UNIT – III

Mortgages of Immovable Property

Definition • Kinds of Mortgages • Rights & Liabilities • Priority • Marshalling • Charges

Including Landmark Judgments

OVERVIEW

Unit Structure

01 **Definition & Essential Features**

S. 58 – mortgage defined

02 **Kinds of Mortgages**

Simple, Mortgage by conditional sale, Usufructuary, English, Anomalous

03 **Rights & Liabilities**

Of mortgagor and mortgagee – redemption, foreclosure, sale

04 **Priority, Marshalling, Contribution & Charges**

Ss. 78–82, 100

Definition of Mortgage

Section 58(a): 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 the mortgagor, the transferee the mortgagee; the principal money and interest of which payment is secured are called the mortgage-money, and the instrument (if any) is called the mortgage-deed.

Essential features:
- Transfer of an interest (not ownership)
- In specific immovable property
- To secure a debt or engagement
- The interest is accessory to the debt

Kinds of Mortgages – Overview

Simple Mortgage

S. 58(b) – mortgagor binds himself personally and agrees that on default the mortgagee may cause the property to be sold

Mortgage by Conditional Sale

S. 58(c) – ostensible sale with condition of re-transfer on payment; must be in the same document

Usufructuary Mortgage

S. 58(d) – mortgagee gets possession and appropriates rents/profits in lieu of interest or principal

English Mortgage

S. 58(e) – transfer of ownership with proviso for re-transfer on payment on a certain date

Mortgage by Deposit of Title Deeds

S. 58(f) – equitable mortgage in notified towns

Anomalous Mortgage

S. 58(g) – any mortgage not falling under the above

Simple Mortgage & Mortgage by Conditional Sale

Simple Mortgage

Mortgagor binds himself personally to pay the mortgage-money and agrees that in the event of default the mortgagee shall have the right to cause the mortgaged property to be sold and the proceeds applied in payment.

No delivery of possession. Mortgagee’s remedy is primarily by sale through court.

Mortgage by Conditional Sale

The mortgagor ostensibly sells the property on condition that on default of payment on a certain date the sale shall become absolute, or on condition that on such payment the buyer shall transfer the property to the seller.

The condition must be embodied in the same document. Otherwise it is treated as a sale.

Usufructuary & English Mortgage

Usufructuary Mortgage

Mortgagor delivers possession to the mortgagee and authorises him to retain possession until payment and to receive rents and profits and appropriate them in lieu of interest or in payment of the mortgage-money.

No personal liability of mortgagor. Mortgagee's rights are limited to possession and appropriation of profits.

English Mortgage

Mortgagor binds himself to repay on a certain date and transfers the property absolutely to the mortgagee, subject to a proviso that the mortgagee will re-transfer on payment of the mortgage-money.

Common in urban areas. Mortgagee gets ownership subject to the equity of redemption.

Rights of Mortgagor

• Right of Redemption (S. 60) – After the principal money has become due, the mortgagor has the right to redeem on payment of the mortgage-money. This right is called the equity of redemption and cannot be clogged.

• Right to inspection and production of documents (S. 60B)
• Right to redeem separately when property is mortgaged to successive mortgagees (S. 61)
• Accession to mortgaged property (S. 63)
• Right to renewal of mortgage (S. 64)
• Implied contracts by mortgagor (S. 65) – to defend title, pay public charges, etc.
• Waste by mortgagor in possession (S. 66)

Landmark principle: “Once a mortgage, always a mortgage” – any clog on the equity of redemption is void.

Rights of Mortgagee

- Right to foreclosure or sale (S. 67) – depending on the nature of the mortgage
- Right to sue for the mortgage-money in certain cases (S. 68)
- Power of sale without intervention of court in English mortgages and certain other cases (S. 69)
- Accession to mortgaged property (S. 70)
- Renewal of mortgaged lease (S. 71)
- Right to spend money for preservation, support, renewal (S. 72) and add it to the mortgage-money
- Right to proceeds of revenue sale or acquisition (S. 73)

The mortgagee's rights are primarily to recover the debt; the property is only security.

Liabilities of Mortgagor and Mortgagee

Mortgagor's Liabilities

- To repay the mortgage-money
- Not to commit waste (S. 66)
- To pay public charges and rents where he is in possession
- To discharge prior encumbrances if so contracted
- To protect the title of the mortgagee

Mortgagee's Liabilities

- To manage the property as a person of ordinary prudence (if in possession)
- To collect rents and profits diligently
- Not to commit waste
- To keep proper accounts
- To apply insurance money in reinstatement or reduction of debt (S. 76)

Priority of Securities

General rule: Priority is determined by the order of time of creation of the mortgages (qui prior est tempore potior est jure).

Section 78: Where through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

Section 79: If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum amount secured, a subsequent mortgage of the same property shall be postponed to the prior mortgage in respect of all advances up to that maximum (even if made after the subsequent mortgage), provided the subsequent mortgagee has notice of the prior mortgage.

Marshalling of Securities

Section 81: 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 mortgagee is entitled to have the prior mortgage-debt satisfied out of the property not mortgaged to him, so far as it will extend, so as not to prejudice the rights of the prior mortgagee or of any other person who has acquired an interest for consideration in any of the properties.

This is the doctrine of marshalling – the subsequent mortgagee can compel the prior mortgagee to proceed first against the property that is not the security for the subsequent loan.

It is an equitable right and can be modified by contract.

Contribution to Mortgage Debt

Section 82: Where several properties are subject to a common mortgage and one of them is sold to discharge the mortgage, the other properties are liable to contribute rateably to the debt.

The rateable contribution is in proportion to the value of the properties at the date of the mortgage (after deducting the amount of any other mortgage or charge to which they may have been subject at that date).

This prevents one property from bearing the entire burden when several properties were given as security.

Charges

Section 100: Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property.

All the provisions of the Act which apply to a simple mortgage apply so far as may be to a charge.

Difference from mortgage: In a charge there is no transfer of interest; only a right to receive payment out of the property. A charge is not a transfer of an interest in the property.

Examples: Maintenance charged on property, unpaid vendor's charge, charge created by will or decree.

Landmark Judgments on Mortgages

Kreglinger v. New Patagonia Meat Co. (1914)

Classic authority on clog on the equity of redemption – collateral advantages may be valid if not unconscionable.

Ganga Dhar v. Shankar Lal (1958)

Supreme Court on the nature of the right of redemption and the invalidity of clogs.

Pomal Kanji Govindji v. Vrajlal Karsandas Purohit (1989)

On the distinction between mortgage by conditional sale and outright sale.

Narandas Karsondas v. S.A. Kamtam (1977)

On the rights of a mortgagee in possession and accounting obligations.

Further Important Decisions

Seth Ganga Dhar v. Shankar Lal

Once a mortgage always a mortgage – any condition that prevents redemption is a clog and void.

Meenakshi Mills v. CIT

On the nature of English mortgage and transfer of ownership.

Rukmani Ammal v. Jagdesa Gounder

On the rights of a usufructuary mortgagee and the period of redemption.

State of Punjab v. Surjit Kaur

On charges and their enforcement.

AT A GLANCE

Kinds of Mortgages – Quick Comparison

Type	Possession	Ownership	Main Remedy
Simple	No	No	Sale
Conditional Sale	No	Ostensible	Foreclosure
Usufructuary	Yes	No	Possession
English	Usually Yes	Yes (subject to proviso)	Sale / Foreclosure
Deposit of Title Deeds	No	No	Sale

Practical Points for Students & Practitioners

• Always examine whether a document is a mortgage or a sale – the nomenclature is not decisive; the intention and terms matter.

• Equity of redemption is a valuable right and any clog is viewed with suspicion by courts.

• In English mortgages and mortgages with power of sale, the procedure under S. 69 must be strictly followed.

• For anomalous mortgages the rights and liabilities are determined by the terms of the contract and local usage.

• Registration is compulsory for mortgages (other than deposit of title deeds) where the principal money is ₹100 or more.

SUMMARY

Key Takeaways – Unit III

- A mortgage is a transfer of an interest in specific immovable property to secure a debt.
- There are six recognised kinds of mortgages under S. 58.
- The right of redemption is inviolable – once a mortgage, always a mortgage.
- Priority is generally according to time, subject to exceptions for fraud, notice and future advances.
- Marshalling and contribution ensure equitable distribution of the burden among multiple properties.
- A charge is different from a mortgage – it creates no interest in the property, only a right to payment out of it.

Quick Reference – Important Sections

Definition & Kinds of Mortgages	S. 58
Right of Redemption	S. 60
Rights of Mortgagee (Foreclosure/Sale)	Ss. 67–69
Mortgagee in Possession – Duties	S. 76
Priority & Postponement	Ss. 78–79
Marshalling	S. 81
Contribution	S. 82
Charges	S. 100

End of Unit – III

Mortgages of Immovable Property
Kinds • Rights • Priority • Marshalling • Charges

Proceed to Unit-IV: Sale, Lease, Exchange, Gift & Actionable Claims