

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS (ISSN 2582 - 6433)

VOLUME 2 ISSUE 6
(April 2022)

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Website – www.ijlra.com



IJLRA

INTERNATIONAL JOURNAL
FOR LEGAL RESEARCH & ANALYSIS

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

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2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

RIGHTS AND LIABILITIES OF MORTGAGER AND MORTGAGEE

By: Falgu Mukati

Introduction

The term mortgage is defined under S58(a) of The Transfer of Property Act as, “A mortgage is the transfer of an interest in specific immovable property for the purpose of securing-

- a) the payment of money advanced or to be advanced by way of loan
- b) an existing or future debt, or
- c) the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor and the transferee a mortgagee.

Rights of Mortgager ¹

A mortgagor has six rights:

a) Right of Redemption

It is one of the most important rights of a mortgagor given under section of the Act. At any time after the principal money has become due, and on payment or tender of the mortgage-money, the mortgagor has the right to get back his property, and demand –

- the return of the mortgage instrument, together with all the title-deeds.
- delivery of possession of the mortgaged property (when the mortgagee is in possession); and
- a re-transfer of the property or an acknowledgement in writing of the extinction of the mortgagee's right.

Redemption means paying off the mortgagee money and getting back the mortgaged property.

b) Right to transfer to the third party

This right was added in the Act by Amendment Act of 1929. This right provides the mortgagor with authority to ask the mortgagee to assign the mortgage debt and transfer the property to a third person directed by him. The purpose of this right is to help the

¹ Amandeep Kaur, Rights and Liabilities of a Mortgager, June 27, 2019, 13:41:07+00:00,

<https://blog.ipleaders.in/rights-liabilities-mortgagor-india/>

mortgagor to pay off the mortgagee by taking a loan from a third person on the same security.

c) Right to inspection and production of documents

As long as his right of redemption subsists, a mortgagor is entitled, at all reasonable times, at his request and at his own cost, to inspect and make copies of (or extracts from) documents of title relating to the mortgaged property, which are in the custody or power of the mortgagee.

d) Right to accession

Basically, accession means any addition to property. According to this right mortgagor is entitled to such accession to his property which is in the custody of mortgagee. There are two types of accession:

- Artificial accession- It is when mortgagor made some efforts, and it increased the value of land.
- Natural accession- The name itself defines i.e., without any man-made efforts.

e) Right to grant a lease

A mortgagor, while lawfully in possession of the mortgaged property, has the power to make leases thereof which are binding on the mortgagee. Section 65A further provides that every such lease should satisfy the following eight conditions:

- a) It should be such as would be made in the ordinary course of management of the property concerned.
- b) It should be in accordance with any local law, custom or usage.
- c) It should reserve the best rent that can reasonably be obtained.
- d) No premium should be paid or promised.
- e) No rent should be payable in advance.
- f) The lease should take effect within six months from the date on which it is made.
- g) It should not contain a covenant for renewal.
- h) In the case of buildings, the duration of the lease cannot exceed three years. Further, such a lease must contain a covenant that if the rent is not paid within a specified time, the lessor can re-enter on his property.

f) Right to reasonable waste

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.

A security is deemed to be insufficient, unless the value of the mortgaged property exceeds by one-third, or if consisting of buildings, exceeds by one half, the amount for the time being due on the mortgage

Liabilities of Mortgager ²

The liabilities of a mortgager are:

a) Covenant for title

The mortgagor is deemed to contract with the mortgagee that the interest which the mortgagor professes to transfer to the mortgagee subsists and that the mortgagor has the power to transfer to the same. There is implied warranty of title by the mortgagor in the property mortgaged to him. If the title of the mortgagor turns out to be defective the mortgagee can sue for the principal money as well as for damages even before the stipulated period.

b) Covenant for defence of title

The mortgagor is deemed to contract with the mortgagee that he will defend, or if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto. The mortgagee has a right to protect the title of the mortgagor because he is entitled to the full benefit of the security.

c) Covenant for payment of public charges

The mortgagor is deemed to contract with the mortgagee that the mortgagor will so, long as the mortgagee is not in possession of the mortgaged property, pay all the public charges accruing due in respect of the property. If the mortgagor fails to pay and the property is sold for arrears and revenue, and he again purchases that property, the property will remain under the mortgage, for he cannot take advantage of his own wrong to better his position

d) Covenant for payment of rent

Where the mortgaged property is a lease, the mortgagor is deemed to contract with the

² Kanishta Naithani, Rights and Liabilities of Mortgager and Mortgagee, September 14, 2021, 08:27:04, <https://www.legalbites.in/rights-liabilities-mortgagor-and-mortgagee/>

mortgagee that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lease, have been paid, performed and observed, down to the commencement of the mortgage; and will pay the rent reserved by the lease and perform the conditions contained therein, and observe the contracts binding on the lease, and indemnifying the mortgagee against all claims, sustained by reason of the non-payment of the said rent or the non-performance or non-observance of the said conditions and contracts.

e) Covenant for the discharge of prior mortgage

Where the mortgage is a second or subsequent encumbrance on the property, the mortgagor is deemed to have contract that the mortgagor will pay the interest from time to time accruing due on each prior encumbrances as and when it becomes due and will at the proper time discharge the principal money due on such prior encumbrances.

Rights of Mortgagee

The rights of a Mortgagee are:

a) Right to sue for the mortgaged property

- Mortgaged property deals with the loan advanced.
- It is a security for the loan.
- The Mortgagee is more interested in a loan to be recovered than the mortgaged property.
- If such loan is not paid, he can exercise the above rights.

b) Right to sell the mortgaged property

- Mortgage is for loan, and therefore, mortgage is security of the payment of loan.
- Mortgage deed contains the provision for payment of loan within the stipulated time.
- If the loan is not paid within the stipulated time, then he can exercise the right to sell the mortgaged property.

c) Right to participate in the sale proceeds

- Sale proceeds are obtained out of sale of mortgage property.
- Since, he is a party for such sale proceeds, he can exercise the right to participate in the sale proceeds.

d) Right to appoint receiver

- Mortgagee advances loan to the mortgagor for business or trade.
- If anything, going wrong with the affairs of the business of the mortgagor, the mortgagee has right to appoint Receiver.

e) Right to spend for maintenance of mortgaged property

- Mortgaged property is in his possession.
- Maintenance of such property is necessary.
- He may exercise such right to spend for maintenance of mortgage property.

f) Right to renew mortgaged lease

- He can extend the period of lease after the expiry of the period mentioned in the mortgage deed.

g) Right to access and enjoyment of the mortgaged property

- Free access into the property mortgaged.
- Free enjoyment of the property mortgaged.

Liabilities of Mortgagee³

- To manage the property as a person of ordinary prudence would manage if it were his own.
- To use his best endeavour to collect the rents and profits thereof.
- In the absence of a contract to the contrary, to pay Government revenue and the other charges of a public nature and all rents out of the income of the property.
- In the absence of a contract to the contrary, to make such necessary repairs as the income of the property permits.
- Not to commit an act which is destructive or permanently injurious to the property.
- When the whole or any part of the property is insured against loss or damage by fire, in case of such loss or damage to reinstate the insured property with the money obtained from the insurance policy or to discharge the mortgage debt with it, if the mortgagor so directs.
- To keep clear, full, and accurate accounts of all sums received and spent by him as mortgaged and give them to the mortgagor when asked.

³ Aditi Shanmugam, Rights and Liabilities of Mortgagee, June 30, 2021, 22:24:00+05:30,

<https://www.lawcolumn.in/rights-and-liabilities-of-a-mortgagee/>

- h) To debit receipts from the mortgaged property or where such property is personally occupied by him; a fair occupation rent thereof after deducting the expenses of management, the collection charges, revenue, and costs of repairs, first against the interest on the mortgage money and then against the principal.
- i) To account for the receipts from the mortgaged property. Such accounting of receipt from the property shall be taken instead of interest on the principal money given to the mortgagor.