- Right of usufructuary mortgagor to recover possession  [Section: 62 of TP Act 1882];
- Power to deposit in court money due on mortgage [Section:83 of TP Act 1882];

# Right of mortgagor to redeem:-

According to s 60 of TP Act, 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-

- 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,
where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and

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 effected 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.

Acknowledgement that right has been extinguished.

Extinguishment of right by (1) the act of the parties, or (2) the decree of the court.

It is the most important right of the mortgagor, through which, the mortgagor after paying-off the money becomes entitle to get back the property. At any time after the mortgage-money has become due, the mortgagor has a right on the payment of the mortgage-money to require the mortgagee to reconvey the mortgaged property to him. This right of the mortgagor, through which he is entitled to get the property returned to him, contemporaneously with the discharge of his obligation, is called the right of redemption.

POSITION IN THE TRANSFER OF PROPERTY ACT.

Unlike England, the Act does not distinguish between the right to redeem and equity of redemption. In England, this right was evolved by the Chancery Courts and was known as equity of
redemption. On the following counts, the mortgagor’s right to redeem can be justified:

1. Transfer of an interest. In a mortgage, the mortgagor transfers one of all his interests in the immovable property. The mortgagor transfers only an interest in favour of mortgagee and not the whole interest in the property.

2. Residuary ownership. After creating an interest in favour of mortgagee, the mortgagor still has the remaining interest. The remaining interest is called the residuary ownership of the mortgagor in the mortgage-property. It is the residuary ownership, by virtue of which, the mortgagor has the right to redemption vested in him.

3. Purpose is only securing the payment of debt. As per the provisions of the Transfer of Property Act, in the transaction of mortgage, since there is a transfer of an interest of the immovable property by the mortgagor for securing the loan, he is entitled to get back that interest on the repayment of the loan. By making the payment of the loan with its interest, the mortgagor becomes entitled to redeem, that is call back the ‘interest’ given to the mortgagee as security for repayment.

4. Principles of equity, justice and good conscience. Mortgagor neither intends nor desires that the property should go absolutely to mortgagee. Therefore if the mortgagee is unable to repay the debt on a fixed date and there is some delay, the law must extend his right to redemption upto a reasonable time. Principles of equity, justice and good conscience do not allow that a transaction which is of borrowing nature should become an absolute conveyance, only on the ground that the debt was not paid on the
fixed date. It is therefore, an inherent right of every mortgagor, laid down in sec. 60, irrespective of the kind of mortgage.

**EQUITY OF REDEMPTION.**

The right of redemption of the mortgagor under sec. 60 of the Transfer of Property Act is based on the equity of redemption under English law. In England, the mortgagor’s right of redemption was introduced by the Chancery Courts, also known as the Courts of Equity. The mortgagor’s right to redeem the mortgage by making payment, even after the due date is known as equity of redemption. The Chancery Court introduced this right in order to do justice with cases on mortgage decided under the common law.

**Prior position at Common Law.**

At common law, the mortgage was the transfer of legal estate (absolute interest), subject to a condition. The condition was ‘non-payment of loan upto fixed date’, which if fulfilled, the mortgaged property belonged absolutely to the mortgagee. Common law treated the non-payment of debt upto a specified period as penalty for the mortgagor. The common law gave no relief to the mortgagor, who failed to repay the debt upto the specified period, even though he was ready to repay within few days after the specified period. Thus, in default of the repayment the mortgagor lost all his rights in his immovable property.

This situation was exploited by the money-lenders, by not accepting the money on the due date. They knew that if somehow
the loan with interest remained unpaid upto the fixed date, they will become owner of the property in lieu of the small sum of money, which the debtor took in his urgent need.

Role of Chancery Courts.

Soon the Chancery Courts realized that the main purpose of the mortgage is to keep the property as a security to the money-lender for the repayment of money. Therefore, the money-lender should not be given any legal right to hold on the property absolutely if the mortgagor was ready to repay the debt within reasonable time after the expiry of the due date. Thus, the right which was denied by the Common Law was given to the mortgagor by the Courts of Equity. This right of the mortgagor to redeem even if he was in default was known as equity of redemption.

Thus, this very principle evolved by the Chancery Courts went against the common law. Equity started with the notion that stipulation as to time (fixed date for repayment) should not be treated as penalty. The Courts even held it to be the essential character of every mortgage. They provided further that it was an important right of the mortgagor and it could not be denied in any manner, not even express agreement of the parties themselves. Equity declared that ‘once a mortgage, always a mortgage’.

ONCE A MORTGAGE ALWAYS A MORTGAGE.

This maxim implies that the mortgagor’s right of redemption would not be defeated by any agreement to the contrary, even if the mortgagor himself has agreed to it. The maxim simply denied
the validity of any stipulation in the mortgage deed, which defeats the mortgagor’s right of redemption. In other word, a transaction, which at one time is mortgage, could not cease to be so by having any stipulation in the mortgage deed intended to defeat the mortgagor’s right of redemption.

The underlying principle of this maxim was stated by LORD HENLEY in following words:

“This Court as a Conscience is very jealous of persons taking securities for a loan and converting such securities into purchases. And therefore I take it to be an established rule, that a mortgagee can never provide at the time of making the loan for any event or condition on which the equity of redemption shall be discharged and the conveyance made absolute. And there is great reason and justice in this rule for necessitous men are not, truly speaking, free men, but to answer present exigency, will submit to any terms that the crafty may impose upon them”\(^\text{13}\).

In the case of

Nabin Chandra Moral

V.

Lalit Mohan Das\(^\text{14}\)

Held: If the mortgage debt is paid, or a tender thereof is made, by any person interested in the equity of redemption, a mortgage suit


\(^{14}\) 19 DLR 338
can be instituted by any other person who has a right to equity of redemption.

The right of redemption is the inalienable right of the mortgagor [Tofzal Ahmed Contractor V. Abdur Rahim & Others, 16 BLD (AD) 160].

Besides the mortgagor any of the following persons may also sue for redemption:-

  a) Any interested person in the mortgaged property,
  b) Any surety for the payment of the mortgaged debt; or
  c) Any creditor of the mortgagor who has obtained a decree for sale of the mortgaged property.

- Section 91 of TP

CLOG ON REDEMPTION:

The right of redemption continues although the mortgagor fails to pay the debt at the due date. Any provision inserted in the mortgage-deed which has the effect of preventing or impeding this right is void as a clog on redemption. This view was substantiated by LINDLEY M. R. in Stanley v. Wilde15.

The Supreme Court considered this rule in Murarilal v. Devkaran16, where the clause incorporated in the mortgage deed provided that the amount due under the mortgage should be paid within 15 years whereupon the property would be redeemed. Further it provided that in case payment was not made within that period, mortgagee would become the owner of the property. The

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15 (1899) 2 Ch 474.
16 AIR 1965 SC 225.
Supreme Court affirming the decision of the Rajasthan High Court, held that any stipulation contained in the mortgage deed, which unreasonably restrained the mortgagor’s equity of redemption can be ignored by the court subject to the general law of limitation prescribed in that behalf.

a) Long Term for Redemption. It is not necessarily true that a long term for redemption is always a clog on redemption. However, if the length of the term is found to be oppressive, redemption would be allowed before the expiry of that period. A period of 90 years for redemption has been held to be unreasonable and a clog on redemption\(^\text{17}\). A period of 90 years for redemption has not been held to be a clog on redemption\(^\text{18}\).

b) Condition of Sale in Default. A condition in the deed that has the effect of converting a mortgage into a sale is invalid as a clog on redemption. Such condition converts a mortgage into a sale. Equity disfavours a mortgage to be converted into a sale. It is therefore void. In *Gulab Chand Sharma v. Saraswati Devi*\(^\text{19}\), there was a mortgage by conditional sale. The mortgagor was given a time of four years for repayment of the debt. The mortgage property was on lease. The deed contained a stipulation that in case the mortgagee receives any notice from any public authority for breach of covenants of lease within four years term, the mortgagee shall become owner of the property. The apex court held this stipulation to be a clog on mortgagor’s right of redemption and therefore not to be enforced.

\(^{17}\) Fateh Mohd. v. Ram Dayal, 2 Luck 588.


\(^{19}\) AIR (1977) SC 242.
But after the execution of the deed, the parties agree to the sale of the property that does not amount to be a clog on the redemption.

c) Condition Postponing Redemption in Default on a Certain Date. The condition or stipulation that postpones the mortgagor’s right of redemption in case of default of payment on a certain date, is regarded a clog on redemption as it bars or restricts the redemption. In *Mohd. Sher Khan v. Seth Swami Dayal*\(^2\), the mortgage was for a term of five years. A stipulation in deed said that if the mortgagor failed to pay the money, the mortgagee was entitled to take possession of the property for next 12 years, during which the mortgage could not be redeemed. The Privy Council held the stipulation to be a clog on redemption for it hindered the right of redemption.

d) Restraint on Alienation. A condition, which restrains the mortgagor from transferring mortgage-property is a clog. In a mortgage, the mortgagor only transfers an interest in the property and still has residuary ownership. He has every right to transfer the property by sale, gift etc and can even, effect another mortgage.

e) Collateral benefits to Mortgagee. Collateral benefits to mortgagee are not necessarily clog on the redemption. In order to establish that the collateral benefits are clog on the redemption it is necessary that:

a. The collateral benefits given to the mortgagee are unfair and unconscionable, and

\(^2\) *AIR (1922) PC 17.*
b. The collateral benefits to mortgagee are part of the transaction of mortgage and not an independent benefit.

In *Kreglinger v. New Patagonia Meat & Cold Storage Company Ltd.*,\(^2\) there was an agreement dated 24 August 1910, whereby a firm of wool brokers agreed to lend to a company carrying on the business of meat preservers a sum of £10,000 at 6 per cent. The deed further provided that if the interest was punctually paid the loan was not to be called in until 30 September 1915, but the company might pay off at any time on giving one calendar months’ notice. The loan was secured by a floating charge on the undertaking of the company. The agreement provided that for a period of five years from the date thereof the company should not sell sheepskins to any person other than the lenders so long as the latter were willing to buy at the best price offered by any other person and that the company should pay to the lenders a commission on all sheepskins sold by the company to any other person. The loan having been paid off by the company in January 1913, in accordance with the agreement, the lenders claimed to exercise their option of pre-emption notwithstanding the payment off of the loan. The House of Lords held the stipulation for the option of pre-emption formed no part of the mortgage transaction, but was a collateral contract entered into as a condition of the company obtaining the loan. It was not a clog on the equity of redemption or repugnant to the right to redeem and the lenders were entitled to an injunction restraining the company from selling sheepskins to any person other than the lenders in breach of the agreement.

\(^2\) (1914) AC 25.
f) Penalty in Case of Default. An agreement which amounts to penalty in case of non-payment of debt is a clog on redemption.

CASES ON EQUITY OF REDEMPTION.

In *Seth Gangadhar v. Shankar Lal and Ors*[^22^], it was admitted that the transaction was that of a mortgage and Section 60 of the Transfer of Property Act was applicable. The Court held that therein the term of mortgage was 85 years and there existed no stipulation entitling the mortgagor to redeem during that term which had not expired. The document in question was held by this Court to be containing a stipulation creating a clog on the equity of redemption which was found to be illegal.

In *Pomal Kanji Govindji and Ors. v. Vrajlal Karsandas Purohit and Ors.*[^23^], the Court held that whether a clause used in a transaction of mortgage amounted to clog on the equity of redemption is a mixed question of law and fact. In that case, there existed a provision for payment of interest at the rate of half per cent per annum payable on the principal amount at the end of the long period which led the Court to conclude that there was a clog on equity of redemption. Furthermore, in that case, materials were brought on record to show that the transaction was entered into by way of security for the loan obtained.

In *Shivdev Singh and Anr. v. Sucha Singh and Anr.*[^24^], the Court was dealing with a case of anomalous mortgage. Therein the mortgage was to remain operative for a period of 99 years. It was in that case...

[^22^]: 1959 SCR 509.
situation, this Court opined that the original owner having been in great financial difficulty, the mortgagees took advantage of the said fact and incorporated a 99 year's term which constituted a clog on the equity of redemption.

So, any condition imposed in the deed of mortgage itself which places any restrictions on the right of redeeming the mortgage is a clog in the equity of redemption and, as such, repugnant to law and void [Mir Zaman V. Ashraf Khan, PLD 1959].

Exercise of the right of redemption:
The mortgagor’s right of redemption is exercised,-

i. By paying or tendering mortgage-money to the mortgagee outside the court, i.e. privately;

ii. By depositing the amount in the court; and

iii. By a suit for redemption, payment or tender.

Tender means an unconditional offer to pay the money under such circumstances that the mortgagee may receive the money there. (Section 38 of the Contract Act, 1872).

Extinguishment of right of redemption:-
The mortgagor’s right of redemption is extinguished:

a) By foreclosure (section 67);

b) When the mortgagee has exercised power of sale (section 68);

c) When it becomes barred under the Limitation Act, 1908.
“The right of mortgage-deed can come to an end only in manner known to law”.

- Jaya Singh V. Krishna, AIR 1985 S.C. 1646

“Redemption of mortgaged property- period of limitation- where mortgagee had transferred mortgage right to new mortgagee before expiry of period of limitation, period of limitation would start from transfer of mortgage and not from original mortgage”.

- Faqir Gul V. Abdur Rahman, 1999 CLC 346

So, the mortgagor’s right on redemption are,-

1. Delivery of the mortgage-deed and document of title relating to the mortgaged property,
2. Possession, and
3. Reconveyance or acknowledgement.

# Redemption of portion of mortgaged property:-

Section 60 of TP Act also provides that a person interested in a share only of the mortgaged property is not entitled to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

# Right to redeem separately or simultaneously:-

According to s 61 of TP Act, a mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages has become due, be entitled
to redeem any one such mortgage separately, or any two or more of such mortgages together.

In the case of Muhammad Hossain V. Inayat Ali, PLD 1952 Lah.372 it was held that “If the plaintiffs wish to redeem the first two mortgages they must redeem them entirely and cannot ask for their own share only. They must pay the entire mortgage money and if that is so, they must obtain the entire property under the mortgage”.

Obligation to transfer to third party instead of re-transference to mortgagor:

Section 60-A states that-

“1) Where a mortgagor is entitled to redemption, then, on the fulfilment of any conditions on the fulfilment of which he would be entitled to require a re-transfer, he may require the mortgagee, instead of re-transferring the property, to assign the mortgage-debt and transfer the mortgaged
property to such third person as the mortgagor may direct; and the mortgagee shall be bound to assign and transfer accordingly.

(2) The rights conferred by this section belong to and may be enforced by the mortgagor or by any encumbrancer notwithstanding an intermediate encumbrance; but the requisition of any encumbrancer shall prevail over a requisition of the mortgagor and, as between encumbrancers, the requisition of a prior encumbrancer shall prevail over that of a subsequent encumbrancer.

(3) The provisions of this section do not apply in the case of a mortgagee who is or has been in possession.”

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❖ Right to inspection and production of documents:

Section 60-B states that:
“A mortgagor, as long as his right of redemption subsists, shall be entitled at all reasonable times, at his request and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts or, extracts from, documents of title relating to the mortgaged property which are in the custody or power of the mortgagee”.

This section makes it clear that a mortgagor has a right to inspect and take copies of documents of title relating to the mortgaged property which are in possession of the mortgagee. This right subsists so long as his right of redemption subsists.

In the case of Jaya Singh V. Krishna, AIR 1985 S.C. 1646, it was held that:

“The right of mortgage-deed can come to an end only in manner known to law”.

In V. Paily V. K. Augusty, AIR 1967 Ker. 247 a full bench of High Court observed that:

“There is no debate on the basis of which right of redemption come to an end”.

# Right of usufructuary mortgagor to recover possession:-

Section 62 of TP Act provides that in the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee,-

- where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits of the property,-when such money is paid;

- where the mortgagee is authorised to pay himself from such rents and profits or any part thereof a part only of the mortgage-money,-when the term (if any) prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the mortgage-money or the balance thereof or deposits it in court.
#Accession to mortgaged property:

Section 63 says that-

“Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

Accession acquired in virtue of transferred ownership: Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property; the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine percent. per annum.

In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to
the contrary, be set off against interest, if any, payable on the money so expended”.

The term “accession” primarily denotes physical accretions or additions whether brought about by natural or artificial means.

The general rule is that where mortgaged property in possession of the mortgagee has received any accession, the mortgagor, upon redemption, is entitled to such accession. This rule is only an application of the equitable principle enacted in section 90 of the Trusts Act, 1882.  

Section 90 of the Trusts Act, 1882 says: “Where a tenant for life, co-owner, mortgagee or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the

25 ACT NO. II OF 1882.
property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted, in gaining such advantage.”

- Ways in which accession arise:

Accession or accretion may arise in any one of the following ways:

1. Reasonable way
2. Artificial way

1. Reasonable way: The general rule is that reasonable or natural accession to the mortgaged property are subject to redemption. For instance, where the area of a village mortgaged without specification of boundaries was increased as a survey settlement, the mortgagor was held to be entitled to the increase.26

2. Artificial way: Artificial or acquired accessions have been sub-divided into:

   (a) Separable, and
   (b) Inseparable

(a) Separable accessions: Where the accession is capable of separate possession or enjoyment without detriment to the

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26 Sadashiv Anand V. Vithal,(1874) 11 Bom. H.R.C. 32. A.C.J.
principle property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. For instance, where the mortgagee, during the continuance of the mortgage sets up a temporary structure on the mortgaged property, the mortgagor, if he desires to take it, must pay the cost of the structure to the mortgagee.

(b) Inseparable accessions: If separate possession or enjoyment is not possible, the accession must be delivered with the property. The mortgagor is bound to pay compensation only in two cases: (1) where the acquisition was necessary to preserve the property from destruction, forfeiture or sale; (2) where it was made with the mortgagor’s consent.

In these two cases, compensation, i.e., the proper cost of acquisition should be paid in addition to the principle money with interest at the same rate is payable on the principle or, where no such rate is fixed, at the rate of nine percent per annum (Vide Sec. 63, para, 2).

- **Contrast with Sec. 86 & 87 of SAT Act**:\n
  Section 86 of SAT Act deals with dilluvion and says that the right, title and interest of the original tenant or his successor-in-interest in the land lost by dilluvion shall subsist if such land re-appear in situ within thirty years of their loss. However, this provision will not apply to the cases where re-appearance of land takes place because of any artificial or mechanical process.

  Section 87 deals with alluvion and says when any land has been gained by accession (alluvion), whether from the recess of a river

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27 EAST BENGAL ACT NO. XXVIII OF 1951)
or of the sea, it shall not be considered as an increment to the holding or tenancy to which it may be annexed rather it will vest to the government as khas land.

So, it appears that natural accessions will vest to the government.

#Improvements to mortgaged property:
Section 63-A says that,

“(1) Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement; and the mortgagor shall not, save only in cases provided for in sub-section (2), be liable to pay the cost thereof.

(2) Where any such improvement was effected at the cost of the mortgagor and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent. per annum, and the profits if any, accruing by reason of the improvement shall be credited to the mortgagor.”
• General rule: Sub-section (1) lays down the general rule that ordinarily a mortgage is not at liberty to make improvements and charge the mortgagor therewith. With this end in view, the sub-section laid down that where mortgaged in possession of the mortgagee has been improved, the mortgagor upon redemption is entitled to the improvement. The object is to prevent mortgagee from spending large sums of money and then charging the mortgagor for it and in consequence make it impossible for him to redeem.

• Exceptions: Sub-section (2) lays down that the mortgagor shall be liable to pay the cost of improvements in the following cases only,-

- If improvement was necessary to preserve the property from destruction or deterioration, or
- Was necessary to prevent the security from becoming insufficient, or
- Was made in compliance with the lawful order of any public servant or public authority.

In the case of State Bank of Pakistan V. Khaledar Ma, 14 DLR 735, it was held that,

“Mortgagor is liable to pay cost for improvement when any when any of the tests under the section is fulfilled.”
Rights and Liabilities of the Mortgagee (s.67-77):

Mortgagee

Rights
(Ss. 67-73)

Liabilities
(Ss. 67A, 76, 77)

Rights of the Mortgagee: [Sections: 67-72 of TP Act 1882]:-

- Right to Foreclosure or sale [Section: 67];
- Mortgagee when bound to bring one suit on several mortgages [Section: 67A];
- Right to sue for mortgage-money [Section: 68(1)];
- Power of sale when valid [Section: 69];
- Rights of mortgagee in possession [Section: 72]

# Right to Foreclosure or sale:--

Section 67 of TP Act provides that in the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become due to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited, a right to obtain from the court a decree that the mortgagor shall be absolutely
debarred of his right to redeem the property, or a decree that the property be sold.

A suit to obtain a decree that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure.

However, nothing of the above provisions shall be deemed-

- to authorise any mortgagee other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or a usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale; or
- to authorise a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure; or
- to authorise the mortgagee of a railway, canal, or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or
- to authorise a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.
This section is the counterpart of section 60, and gives the mortgagee a right of foreclosure or sale in default of redemption by the mortgagor. If the mortgagor has paid or deposited the mortgaged money, there is no occasion for the exercise of the right of foreclosure or sale. Again, if a decree for redemption is made, a suit for foreclosure or sale would be infractuous, especially as a redemption decree itself provides for sale or foreclosure in default of payment.

Difference between right to foreclosure and right of redemption:

There is, however, one fundamental point of difference between the mortgagor’s right of redemption and the mortgagee’s right to foreclosure or sale. The difference is that the right of redemption is not subject to a contract to the contrary while the right to foreclosure or sale may be curtailed by the agreement of the parties. This is quite clear from the opening words of sections 60 and 67.

Section 60 is not prefaced by any such words as “In the absence of a contract to the contrary”.

Section 67 opens with the words “In the absence of a contract to the contrary”.

The reason for the distinction is that the mortgagor requires protection against oppression, while the mortgagee not being in need of the same protection may curtail his right.
What is meant by foreclosure? A mortgage is foreclosed when the mortgagee obtains a decree that the mortgagor shall be absolutely debarred of his right to redeem the property. Such a decree puts an end to the equity of redemption and makes the mortgagee absolute owner of the property.

Who may sue for foreclosure? The remedy of foreclosure is available only to a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose.

Partial foreclosure or sale:

The last paragraph of section 67 is an illustration of the rule of indivisibility of mortgage. The rule is that one of the several mortgagees have, with the consent of the mortgagor, served their interests under the mortgage. The reason for this rule is to protect the mortgagor from being harassed by a multiplicity of suits where the severance of interest of the mortgagees has taken place without the consent of the mortgagor. Accordingly, all the co-mortgagees must join together and file one suit in respect of the whole mortgage-money.

★Hasina Begum vs Haji Md Ekramullah, 34 DLR 116

“If the mortgagee is not foreclosed and the mortgagor’s right to redemption is not debarred. So far as the right to redeem is concerned, a mortgagee by a conditional sale like other
mortgages will be governed by provisions of the Transfer of Property act.”

★ Moulvi Ruhul Amin V. Bazal Huq, 31 DLR 165

“Stipulation that if money is not paid within 15 years the purchaser shall have the right to foreclose – section 67 applies.”

# Mortgagee when bound to bring one suit on several mortgages:-

Section 67A provides that a mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under s 67, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due.

# Right to sue for mortgage-money:-

Section 68(1) provides that the mortgagee has a right to sue for the mortgage-money in the following cases and no others, namely,-

✓ where the mortgagor binds himself to repay the same;
✓ where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is
rendered insufficient within the meaning of s 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so;

✓ where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor;

✓ where the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor.

However, in the case referred to in clause (a), a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money.

Section 68(2) provides that where a suit is brought under clause (a) or clause (b) of sub-section (1), the court may, at its discretion, stay the suit and all proceedings therein, notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and, if necessary, re-transfers the mortgaged property.
# Power of sale when valid:-

Section 69 provides that a mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section have power to sell or concur in selling the mortgaged property or any part thereof, in default of payment of the mortgage-money, without the intervention of the court, in the following cases and in no others, namely:

- where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muslim or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the Government, in the Official Gazette;
- where a power of sale without the intervention of the court is expressly conferred on the mortgagee by the mortgage-deed and the mortgagee is the government; or schedule bank as defined in Art 37 of the Bangladesh Bank Order 1972; and
- where a power of sale without the intervention of the court is expressly conferred on the mortgagee by the mortgage-deed and the mortgaged property or any part thereof was, on the date of the execution of the mortgage-deed, situate within the town of Dhaka or in any other town or area which the Government may, by notification in the Official Gazette, specify in this behalf.
However, as s 69(2) provides, the above power of sale must not be exercised unless and until –

- notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or
- some interest under the mortgage amounting at least to Tk 500/- is in arrear and unpaid for three months after becoming due.

Provided that the power of a schedule bank under clause (b) of s 69(1) as mentioned above should further be subject to such conditions as may be prescribed in this behalf by notification in the official Gazette by the Government in consultation with the Bangladesh Bank.

In the English case of *Hoole V. Smith*,28 the mortgage deed provided that the power of sale was not to be exercised unless and until notice had been given in writing to the mortgagor, his executors, administrators or assigns to pay off the moneys for the time being due and owing on the said indenture of mortgage.

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28 (1881) 17 Ch. D 434
**#Right to appoint a receiver:**

Section 69A, Transfer of Property Act provides that a mortgagee having the right to exercise a power of sale under section 69 shall, subject to the provisions of sub-section (2), be entitled to appoint by writing signed by him or on his behalf, a receiver of the income of the mortgaged property or any part thereof.

The receiver was initially appointed by the mortgagor but later on he could be appointed, if provided in the deed, by the mortgagee himself on behalf of the mortgagor so that the receiver was the agent of the mortgagor [Gaskell V. Gosling, (1896) 1 Q.B. 669,672]

**# Right of accession to property:**

If any addition is made to the mortgaged property, the mortgagee is entitled to such addition for the purpose of security provided there is no contract to the contrary. [Section 70]

For example, A mortgages a certain plot of land to B and afterwards constructs a building on it. B is entitled to the building and land as security for the loan.

This section is not limited to physical or natural accessions but also embraces an increase or enlargement of interest. Thus, if the mortgagor discharges a prior mortgage existing at the date of the mortgage, the increase in value of the estate is for the benefit of the mortgagee. [Shayama Charan V. Ananda Chandra, (1898) 3 cal. W.N 323]
## Right to the benefit of the renewed lease:

Where the mortgaged property is a lease, and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall for the purposes of the security be entitled to the new lease. [Section 71].

The principal is that a renewed lease is a draft upon the old stock and is, therefore, subject to the same equities regarding redemption as the old lease [Moody V. Mathews, 2 ves. 174].

## Rights of mortgagee in possession:-

Section 72 of TP Act provides that a mortgagee may spend such money as is necessary –

- for the preservation of the mortgaged property from destruction, forfeiture or sale;
- for supporting the mortgagor's title to the property;
- for making his own title thereto good against the mortgagor; and
- when the mortgaged property is a renewable lease-hold, for the renewal of the lease;

and may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and, where no such rate is fixed, at the rate of nine percent per annum:
Provided that the expenditure of money by the mortgagee under clause (2) or clause (3) shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property, and the premiums paid for any such insurance shall be added to the principal money with interest at the same rate as is payable on the principal money or, where no such rate is fixed, at the rate of nine per cent per annum. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed or (if no such amount is therein specified) two-thirds of the amount that would be required in case of total destruction to reinstate the property insured.

#Right to proceeds of revenue sale or compensation on acquisition:

Section 73 of TP Act provides that –

✓ Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole
or in part, out of any surplus of the sale proceeds remaining after payment of the arrears and of all charges and deductions directed by law.

✓ Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894, or any other enactment for the time being in force providing for the compulsory acquisition of immoveable property, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of the amount due to the mortgagor as compensation.

✓ Such claims shall prevail against all other claims except those of prior encumbrancers, and may be enforced notwithstanding that the principal money on the mortgage has not become due.

Liabilities of the mortgagee:

#Liability to bring one suit on several mortgages:

Section 67A, Transfer of Property Act provides that a mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under section 67 and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage money has become due.
Liabilities of mortgagee in possession: - [Section: 76 of TP Act 1882]:-

According to s 76 of TP Act, when, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, -

- He must manage the property as a person of ordinary prudence would manage it if it were his own;
- He must try his best endeavors to collect the rents and profits thereof;
- He must, in the absence of a contract to the contrary, out of the income of the property, pay the government revenue, all other charges of a public nature and all rent accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold;
- He must in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in clause (c) and the interest on the principal money;
- He must not commit any act which is destructive or permanently injurious to the property;
- Where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy or so much thereof as may be necessary, in reinstating the property, or, if the
mortgagor so directs, in reduction or discharge of the mortgage-money;

✓ he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported;

✓ his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation-rent in respect thereof, shall, after deducting the expenses properly incurred for the management of the property and the collection of rents and profits and the other expenses mentioned in clauses (c) and (d), and interest thereon, be debited against him in reduction of the amount (if any) from time to time due to him on account of interest and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money; the surplus, if any, shall be paid to the mortgagor;

✓ when the mortgagor tenders, or deposits in the manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, notwithstanding the provisions in the other clauses of this section, account for his receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of court, as the case may be, and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after
such date or time in connection with the mortgaged property.

Under section 76© of the transfer of Property act, mortgagees are responsible for sale of the property in execution of a decree for arrears of rent even though they are for a period prior to the execution of the deed of mortgage [Alip Chand V. Karamulla, 6 DLR 115].

Eshad Ullah Haji V. Muhammad Hossain, 3 DLR 480

“When the deed is admitted to be a mortgage deed by both the parties, the mortgagor, the plaintiff in the redemption suit, is certainly entitled to accounts under section 76 of the Transfer Of Property Act.”

Some Doctrines Regarding Mortgage:-

- Doctrine of Priority [Sections: 78, 79 of TP Act 1882];
- Doctrine of Marshalling [Section: 81 of TP Act 1882];
- Doctrine of Contribution [Section: 82 of TP Act 1882]

#Doctrine of Priority [Sections: 78, 79 of TP Act 1882]:

- The fundamental rule is: “he who is prior in time is prior in right (qui prior est tempore posterior est jure)”.

The general rule is that in case of different mortgages on the same property, successive mortgage is paid after the prior mortgage has been satisfied.

In case of not satisfying both out of the mortgage property, then prior mortgage should be first satisfied.

But where the prior mortgages suffers from fraud, misrepresentation or gross neglect, the subsequent mortgage shall have priority over prior mortgage, or of any other person who has for consideration acquired an interest in any of the properties. [Section 78].

If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage. [Section 79].

Illustration: A mortgages Sultanpur to his bankers, B & Co., to secure the balance of his account with them to the extent of Tk. 10,000. A then mortgages Sultanpur to C, to secure Tk. 10,000, C having notice of the mortgage to B & Co., and C gives notice to B & Co. of the second mortgage. At the date of the second mortgage, the balance due to B & Co. does not exceed Tk. 5,000. B & Co., subsequently advance to A sums making the balance of the account against him exceed the sum of Tk. 10,000. B & Co., are entitled, to the extent of Tk. 10,000, to priority over C.
# Doctrine of Marshalling:

Marshalling means to arrange. Section 81 of the TP Act provides that if the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgage is, in the absence of a contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties.

Illustration:-

Raja mortgages his two properties X and Y to Rumi and then mortgages Y to Rana. If Rumi seeks to realize his mortgage out of Y, Rana can compel Rumi to proceed first against X and realize the debt from it. In case Rumi is unable to realize the whole amount due to him from X, he is entitled to recover the balance from Y.

The words “but not so as to prejudice the rights of the prior mortgagee” cannot be construed as giving the prior mortgagee a right to have the properties mortgaged to him sold in any order that he may prefer [40 CWN 1173].

The purchaser of the property in execution of his mortgage decree is entitled to enforce the rights of marshalling against a prior mortgagee so long as that prior mortgage is not extinguished [42 CWN 502].
The doctrine of marshalling embodied in this section is stated by Lord Eldon in Aldrich V. Cooper$^{29}$ as follows:

“If a creditor has two funds, the interest of the debtor shall not be regarded, but the creditor having two funds shall take that which, paying him will leave another fund for another creditor.”

The underlying principle behind the doctrine is that “One man should not be permitted to do an injury to another.”

**Conditions of Marshalling:**

4 conditions:-

iv. There is a common debtor (mortgagor)

v. Firstly mortgaged to one person then to another

vi. It must not be prejudiced to the first mortgagee as well as 3rd person claiming as purchaser

vii. There is no contract to the contrary.

**Contract to the contrary:**

The right of marshalling may be excluded by contract. Thus, if A mortgages X and Y to B, and A then mortgages X to C, C will have no right to require B to realize his mortgage as far as possible out of Y if C’s mortgage has been made expressly subject to and after satisfaction of B’s mortgage. The converse is also true, for if there is a third encumbrancer thus:-

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$^{29}$ (1803) 8 Ves. 382
A mortgages X & Y to............................B
A mortgages X to...............................C
A mortgages X & Y to............................D

Then if D’s mortgage has been made expressly subject to and after satisfaction of the two prior mortgages, D could not prevent C from marshalling against him.³⁰

Limitations of Rule:

The claim to marshal must not be allowed to prejudice the rights of the first mortgagee or of others who have acquired an interest for consideration. For instance, if two estates, X and Y belonging to the same person are first mortgaged to B, then X is mortgaged to C and then Y to D, C would not be permitted to compel B to marshal in his favour, if that course would prejudice D. similarly, D could not compel B to resort in the first instance to the estate X.

Mr. A  X  Y  B
               C
               D

Doctrine of Marshalling is meant to providing justice to both the parties to the mortgage. Its main aim is to see that any of the

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³⁰ Re Mower’s Trusts (1869) LR 8 Eq 110; Deratha Pullaya V. Jaldu Manikyala Rao, AIR 1962 Ap 425.
creditors is not deprived of satisfaction. Here equality of treatment lies among different shares of creditors. It is an example of the maxim, “equality is equity”.

So, the basis of Marshalling is that “the mortgagee should not act in such way which can hamper the right of other mortgagee”.

**# Doctrine of Contribution:-**

Section 82 of the TP Act deals with the doctrine of contribution. It provides that where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date.

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of former debt from the value of the property out of which it has been paid.
However, the above provisions are not applicable to a property liable under s 81 to the claim of the subsequent mortgage. Thus it is in effect declared that, where marshalling and contribution might conflict with each other, marshaling is to prevail. For example, the owner of two properties, X and Y after mortgaging them separately to Rumi and Rana, mortgages them together to Raisa, and then mortgages X to Rafi. Here Rafi is under s 81 entitled to compel Raisa to resort to property Y and satisfy his claim out of that security as far as it will go.

Section 82 applies to mortgagors inter se and gives one mortgagor a right to have the other’s property contribute to the discharge of the mortgage debt. This right cannot be availed of against mortgagee or auction purchaser [54 CWN (DR) 287].

The fundamental rule of contribution is – “Equity delights in Equality”. In the case of Steel V. Dixon (1881), Justice Fry observed:-

“Where right in equality, there right is equally in separate form”.

Where a creditor has a single claim against several persons, he has the option of realizing the debt from any one of them, and by the common Law, the debtor who had thus been compelled to pay the debt in full, had no remedy against his co-debtors. But in Equity he could claim contribution from the latter, so that the burden might fall equally on all.
The right to compel marshalling as well as contribution rests upon the principles that a fund which is equally liable with another to pay a debt shall not escape because the creditor has been paid out of that other fund alone; and, on the other hand, that a creditor who has the means of satisfying his debts out of several funds shall so exercise his right as not to take from another creditor or claimant the fund which forms his only security [Ibne Hassan V. Rijibhukhan, (1904) 26 All. 407].

Marshalling supersedes contribution:

By the last paragraph, it is in effect declared that, where marshalling and contribution might conflict with each other, marshalling is to prevail. Thus, if the owner of two properties X and Y:

- Mortgages X to......................A
- Mortgages X to......................B
- Mortgages X & Y to.....................C
- Mortgages X to......................D

Then, X and Y both contribute to C’s mortgage in the portion to their values after deducting from X the amount of A’s mortgage and from Y the amount of B’s mortgage; but under the right of marshalling, D could require C to proceed first against Y. This right of D to marshal would prevail against the right of contribution.

Problem: A, B and C mortgaged their joint property first to D and then to E. A, B and C effected a partition into 3 shares. D brought a suit and realized the amount by the sale of A’s share. A obtained
a decree for contribution against the shares of B and C. then B and C redeemed the puisne mortgage to E and claimed contribution from A. Is their claim maintainable?

Solution: They had no right to contribution as A’s share had been sold to satisfy the prior mortgage debt [Kashi Ram V. Het Singh (1915) ILR 37 All 101]. Under s. 82 the liability to pay contribution is laid on the items of property mortgaged. There is no personal liability. Since A has no item of mortgaged property in his hands, there can be no claim to contribution against him. An item of property sold to discharge a prior incumbrance is not liable for contribution [Bohra Thakur Das V. Collector of Aligarh, 32 All. 612 (P.C.)].

❖ Suit for Redemption:- [Section:91 of TP Act 1882]:-

The Following Persons may sue for redemption:-

Section 91 of the TP Act provides that besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely:

- any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;
- any surety for the payment of the mortgage-debt or any part thereof; or
any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property.

Arab Ali V. Abdul Khaleque Prodhania, 33 DLR 11
“Partial owner of the equity of redemption is entitled to redeem the whole mortgage”.

Samarkand V. Qadar Khan, PLd 1954 Peshwwar 78
“A co-sharer has got such an interest, which entitled him to bring a suit for the redemption of the mortgage”.

Subrogation [Section: 92 of TP Act 1882]:-
Section 92 of the TP Act provides that any of the persons referred to in s 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of
the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

However, the above provisions of s 92 shall not be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

Subrogation is the substitution of one person for another. The doctrine of subrogation confers upon the insurer the right to receive the benefit of such rights and remedies as the assured has against third parties in regard to the loss to the extent that the insurer has indemnified the loss and made it good.

“Insurance company can be subrogated in the position of the insured and thereby become vested with the right of the latter to sue the person liable originally to the insured”

- [12 DLR 690].

Prohibition of tacking:

Section 93 of the TP Act provides that- “No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security; and, except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance”.
Tacking means uniting securities given at different times. For instance, A mortgages his property to B, then to C, and then to D. D pays off B. Under the doctrine of tacking D acquires priority over C not only in respect of B’s mortgage which he has paid off but also in respect of his own. Section 94 of the Act abolished the doctrine with certain exceptions as Section 79.

Section 93 of the Transfer Of Property Act, 1882 now declares that no mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgagee, shall thereby acquire any priority in respect of his original security.

**Other Provisions regarding Mortgage:**

Section 94 deals with the rights of mesne (i.e., intervening) mortgagee.

Section 95 deals with the right of redeeming co-mortgagor to expenses.

Section 96 deals with the mortgage by deposit of title-deeds.

Section 98 deals with the rights and liabilities of parties to anomalous mortgages.

These are the provisions of the Transfer of Property Act, 1882 relating to mortgage. Now providing a quick review of all these provisions below.................
Quick Review the provisions of Transfer Of Property Act relating to Mortgage:-

Quick Review Flow Chart: Mortgage

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/future debt or the performance of an engagement which may give rise to pecuniary liability. The transferor is called mortgagor, transferee is called mortgagee, the principal money and interest is called mortgage-money and instrument is called mortgage deed.

Where principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by mortgagor and attested by at least two witnesses. S. 58

Where principal money has become due, the mortgagor has right, on payment of mortgage money, to require the mortgagee to deliver mortgage deed and all related documents. To deliver possession to mortgagee where mortgagee is in possession and at the cost of mortgagor either to re-transfer the mortgaged property to him or to direct third person or to execute and to have registered an acknowledgement in writing that the interest of mortgagee has been extinguished. S. 60

After the principal money has become due, the mortgagor has right, on payment of mortgage money, to require the mortgagee to deliver mortgage deed and all related documents. To deliver possession to mortgagee where mortgagee is in possession and at the cost of mortgagor either to re-transfer the mortgaged property to him or to direct third person or to execute and to have registered an acknowledgement in writing that the interest of mortgagee has been extinguished. S. 60

A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in absence of contrary contract, when the principal money of any two or more of mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together. S. 61

Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagee upon redemption shall, in the absence of contract to the contrary, be entitled as against the mortgagee to such accession. S. 63

Where the mortgaged property is a lease and the mortgagee obtains a renewal of the lease, the mortgagee shall, in absence of contrary contract, have the benefit of new lease. S. 64

In the absence of contrary contract, the mortgagor shall be deemed to contract with the mortgagee the subsisting interest, that mortgagee shall defend the title, that mortgagor shall pay all public charges when mortgagee is not in possession. S. 65

A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act. S. 66
Recommendations:-

Mortgage is the one kind of mode of transfer among the six modes i.e. Sale, Exchange, Actionable claim, Mortgage, Gift, Lease. Regarding Mortgage in Transfer of Property Act 1882, there are sufficient laws but the application of these laws in the practical field is not well-founded. So, it is expected that the statutory law will be implemented in the practical field. Most of the provisions in the Act are not applicable to the contract for mortgage as most of the section contain the sentence “in the absence of contract to the contrary”. I think these provisions should be followed in the contract for mortgage otherwise the contract will be voidable. It is also expected that the rights of the mortgagor and mortgagee must be more protected by adding some additional provisions.

Conclusion:-

Mortgage is a transfer of an interest in specific immovable property as a security for the repayment of a monetary liability. This liability could be arising out of money already advanced or to be advanced; it could be future debt or it could be pecuniary liability arising out of the non-performance of any engagement. A mortgage corresponds to the Hypotheca of Roman Law. The creditors, on the failure of the debtor to pay the debt, could being the debtor’s property to sale and recoup him. To conclude it can be said that the provisions of the Transfer of Property Act, 1882
relating to mortgage successfully met the expectation and demand of the mortgagor and mortgagee though it had many limitations.