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A STUDY ON LAW OF MORTGAGES WITH SPECIAL REFERNCE TO THE RIGHT TO REDMEPTION

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ABSTRACT

Mortgage law is a fundamental aspect of property law, governing the rights and obligations of borrowers and lenders in securing loans with immovable property. This article delves into the concept of mortgage laws, focusing on the historical developments, what are the restrictions and its validity and Parital redemption.

Further, the article addresses the legal framework, covering the SARFAESI Act, Transfer of Property Act, and Limitation Act, which collectively influence the enforceability, recovery, and redemption rights within mortgage law. A comparative analysis between the SARFAESI Act and the Transfer of Property Act emphasizes the tension between expedited asset recovery for lenders and extended redemption rights for borrowers. Through this discussion, this article focuses on balance between borrower protection and lender security in mortgage law, underscoring its broader economic and social implications.

INTRODUCTION TO MORTGAGE LAW

Sometimes there arises a need in peoples life to mortgage the property, to invest the amount that is brought out of it, to settle the debts that was brought and much more . But, what does mortgage law mean, why do we need a law to regulate such procedure?

The definition of mortgage is best given under section 58(a) of the Transfer of Property act, which states 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. In such transaction, the person who transfers is called mortgagor and the one who receives is called as mortgagee. The principal amount and the interest of which the payment is secured is called the mortgage money and the instrument known as mortgage deed.

Remember it involves only immovable property and whereas, if it deals with movable property it will be dealt under pledge. But if asked whether the ownership is transferred, the answer is no, only the temporary possession of the property is transferred. Then how will the mortgagee receive the property back? It is by the way of right to Redemption.

LENDER BORROWER RELATIONSHIP IN MORTGAGE LAW

The relationship between the lender and borrower is bound by a contract where the lender receives the property as a security to the extended loan amount. The essentials of the relationship are:

1. CONTRACTUAL OBLIGATION : The parties are bound by a contract under the mortgage instrument , where the mortgagor has right to redemption and mortgagor has right to sell the property if the conditions of the mortgage are not met out.

2. SECURED DEBT : The mortgagor extends the property as a secured debt, where the interest of the property ensures if the mortgagor defaults, then possession of the property can be taken by the mortgagee.

3. RIGHT TO REDEEM THE PROPERTY: This right is given to borrowers to safeguard their lands from losing it. Once the debt is fully paid by the mortgagor, he can receive the property back to his possession. However , in rare case clogs on redemption right is also given to mortgagees to restrict the redemption conditions.

REGISTRATION OF THE MORTGAGE INSTRUMENT

Section 59 of the Transfer of Property act, 1872 deals about the registration of mortgage Instrument , it states, if the principal amount is above Hundred rupees it has to be registered unless the mortgage is by deposit of title deeds. Which means if the terms and conditions are prescribed in the instrument then registration is mandatory whereas if not mentioned such registration is not required. If the Agreement forms an integral and operational value of the mortgage transaction then it has to be registered [20]

In the case of R. Janakiraman Vs State[21], it was held that to claim a mortgage as a valid mortgage , the deposit of title deeds has to be submitted, because equitable mortgage cannot be made without such submission.

HISTORICAL BACKGROUND

In the early civilizations, pledges were given much importance rather than mortgages, as there was no written form of agreements required to make actual form of the security. The usages of mortgages originates from the jews as they are called the historians of the land mortgaging. Then the concept spread to romans as fiducia which means the property will be forfeited in case of no matter what the value is, then two main concepts were considered important such as pignus and hypotheca . The pignus which means transfer of possession without forfeiture of property, whereas hypotheca means which resembles the modern form of mortgage where the property will remain will remain with the debtor.

The right to redemption in English law called as equity of redemption, was brought by the Amendment act 1929. This right is given to the person who had rights of ownership, by virtue of which he resumes what he parted with. This concept developed during the late- sixteenth century .It was a different approach which reshaped the framework of mortgages. This concept has helped the mortgagor to remain the true owner of property despite lacking title and the mortgagees interest was mere security for debt and the mortgagor can redeem the property once the debt is paid, unless the court orders foreclosure, It has also led to the development of mortgages in the half of seventeenth century.

The supreme court in Thumbasawmy Mudley and Another vs Mahomed Rowthen and Others[22] has held that , the right to redemption is a statutory right stated by judicial committee and reaffirmed by the supreme court

LEGAL FRAMEWORK

The legal Framework governing mortgage law and right to redemption are discussed in key statutes such as transfer of property act, limitation act and SARAESI Act. These act discusses about the rights and liabilities and types of mortgages , enforcement procedure, redemption of security and much more.

The provisions under transfer of property act deals with the definition and types of mortgages, right to redemption , liabilities of mortgagor and mortgagee. whereas the limitation act prescribes the time limit to file a suit of mortgagor in case of right to redemption.

Section 58: This section defines what is mortgage and types of mortgages. This act states that the mortgage is a transfer of an interest in specific immovable property as security for the repayment of debt.[23]

Section 60: This section gives right to borrower to redeem the property once the debt is settled .

Also, SARFAESI ACT ,2002 (The securitisation and

[20] *Madan Lal Sobti v.Rajasthan State Industrial Development and Investment Corporation ltd AIR 2007(NOC)638(DELHI)*
[21] [2006] 1 SCC 697
[22] [1875] ILR 1 Mad 1
[23] madan lal sobti vs rajasthan state industrial development &investment corporation AIR 2007(NOC)638(Del)

Reconstruction of Financial institutions and enforcement of security interest Act, 2002). This act was brought with the object of recovering the Non performing assets(NPA),without the intervention of the court. It favours the lenders right to acquire right over the property if the terms and conditions of the mortgage instrument are not fulfilled. The provisions which deals with the mortgage are:

Section 13: The secured asset can be acquired by the lender without the intervention of the court. It states that after the issue of notice to the borrower, steps can be followed to take the possession of the secured asset.

Section 14: When the secured assets are taken , the secured creditors can seek assistance from the chief Metropolitian magistrate and District magistrate .

Section 17: This discusses about the appeals through debt recovery tribunal(DRT) for borrowers.

Section 61(a): The limitation Act also prescribes the time limit to file suit for right to redemption, under section 61(a). The mortgagor from the date of right to redemption accrues can claim within 30 years the right to redeem the property.

RESTRICTIONS AND LIMITATIONS ON REDEMPTION

CLOGS ON REDEMPTION

When the payment is made by the mortgagor, then without being restrictive to any condition, irrespective of any contrary to the agreement , the mortgagor can redeem the security interest, until it is foreclosed.

As per section 60 of Transfer of property act,1882 it states clearly when viewed in legal perspective, an instrument for mortgage, if it restricts right to redemption , it will be held invalid. The right to redemption is based on principles of equity, fairness and good consciousness. The right to redeem the property should be made during the time of making agreement, rather than modifying later to make it redeemable doesn't apply. Thus the rights which are held prior to the mortgage agreement will be held valid.

This doctrine Has been described as anachronism by pollock [24], argue that the restrictions which are imposed on redemption are unjust as they impose unnecessary hardships on borrower. The test suggested by Pollock has, been generally applied in determining whether conditions which directly or indirectly fetter or limit the right to redeem, violates this doctrine.

SETH GANGA DHAR VS SHANKARLAL[25]

In this case, It was decided that the courts jurisdiction to relive a mortgagor from his bargain depends on whether it was attained by taking advantage of any difficulty or embarrassment that he might have been in when he borrowed the money on the mortgage , depending on that he will be entitiled to relief.

This doctrine doesn't apply if the transaction is not in its essence a mortgage and it applies to anomalous mortgage.

PARTIAL REDEMPTION

The partial redemption of the property is generally considered as void, under section 60 as it doesn't allow the mortgagor to recover only part or proportionate share of the security, unless the mortgagee has obtained a share of the mortgagor.

General rule has been laid in the case of Narendra Narain vs dwarka lal Mundur[26], The ordinary right of sharer is to redeem the whole of the balance debt, but suit for partial redemption will only lie when the mortgagee has acquired a share in the equity of redemption.

EXCEPTIONS TO PARTIAL REDEMPTION

POONAN ROWEL NADAN VS MUTHUKUTTINADAN SUBBIAN NADAN

The high court recognised three exceptions in this case:

i)where the mortgagee recognises a partion of the mortgaged property among the co-mortgagors.

[24] (1903) 19 LQR 359
[25] 1959 SCR 5
[26] 1877 ILR 3Cal 397

ii) where the mortgagee himself acquires a portion of the mortgaged property, and

iii)where co-mortgagors have distinct and separate interests.

NAWAB AZIMUT ALI VS JOWAHIR SINGH [27]

This is one of the leading cases in the partial redemption. In this case 16 villages were mortgaged as a security for debt.Then they were sold in order to redeem the mortgage money, here, one village being purchased by the plaintiff, one village by B ,quarter of another village by C, and twelve villages by C.

The plaintiff wanted to redeem the mortgage by paying proportionate amount of debt, but A, B, C, were not included, It was claimed by mortgagee that A,B,C should have been included as parties to the suit as they have acquired interests in the property,

The plaintiff was allowed to redeem only their village and were allowed to pay proportional share of debt for redemption. The court emphasized that if a party wanted to redeem part of mortgaged property they need to account for the rights of other parties who has interest in the remaining property.

GOPALAN JURUP VS KERALA HIGH COURT

In this case ,the right to redemption was ordered by the trial court but subsequently it got dismissed and reversed by appellate court, stating that section 60 of the act deals with it and the partial redemption could be allowed in cases mortgagee acquired in while or part the share of the mortgagor. Then when this case went for second appeal, the trial court's order was restored.

ECONOMIC AND SOCIAL IMPACT OF RIGHT TO REDEMPTION

The right to Redemption significantly influences both economic and social outcomes for borrowers facing foreclosure. This legal provision allows homeowners to reclaim their property after a foreclosure auction, which can lead to reduced bankruptcy rates and impact property values. The following essentials outline the key economic and social impacts of the right to redemption.

ECONOMIC IMPACT

i) **REDUCTION IN BANKRUPTCY FILINGS** : A strong statutory right of redemption can decrease bankruptcy filings among defaulted mortgage borrowers.

ii) **INFLUENCE ON PROPERTY PRICES** : In states with redemption rights, foreclosed properties may sell for lower prices due to risk of redemption, by causing certain economic losses.

iii) **OPTIMAL REDEMPTION PERIOD**: The length of the redemption period can balance the protection of landowner's non transferable values against the increased likelihood of default,creating an economic impact.

iv) **STABILITY**: The right to redemption creates a security and stability for the owners, allowing them to avoid displacement during financial hardships.

Thus, while right to redemption offers significant benefits, it may also create challenges .

CONTRADICTIONS BETWEEN SARFEASI ACT VS TRANSFER OF PROPERTY ACT, 1882

Once a mortgagee, always a mortgagee. Section 60 of the Transfer of Property Act, 1882 states about the statutory right of redemption to mortgagor. Thus, the rights can be extinguished only by the act of parties or decree of court. However, an amendment was made to section 13(8) of the SARFAESI ACT, 2002 restricts the borrowers right to redemption.

The contradictions between the SARFAESI Act and the Transfer of Property Act in the context of redemption primarily revolve around the rights of borrowers and the procedures for asset recovery. The SARFAESI Act allows banks to take possession of secured assets without court intervention, while

[27] [1870] 13 MIA 404

the Transfer of Property Act emphasizes the need for judicial processes in property transfers, creating a conflict in the redemption rights of borrowers.

Under the SARFAESI Act, borrowers can redeem their property before the sale, but the process is expedited, often limiting the time available for borrowers to act.

The Transfer of Proprety Act provides a more extended period for redemption, allowing borrowers to reclaim their property even after default, which can lead to confusion regarding the applicable timeframe

The SARFAESI Act minimizes judicial involvement, enabling banks to act swiftly against defaulters. Conversely, the Transfer of Property Act mandates court proceedings for property transfers, which can delay recovery processes and complicate the rights of borrowers.

The SARFAESI Act prioritizes the lender's rights to recover dues, potentially infringing on the property rights of borrowers as guaranteed by the Constitution.

The Transfer of Proprety Act, however, emphasizes the protection of property rights, requiring due process before any transfer of ownership occurs . In contrast, some argue that the SARFAESI Act's efficiency in asset recovery is essential for maintaining the stability of the banking sector, especially in light of rising non-performing assets. This perspective highlights the need for a balance between swift recovery and the protection of borrower rights.

The supreme court in the famous case, **Celir LLP vs Bafna Motors Pvt.(Mumbai) Ltd & Ors** [28] , Held that as per the amendment made to section 13(8) of the SARFAESI ACT, the right to redemption of borrower is extinguished once the auction notice is published by the mortgagee.

The issue in this case, arose when credit was availed from the bank for Rs.100 crore. While the amount of Rs.65 crore was adjusted and balance amount of Rs.35crore a security in form of simple mortgage was created over a parcel of land. When the borrower defaulted in repayment of the loan amount , the loan amount was declared as Non-performing Asset. The bank issued a demand notice under section 13(2) of SARFAESI Act for repayment was around 123.83 crore. As the borrower was unable to pay the amount ,the bank decided to put the secured asset to auction. However, the borrower sought relief under debt recovery tribunal and High court to exercise their right of redemption by offering to pay an amount higher than than the auctioned amount.

The high court granted the borrower to redeem the mortgage recognizing the statutory right to redeem even after the auction took place. However ,this order was challenged before the supreme court which took into consideration the borrowers right to redeem the property until the sale is confirmed. The Supreme court in this case held that the failure on the part of the borrower in tendering the entire dues before the publication of the uction notice as per as section 13(8) of the SARFAESI Act constituted extinguishment of right to redemption of mortgage and stated that the borrower did not have any right of redemption under section 13(8)of the Act.

MATHEW VARGHESE VS AMRITHA KUMAR[29]

In this case, it was held that the borrower has complete right to Redeem the property by paying off the debt prior to the property's sale. The right stands terminated on the date of publication of notice of public Auction.

SHAKEENA VS BANK OF INDIA[30]

In this case , the supreme court discussed how it imposed stringent condition on the borrowers. If a borrower wants to keep their mortgaged property and avoid its public auction, they must repay all their dues to the secured creditor, along with any associated costs, charges, and expenses, before the "date of publication of notice" for the auction. This amendment means that the borrower's window to redeem the property and stop the sale is limited, and hey

[28] [2023] SCC SC 1209

[29] [2014]2 S.C.R. 736

[30] [2019] AIR SC 2031

must act before the notice is published.

SRI SAIANNANDHATHA POLYMERS&ANR VS CANARA BANK REPRESENTATIVE MANDANAPALLE[31]

The Andhra Pradesh high court Interpreted the amended Section 13(8) of the SARFAESI Act as fundamentally changing the borrower's right of redemption. According to this interpretation, once the public auction notice is published, the borrower's right to redeem the property is extinguished. It suggests a strict rule of redemption, emphasizing the rights of the creditor over the borrower once the auction notice is published.

M/S PALS ALLOYS AND METAL INDIA PRIVATE LIMITED VS ALLAHABAD BANK[32]

In this case Punjab and Haryana high court held that Section 13(8) should not be interpreted to terminate the borrower's redemption rights at the auction notice stage. The court also referred to the joint committee report which is 2016 amendment of SARFAESI ACT 2016 that it didn't explicitly mention the intention to curtail the redemption rights upon auction notice.Thus, it supports the borrowers right to redeem . The same was upheld in Amme sresailam vs union of India[33] , states that Section 13(8) restricts the secured creditor's actions but does not extinguish the borrower's redemption rights until the final execution of the sale. This interpretation preserves the borrower's right to regain ownership until the sale process is complete.

SUGGESTION

The Transfer of Property Act and SARFAESI Act currently have differing redemption periods, which can lead to confusion and inequity in property rights. Stabilising these periods would create a uniform standard, simplifying legal processes for both mortgagors and mortgagees.

Longer redemption periods, can protect landowners from losing non-transferable values associated with their property. However, excessively long periods may increase default risks, which requires a balanced approach to determine optimal redemption times while harmonization presents numerous benefits. Balancing these factors is critical for effective legal reform. Thus, the reforms in favour of borrowers right to redemption are crucial for protecting mortgagors from losing their properties after foreclosure, significantly reducing bankruptcy filings. The historical development of the equitable right of redemption has played a vital role, as courts have intervened to ensure that borrowers can reclaim their properties thus preventing unjust enrichment of lenders.

As mortgage laws are critical for facilitating secure lending practices, ensuring borrowers adequate rights, particularly the right to redemption, is vital for maintaining fairness and economic stability. Harmonizing the disparities of the Transfer of Property Act and SARFAESI Act could lead to more equitable outcomes in the mortgage sector, strengthening borrower protections while still safeguarding lender's interests. Such reforms are essential not only for protecting property rights but also for promoting a stable and sustainable economic environment, thereby fostering public trust in the financial system.

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