

## UNIT I- ( remaining portion)

Right of redemption
Once a mortgage always a mortgage
Clog on redemption
Foreclosure
Election

### Right of redemption, Once a mortgage always a mortgage and Clog on redemption-

A mortgagor is entitled to redeem their property once the debt secured by the mortgage has been discharged, or the surplus remaining after a power of sale has been exercised by the mortgagee. This is referred to as the mortgagor's *'equitable right of redemption'*.

However, if an option to purchase (or transfer) is included as part of the mortgage transaction (as is the case in the above example), then the option will be void for extinguishing – or *'clogging'* – the mortgagor's equity of redemption. This position is consistent with the doctrine *that 'once a mortgage, always a mortgage'*.

Example-

A lender (as **mortgagee**) advances 1 Lakh to a borrower (as **mortgagor**), and to secure its repayment, the lender takes a mortgage over the mortgagor's land, which is currently valued at Rs. 2 Lakh. The wider property market considers the mortgaged land to be undesirable, but the lender sees potential in the land and thinks it could soon be valued at Rs. 3 Lakh. The lender has therefore decided to insert an 'option to transfer' clause in the deed of mortgage with words to following effect:

*'upon an event of default, the mortgagor must transfer the mortgaged property to the mortgagee as full satisfaction of the mortgage debt.'*

That is, upon an event of default, the lender will receive full possession of the mortgaged property. If the lender's predictions are correct, they would receive a Rs. 3 Lakh property, which

if they could realise at that price, may result in them earning a Rs. 2 Lakh profit on their original Rs. 1 Lakh loan.

Another reason why an option to purchase (or transfer) won't work is because it would likely be a penalty. It would be construed as a penalty if the amount to be paid by the mortgagor on default exceeds what can be regarded as a genuine pre-estimate of the damage likely to be caused by the breach.

### **Indian Law-**

Right of redemption section 60 of Transfer of Property Act describes the right of redemption-

*Right of the mortgagor to redeem at any time once the principal cash 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 mortgage holder to deliver to the mortgagor the mortgage-deed and every one documents concerning the encumbered property that area unit within the possession or power of the mortgage holder, where the mortgagee has 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 person as he could direct or to execute and (where the mortgage has been affected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished provided that the correct presented by this section has not been destroyed by the act of the parties or by decree of a court.*

*Nothing during this section shall be deemed to render invalid any provision to the result that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fastened, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.*

There are three important provisions made in section 60 of the Transfer of Property Act 1882:

1. Right of redemption
2. Clog on Redemption
3. Once mortgage, always a mortgage.

Redemption is a right of the mortgagor by which the mortgaged property is kept secure and the property is returned to the mortgagor. The word redemption means to make free or get back the mortgaged property by paying mortgage debt.

Anything which obstructs the right of the mortgagor to **redeem** his **property** is void, and such obstruction constitutes a **clog** on the right to **redemption**.

### **Essential elements of Right of Redemption:**

From the definition u/s 60, following essential of the right of redemption are viewed:

- Legal validity of mortgage- the first compulsory element for the applicability of right of redemption is the legal validity of the mortgage.
- Due to principle- the mortgagor can redeem the mortgage anytime after the mortgage money is paid and he can't be avoided from it except the decree of the court or any act of the court.
- Payment of dues money – The third essential condition of applicability of the right of redemption is the payment of dues money can be done to mortgagee himself or to his agent. But it is compulsory that such payment must be done without condition and at the proper time and place.
- Filing of the suit – filling of the suit is compulsory for The Redemption of mortgage the use of the right of redemption cannot be done without filing a suit the suit of redemption can be filed by the mortgagor or by any transferee from his side.

### **Once a mortgage, always a mortgage-**

The rule of opposition on the right of redemption is based on the maxim once a mortgage always a mortgage. Mortgage always remain a mortgage and no change or revision can be done in it. Such right of redemption of mortgage cannot be put to an end or cannot be limited.

As per this maxim, the right of redemption is inherent to all mortgages on the full payment of the debt, for which such an immovable property was used as a security.

In this regard, the case of *Knocks vs Roulds* (1902 Sc 24) is a good example where under lord Dev laid down that- “once a mortgage always a mortgage and nothing but a mortgage”. The right of redemption of mortgage cannot be failed by any activity that is it cannot be made non-redeemable. If any exercises is made then it will null and void. If any condition is imposed by the party then it will also be void.

In the instant case, the goodwill and premise were mortgaged by Mr rice to company and a condition was laid down that on payment of mortgage money and interest by Mr rice he will have the right to get back the mortgaged property. The court stated the mortgage deed created a mortgage and such mortgage always remain mortgage. But the limitation of the right of redemption after mortgage by a contract will not be considered an opposition. The Indian courts have reiterated the same principle in *Jaimal v State of HP*, wherein the right to redemption was found to be an absolute right that cannot be waived by any contract to contrary.

The condition of converting the mortgage into the sale is also considered as opposition on the right of redemption.

A condition that in case of non-payment of mortgage money the mortgagee will hold the mortgaged property as a lease, in the mortgage deed has also been considered illegal and ineffective.

In nutshell, the intention is that mortgage and the right of redemption of mortgagee are co-extensive whether the right of redemption has been a mention or not. The mortgage and right of redemption are coextensive whether the right of redemption is described or not. Thus meaning that once a mortgage is done it will always be a mortgage. It cannot be transferred in any other transaction.

### **The doctrine of Clog on Redemption -**

The right of redemption is a right free from restrictions and always remains. In other words, it can be said that the mortgage is always redeemable. It can neither be finished nor making limits. However, there have been situations in the past where the mortgagee has made attempts to obstruct the mortgagor's right of redemption by putting conditions in the mortgage- deed that forbids the mortgagor from exercising the right to redemption. These obstacles are called 'clogs' and any deed with such a 'clog' has been declared void ab initio by the courts. The deeds that have a clog on redemption are often seen as having been signed under coercion. This can be seen as the mortgagee, possess the financial resources to pressurize the mortgagor to accept any terms in the deed. Apart from this, any clog on redemption affects the mortgagor's right to enjoy and possess property, along with the right to alienate. These rights are fundamental to having an interest in the property. Thus, the courts to protect the rights of the mortgagor have found deeds with any clog, to be void ab initio.

This principle was first laid down in an English case *Santley v Wilde* and has been adapted into Indian jurisprudence to protect the mortgagor.

The courts in India have declared any 'clog' on redemption in the mortgage deed as void ab initio. This is done to protect the mortgagor who is in a vulnerable position, in the mortgage deed as the mortgagee has the financial resources, for which the mortgagor is ready to temporarily depart with his/her interest in the immovable property. Another reason for following the position has been the widespread abuse of powers by the mortgagees against the mortgagors.

It is known that the main object of mortgage is to secure the repayment of mortgage money hence the mortgage exists in the repayment of debt irrespective of the matter passing of the date of repayment. The right of redemption neither can be extinguished nor be made limited or restricted.

### **Exceptions to Clog on redemption being void-**

Under the following circumstances the right of redemption can be limited or restricted-

- The right of redemption cannot be finished in mortgage deed of the agreement but after it can be finished by submission of the right of redemption or by sale or by any method by the free transaction.
- The right can be finished by the degree of court. The mortgagor only has the right to get such decree the right of redemption can be awaited till exercising after the degree for forfeiture of the right of redemption can be passed by the court.
- If the right of redemption and interest of mortgage vested in one person then the right is finished.
- If the mortgaged property is vested in-state or if the mortgaged property acquisition by the government the right is finished.

In **Rama Shankar Singh vs Silver Screen Corp. Pvt. Ltd** (1998) it was decided the right of redemption of mortgagor cannot be finished.

In **Shiv Dev Singh vs Sucha Singh** (2001) it was said that no condition can be put in the deed of mortgage which makes it irredeemable.

In **Gangadhar vs Shankarlal** (1958) it has been stated by the supreme court that the right of redemption of mortgage to mortgagor there exist forever this right neither can be finished no limited by any condition of the parties if any such condition is imposed then it will be void.

In **Murarilal vs Devkaranit** was said that the parties cannot restrict the right of redemption of mortgages. Even after a fixed period if done so such agreement will be void.

## **Foreclosure-**

The right of foreclosure is a right available to a mortgagee to recover his outstanding money. This right is available under Section 67 of the Transfer of Property Act, 1882.

After the principal amount has become due, and before payment of mortgage money by mortgagor or before decree of redemption has been passed by Court, mortgagee has a right to obtain a decree of foreclosure from the Court. A suit to obtain a decree that a mortgagor will be absolutely debarred from exercising his right to redeem the mortgaged property is called a suit for foreclosure.

### **Conditions:**

The right to foreclosure can be exercised by mortgagee only when:

- The debt amount has become due for payment.
- There are no contrary conditions in the mortgage deed as to the time fixed for repayment etc.
- Mortgage money has become due but mortgagor has not got a decree of redemption of the mortgaged property.
- Mortgage money has become due but mortgagor has not paid or deposited the amount.

Section 67 of Transfer of Property Act, 1882 defines foreclosure as *“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.”*

Thus it is a tool by which the mortgagee can deprive the mortgagor of his right interest in property, by barring his right of redemption. However, this right to foreclose the mortgage property is not existent in all forms of mortgage. A simple mortgage, usufructuary mortgage, English mortgage, equitable mortgage doesn't find this right to foreclose. Therefore, in such mortgages, other remedies such as a suit for money decree or for sale of the property can be exercised.

Section 67 is the counterpart of S. 60 of the Transfer of Property Act, 1882, therefore the right to foreclose only occurs after the debt becomes due. The right of foreclosure is counter-part of right

of redemption. Mortgagor gets a right of redeeming his security after payment of debt amount; similarly mortgagee has a right of foreclosure or sale in default of redemption by the mortgagor. Section 67 protects interest of a mortgagee who has advanced a loan in pursuance of some interest in a security and mortgagor has defaulted in payment. The right of foreclosure of mortgagee is co-extensive to right of redemption of mortgagor.

The right of foreclosure gets diminished in cases where the mortgagor has deposited the mortgage money. Therefore only once the mortgagor has defaulted on the debt becoming due, can the mortgagee exercise this right. This right is only available in cases of mortgage by conditional sale and certain kinds of anomalous mortgage.

However, when mortgagor fails to redeem the property, the mortgagee does not become the owner of the property, he has to file a suit for recovery of the amount due. The limitation period for instituting a suit is 12 years. The final decree in a suit for foreclosure on the failure of defendant to pay all amounts due extinguishes the right of redemption which has to be specifically declared.



## Election-

‘Election’ means choosing between two inconsistent or alternative rights. Principle Underlying the Doctrine of Election is *Allegans contraria non est audiendus*: he is not to be heard who alleges things contradictory to each other. In other words, a man cannot approbate and reprobate or blow hot and cold. It means that a man taking a benefit under an instrument must also bear the burden. Under any instrument if two rights are conferred on a person in a manner one right is in lieu of the other, he is bound to elect the proposal on whole or reject on whole. In other words, he can elect only one of them. A person cannot take under and against the same instrument. Election is an obligation to choose in a case where there is a clear intention of the grantor that the grantee should not enjoy both. The foundation of the doctrine is that the person taking a benefit under an instrument must also bear the burden.

The doctrine of election is based on the rule in *Cooper v. Cooper* and is stated in Section 35 of the Transfer of Property Act, 1882 alongside Section 180 to 190 of the Indian Succession Act.

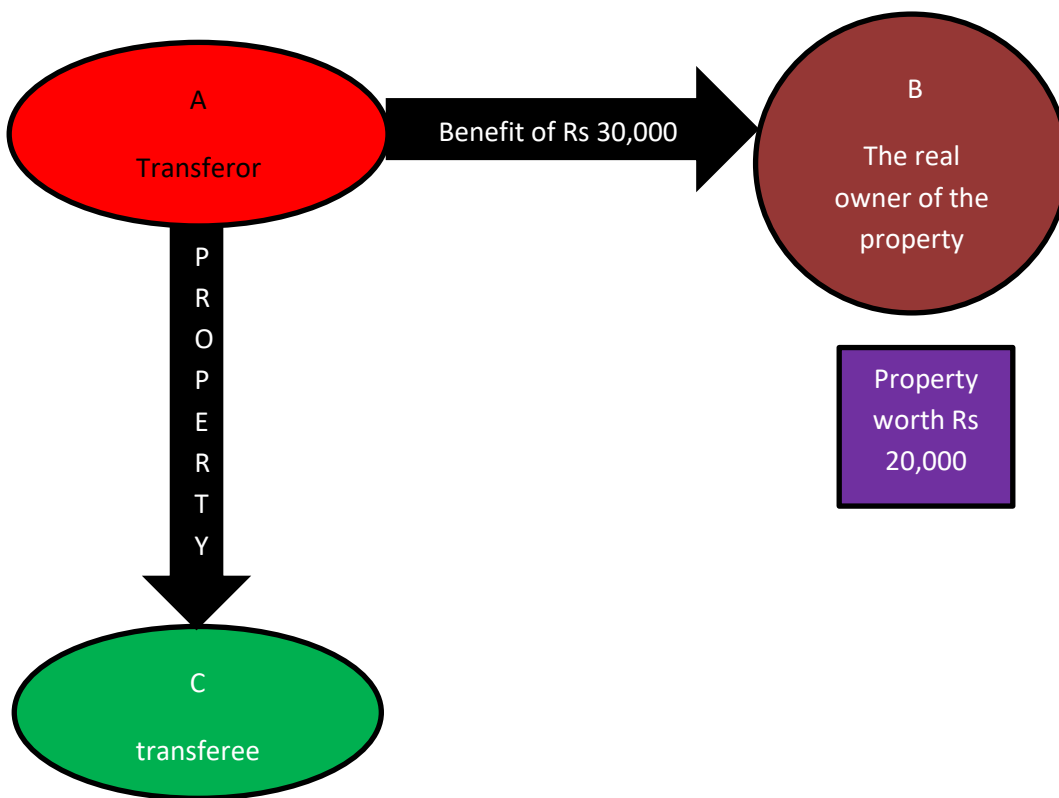
It states that when a party transfers a property over which he does not hold any right of transfer and entailed in that transaction is the benefit conferred upon the original owner of the property, such title holder must elect his opinion to either validate such transfer of property or reject it; upon rejection, the benefit shall be relinquished back to the transferor. The basic of this doctrine is that a person who gets the benefits must also bear the burden.

- Generally, the benefit is greater in value than the burden.
- The benefit should be express and particular. It must be in the same transaction (The Doctrine of Election only applies when the two donations are part of the same transaction).
- The transfer and benefit should be gratuitous without money.
- If the transferor has died or has become incapable of making a fresh transfer before such election, then the subsequent election by owner of the property is void.

For example, by a deed A gives to B a house belonging to C, and by the same instrument gives other property belonging himself to C. C is entitled to A’s property only upon the connection of C’s conforming to all the provisions of the instrument by renouncing the right to his own property given in favor of B; he must consequently make his choice, or as it is technically termed

“he is put to his election”, to take either under or against the instrument. If C elects to take under the instrument, he must relinquish in favor of B his property given to B by A; and takes the property which is given to him by A.

It was held in *Codrington v. Lindsay* (1873) 8 Ch 578 that the doctrine of election is based on the principle of equity that one cannot take what is beneficial to him and disapprove that which is against him under the same instrument. One cannot approbate and reprobate at the same time.



- There is a property worth Rs. 20,000.
- B is the real owner of the Property.
- A is a transferor who has got no rights over the property.
- C is the transferee who wants the property
- A says to B, if you agree to sell your property to C, I will give you Rs. 30,000.

Doctrine of Election starts here when the real owner, i.e., B now has to give effect to this transaction. He has to elect - To **Either** Accept the offer i.e. to agree to sell his property to C and receive the benefit given by A of Rs. 30,000 **Or** Reject the whole of it, i.e., *Reject to transfer the property to C and refuse to accept the benefit*. This is Doctrine of Election i.e. B has to choose from the two alternative (accept / refuse) rights.

**Conditions in Election-(explaining with the help of the abovementioned example)-**

- *The transferor should dispose of the property in which he has no right to transfer.*

B the real owner, but A is the one (the transferor) who has got no right to transfer but is willing to sell B's property to C. B is not the one who wanted to transfer the property to C but it is A, the transferor who is neither the real owner nor he has got any such rights of transfer, but will transfer the property to C.

- *The transferor must confer a benefit to the real owner of the property.*

A (the transferor), when he is willing to transfer the property to C, tells B that your property is of Rs. 20,000 but I will give you a gift of Rs 30,000 if you give your property (and A will transfer it to C).

- *Both the benefits conferred and the transfer made must be part of the same transaction or document. This doctrine only applicable when transfer and benefit a part form the same transaction which means the benefit and transaction are interdependent and inseparable.*

In the example everything (transfer of property + benefit) was covered under the same transaction between A, B and C.

- *The owner is now given a choice of election either to accept the benefit and allow the transfer or to reject both.*

If B allows A to transfer the property to C, then B gets the benefit of Rs 30,000, C gets the property of B and A gets whatever he had demanded of C or else B gets nothing.

## **Mode of Election :**

Election must be divide into two :

1. Direct Election or
2. Indirect Election.

### **1. Direct Election :**

There is no prescribed form. A letter, telegram, oral words of transferor or any other sign by the person which conveys the intention of the transferor is enough.

### **2. Indirect Election :**

There are three types of Indirect Election.

They are :-

1. Acceptance of benefit without knowledge of duty to elect
2. Enjoyment for two years and
3. Status quo cannot be restored.

### **Effect of election against the transfer-**

Where the owner dissents from the transfer of his property –

- He must relinquish the benefit ;
- The benefit intended for him would then revert to the transferor.