

A new dimension to novation of mortgages.

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Perhaps the most confusing legal matter now-a-days is novation of mortgages and its effect on foreclosure. This controversy cropped up after the pronouncement of the land mark judgment by the Shariat Appellate Bench of the august Supreme Court in Maqbool Ahmad's case (**1991 SCMR 2063**). Before discussing, it would be apt to recapitulate the different types of mortgages. The Transfer of Property Act, 1881 (**TPA**) at section 58 defines the mortgage as a security to the credit given by a stranger to the owner of the property. Here the owner is connoted as the Mortgagor, while the creditor is called the mortgagee. The *supra* Act differentiate mortgages into six different types. These ought to be viewed in the context of 1. Possession of the mortgaged property. 2. Mortgagor's personal liability. 3. Special conditions attached to the mortgage. 4. Rent/profits accruing and its appropriation towards the mortgage consideration and lastly, 5. Any other condition attached to the same.

Thus Simple mortgage is the one in which the possession is with the mortgagor, he is personally liable to pay the mortgage consideration and the special condition attached is that in case he fails to repay the money the mortgagee has a right to sell the property.

The second type of mortgage is Conditional Sale. It is when the mortgage property is with the mortgagor and he is not liable personally to pay the mortgage consideration. The special condition attached is that he ostensibly sells the property with the permission that in case the mortgagor makes default in repayment of mortgage consideration, the sale shall become absolute.

The third kind of mortgage is common throughout of the Country and especially the Province of Khyber Pukhtoon Kwa. It is the Usufructuary mortgage. Here the mortgaged property is given to the possession of the mortgagee, the mortgagor has no personal liability and mortgagee retains the profits and rents accruing from the property. Similarly, he may either fully or partially appropriate this towards the mortgaged consideration.

The fourth type of mortgage is called 'English Mortgage'. It is when there is absolute transfer by the mortgagor in favour of the mortgagee subject to the condition that on payment of mortgage money it shall be retransferred to the mortgagor. Here the possession of mortgage property is with the mortgagor and he does not undertake personal liability of repayment of the mortgage money.

Then come, the mortgage with deposit of title deed. Such contracts are mostly carried out by Financial Institutions. In this type of mortgage the mortgagor gives the document of title to the mortgagee with the intent to create a security thereupon. In this type of mortgage the possession is with the mortgagor he has not personal liability for the re-payment of the mortgaged consideration.

Last but not the least is the Anomalous mortgage. The Legislator has comprehensibly defined this type of mortgage in the widest possible terms so as to encompass all other types of mortgages not falling in the aforementioned kinds of mortgages. Thus if the title documents of the mortgaged property is delivered to

the mortgagee and at the same time possession is delivered to him it would neither be Usufructuary mortgage nor the mortgage by deposit of title deed but an Anomalous mortgage.

From this discussion it is inferred that for a specific type of mortgage its ingredients must co-exist and in absence of a single component it cannot be treated as that type of mortgage but would be considered as an Anomalous mortgage.

The ingredients are shown in tabular form herein below for convenience:

Type of Mortgage	Possession	Mortgagor personal liability	Special condition attached	Rents & Profits accruing appropriate or otherwise	Any other condition
Simple	With Mortgagor	Yes	In case the Mortgagor fails to repay, Mortgagee shall have right to sell		
Conditional Sale	With Mortgagor.	No	Ostensible sale of property, in case of default on a certain date, the sale shall be absolute		
Usufructuary	With Mortgagee	No	No	<ol style="list-style-type: none"> 1. Retain possession until payment. 2. Receive Rent and Profits 3. Appropriate the rents /profits toward the mortgage money. (Partially or completely). 	
English	With Mortgagor	No	Absolute transfer to Mortgagee subject to the condition that on payment of mortgage money the transfer to Mortgagor be made.	No	.
Deposit of title-deeds	With Mortgagor	No	No	No	Delivers documents of title to Mortgagee with intent to create a security thereon.
Anomalous	That kind of mortgage the terms and conditions whereof do not figure above.				

Section 60 of the Transfer of Property Act, 1882 (**TPA**), gives a right to redeem the mortgaged property, when the principal money has become due and the mortgagor pays or tender it to the mortgagee, such right has been defined as a right of redemption and the suit meant to enforce this right is called a suit for redemption.

Nevertheless for the enforcement of this right of redemption article 148 of the Limitation Act, 1908 (**LA**) prescribes a maximum of 60 years. Thus, it is only on the payment of mortgage amount within the prescribed period provided at article 148 of the LA, that the mortgagor can redeem the property.

Section 62 TPA relates specifically in respect of Usufructuary mortgages. It gives a right to a mortgagor to recover possession of the mortgaged property in case the terms of the contract bound the mortgagee to appropriate towards the mortgage consideration the profits and rents accruing from such property. Thus at the re-payment of the whole mortgage consideration, or in case such contract bounds partially the mortgagee to appropriate the rents and profits towards the mortgage consideration when such remaining payment is returned by the mortgagor to the mortgagee.

Now we shall discuss the connotation FORECLOSURE. It is defined at section 67 TPA as a right of the mortgagee to obtain from the court a decree to the effect that the mortgagor shall be absolutely debarred of his right to redeem the property. The suit brought for the enforcement of this right is called a suit for foreclosure. This right can only be enforced when:

1. In the initial mortgage contract there is no stipulation to the contrary.
2. The mortgage money has become due to the mortgagor.
3. No Decree has been passed in favour of the mortgagor for redemption.

The point to be deciphered is that such right of foreclosure does not extend to Usufructuary mortgages, and the reason is quite obvious. It is by virtue of section 62 TPA that automatic redemption of mortgage on complete appropriation of the rents and profits towards the mortgage money occurs. For this reason section 67 in its application is limited to all mortgages except the Usufructuary. This principle was enunciated in the year 1940 in Lachhman Singh's case (**A.I.R. 1940 Lahore 401**).

For convenience the comparative analysis of the aforementioned sections of the TPA is carried out on the next page.

Lachhman Singh vs Natha Singh through Harnam Singh and others (A.I.R. 1940 Lahore 401) FULL BENCH:

Necessary ingredients of Usufructuary mortgage:

(1). The possession of the mortgaged property is delivered, or agreed to be delivered, to the mortgagee;

(2). Mortgagee is to appropriate the rents and profits either a. in lieu of interest, or b. towards the principal, c. partly in lieu of interest and partly in payment of the principal.

(3). In none of these cases the mortgagor incurs any personal liability to repay;

(4). As the mortgagor has not bound himself to repay (but may repay if and when he chooses) there can be no 'forfeiture' and therefore the remedies by way of foreclosure or sale are not open to the mortgagee.

Section 62 of *Transfer of Property Act, 1882*.

Provides that in cases of Usufructuary mortgage, The mortgagor would have right to:

- i. Recover possession of the mortgage property;
- ii. Together with the mortgaged deed etc,

In case:

- a. The mortgagee was authorized to appropriate the profits/rent accruing from land towards the mortgage money, when such money is paid,
- b. When the term of mortgage expired and the mortgagor pays or tenders to the mortgagee the mortgage-money or the balance thereof or deposit it in Court.

Section 67 of *Transfer of Property Act, 1882*.

It defines Foreclosure and thereafter setforth the conditions:

Foreclosure is the mortgagee right to obtain from the Court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property.

When it can be sought:

- i. After the mortgage money has become due to mortgagee,
- ii. Before a decree has been made for the redemption of the mortgaged property,

Such suit would be called a Suit for foreclosure.

This section would not be applicable to Usufructory mortgages, thus no suit for foreclosure can be brought in such mortgages as held in Lachhman Singh case (AIR 1940 Lahore 401)

Now coming to section 20 of LA. For its proper understanding one should keep in mind section 3 LA. The latter said section lay down a general principle that all *lis* shall fail if it is not brought within the prescribed limitation period. To this rule the exceptions are provided from section 4 to 25 LA. Thus section 20 LA is in fact one of the exception to that general principle. Its subsection 1 provides that each fresh payment in case of debts would result in a fresh period of limitation to be reckoned from that date for the recovery of the loan amount. At subsection 2 thereof it is provided that in case the mortgage land is in possession of mortgagee and he receives the rent or produce of such land it shall be deemed as payment within the meaning of this section. Thus, the overall affect of section 20 LA is that when the mortgagee receives the rents or profits of the land mortgaged & in his possession, a fresh starting point of limitation would be reckoned for redemption. It should be borne in mind that it is only in cases of Usufructuary mortgage where the mortgagee is in possession and receives rents or profits, thus this section applicability is restricted to usufructuary mortgages only.

At this juncture article 148, 144 (*deleted*) and section 28 (*deleted*) of the LA needs to be analyzed. Article 148 prescribes that the mortgagor has a right to redeem or recover possession of the immovable property within 60 years when the right to redeem or recover possession accrues to him. Through the deleted Section 28 LA the right of a person to recover possession of a property extinguishes in case the prescribed period of limitation expires. In the like manner the deleted article 144 LA provided a period of 12 years for suits seeking possession.

The august Supreme Court in Maqbool Ahmad's case declared section 28 **only** to be against the injunctions of Quran and Sunnah, however it indeed recognized the concept of limitation in Islam. Nevertheless the legislature omitted both section 28 and article 144 LA. (**Amendment Act, II of 1995**)

From this whole discussion the following points crops up which needs objective deliberation:-

- 1- Whether by virtue of sub section 2 of section 20 of LA article 148 has become superfluous?
- 2- Whether the principle enunciated by the august Supreme court of Pakistan in Maqbool Ahmad case is applicable to article 148 LA thus in absence of section 28 LA there is no way a mortgagee at the expiry of 60 years becomes owner of the mortgaged property or otherwise?
- 3- In case there is no express terms and condition in the mortgage deed or if such mortgage deed does not existence how should the contract be interpreted?

In the opening para, it was highlighted that section 58 of TPA has given separate ingredients for each type of mortgages. These ingredients should co-exist or else it cannot be considered as such mortgage. Similarly, section 20(2) of LA refers to those mortgages where (1) the mortgagee is in possession of the land and (2) receipt rent or profits of such land. These ingredients fit in the definition of Usufructuary mortgage only, thus it is inferred that by virtue of section 20(2) LA article 148 LA does not operate in respect of Usufructuary mortgages, on the contrary it would be applicable to all the remaining types of mortgages, be it simple, conditional sale, English, deposit of title deed and anomalous.

Coming to the second point for deliberation, the principle enunciated in Maqbool Ahmad's case was that a person in adverse possession through efflux of time cannot become owner of that property. It

was held that such conversion of possessory rights to title is against the injunctions of Quran and Sunnah. On this premise section 28 of LA was declared as repugnant to the injunction of Islam. It is indeed a matter of utmost significance to highlight that the august Supreme Court in the *supra* case **did not** held article 144 of LA to be unislamic. It in fact recognized the concept of limitation for bringing a *lis* in Islamic Jurisprudence. Nevertheless the legislature deleted both section 28 and article 144 of LA. Similarly, in the said judgment there is no reference at all to article 148 LA.

It is a settled principle of law that mortgage held rights or the status of mortgagee is not at par with that of a person in adverse possession. Thus on this premise also the principle contained in the said judgment would not be applicable to mortgages.

It would be advantageous to reproduce the omitted section 28 LA:-

28. Extinguishment of right to property. --- At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

Here the language of the section speaks of a, "**Suit for possession of any property**". On the other hand section 67 of TPA gives a right to the mortgagee to bring a **suit for foreclosure**. If the intention of the legislature was that both these connotation are synonymous, why these sections were couched with different phrases. Similarly, in case the intention of the legislature in the old section 28 of LA was to include in a **suit for possession** a suit brought by a mortgagee at the expiry of 60 years, then what for section 67 of TPA was enacted. It is indeed a celebrated principle of interpretation of statutes that nothing shall be considered redundant and in the like manner the interpretation should bring harmony in the different sections of a Statute besides other Enactments. Thus as section 67 TPA has given an exclusive remedy to a mortgagee to seek foreclosure of the mortgaged property at the expiry of 60 year it cannot be intermingled with the omitted section 28 of LA; which indeed pertained to disputes *inter se* person in adverse possession and the owner. It therefore follows that old section 28 LA is not applicable to a mortgagee who seeks possession after expiry of 60 years.

Similarly, the status of the mortgagee is not at par with that a person in adverse possession. On this premise too the omitted section 28 LA cannot apply to suits seeking foreclosure.

The august Supreme Court of Pakistan in KATA MIR AND OTHERS versus MST. SHO BEGUM AND OTHERS CASE (**2003 AC** 845) observed:

Learned Counsel for the respondents could not controvert this argument of learned counsel for appellants successfully. It may be noted that this court in the judgment of Maqbool Ahmad vs Hukomat-e-Pakistan (1991 SCMR 2063) declared the provisions of section 28 of the Limitation Act as repugnant to the injunctions of Islam to the extent as it deals with extinguishments of the right in the property at the determination of the period prescribed for instituting a suit for possession for the said property. However, in this case the provisions of Article 148 of the Limitation Act relating to the filing of the suit for possession through redemption was not discussed that is why for such reasons this court in the case of Ismail (ibid) has held that if a mortgagor has not filed a suit for redemption within the time he would lose his proprietary right

over the property and the mortgagee who is in possession of the mortgaged land by prescription would be deemed to be the owner of the property.

Now, coming to the matter of interpretation of such a mortgage contract; the terms and conditions whereof as not ascertainable? It is a matter of common observation that frequently the mortgage contracts dates far back in the past, and thus naturally it cannot be ascertained as to what were its terms and conditions. This, question came up before the august Supreme Court in NAZEEF VS ABDUL GHAFAR AND others case (**PLD 1966 Supreme Court 267**) It was held:

...The principle to be followed in such cases is that when a person is possessed of a certain right and the question is whether by a particular conduct he has waived or renounced that right and his conduct is capable of two interpretation one involving loss of that right and the other preserving the right his conduct must be construed on the basis that he preserves his right. Every person is presumed to act to his own best advantage. If the mortgagee pays money to his mortgagor on the implied condition that the terms relating to this debt will be the same as relating to the original debt, conduct is not inconsistent with the position that he retains all the benefit of the existence of the original mortgage and we should construe his conduct in accordance with his benefit. As a matter of fact it is the mortgagor who is in need of money and he would be prepared to accept terms favourable to the mortgagee and if the mortgagee wanted him to say explicitly that the previous mortgage will remain intact, the mortgagor will probably agree but the parties who are entering in to a transaction are without legal help are not aware of these intricacies and therefore such matters are not clarified...

This is indeed the golden principle of interpretation of a mortgage contract, whose terms and conditions cannot be ascertained. It ought to be interpreted in a manner as not to put the mortgagee in a disadvantageous position by depriving him of his right to foreclosure.

The gist of the above discussion is that the TPA has given exclusive ingredients for each and every kind of mortgage. The mortgage transaction is to be analyzed for determination of the type of mortgage. In case the mortgage is Usufructuary then article 148 LA would not be applicable and even at the expiry of 60 years the mortgagor can redeem it by following the exception laid down at section 20 (2) of LA. Nevertheless it would not be the case in the remaining type of mortgages for which suit for redemption brought by the mortgagor after expiry of 60 years would be time barred. Similarly, the ratio of Maqbool Ahmad case cannot be applied to article 148 LA for the reason that the deleted section 28 LA had provided a remedy to a person in adverse possession while section 67 TPA gives a right to a mortgagee to seek possession when 60 years has lapsed for redemption. Similarly in case of any ambiguity in the mortgage contract, its interpretation should be made in favour of the mortgagee.