

Deed of Mortgage

Y. Srinivasa Rao*

INTRODUCTION:

In India, section 55 of the Transfer of Property Act, 1882 explains for the relevant covenants and under section sub section 2 of section 55 of the Transfer of Property Act, 1882, the benefit of the covenants run with the land and can be enforced by the transferees for time to time except the covenant as to indemnity. Before going to discuss with the deed of mortgage, it is apt to see how a conveyance begins with. A conveyance starts with the names of the parties and it ends with the execution and attestation clauses.

SOME ESSENTIAL REQUIREMENTS OF DEED OF TRANSFER:

1. Description of deed; 2. Parties to the deed; 3. Date on which it is executed. These three are essential requirements of a deed. As a matter of fact, there are special requirements of different kinds of transfer, such as lease, sale, mortgage, gift, and exchange etc.,

1. Description of deed:

The title of deed is to be written in capital letters like " THE DEED OF MORTGAGE"; "THE DEED OF SALE"; THE DEED OF LEASE". Etc.

2. Parties to the deed:

While drafting a deed, the name of party comes first, and then the surname and thereafter the address of the party by other descriptions like " son of " ("s/o"), "wife of "("w/o"), "daughter of " ("d/o"). the transferor must be mentioned first thereafter the the transferee. And then the occupation/profession of party comes next. If there is a confirming party, he/she may be joined and placed next after the transferor. It must be remembered that all proper parties to a deed , however the inter parties should be impleaded for the reason in common law, only parties to the contract can take benefit under the same. If any change in names of the parties is intended, such change should be accounted for after the name of the conveying party. If a woman, who is divorced, her name should be described as " fame sole". Caste or religion may be mentioned.

TRUST: If there is trust, their names and as trustees to the estate under the deed of trust must be stated. In case of any trustee who is appointed by Court, the date of such order of the Court and its proceedings are to be mentioned.

GOVERNMENT: In case of Government, person authorized under Article 229(1) of Indian Constitution is to be mentioned in the deed and such transfer must be expressly made on behalf of or in the name of the President of India or the Governor of State concerned.

FIRMS: In case of Firms, all partners must join as under section 19 of the Indian Partnership Act (IX of 1932). Here, it is essential to see that one or more partners of a firm shall not transfer any immovable property which belongs to such firm in the absence of express terms or by virtue of custom or usage to the contrary. However, if trading assets of a firm, which business is to buy and sell lands, the managing partner can sell as the partner of firm and acting on behalf of such firm carrying business under the name and style of such firm.

JURIDICAL PERSONS: If registered society, company, after their names, registered under Societies Registration Act, or the Indian Companies Act, or incorporated under any special statute with full address of the head office are to be mentioned.

RECITALS OF DEED: The recital of the deed must be short and intelligible. The recital of a deed must contain a brief history of the property up to its vesting in the transferor. Basically, recitals are two types. 1. Narrative recitals, 2. Introductory recitals. Narrative recitals means facts and circumstances which show the nature of interest to be dealt with. Introductory recitals means those show the motive or intention behind the execution of the deed and are immediately followed by the operative part, however Introductory recitals of a deed can contain facts culminating in the execution of the deed beginning from the agreement up to the motive for such transfer.

HABENDUM: It means part of the deed which explains the interest that the purchaser is to take in the property such phrases as "to have" and "to hold" are to be used, however, those are not essential to make the transfer.

COVENANTS: Generally a covenant can be in express terms. However, it is inferred on the construction of the entire instrument. That too, an implied covenant or covenant in law, is one which the law implies either from the nature of the transaction or from the use of certain technical words. Further, a covenant is an agreement under seal, whereby one or more of the parties to the deed stipulate for the truth of certain facts, or is bound to do or not to do a specified thing.

Apart from the above, testimonium, Testatum, Operative Words, Parcels, Exceptions and Reservations, Completion of transaction, execution, Attestation, Possession of the property, Registration of deed, Delivery of deed, Essence of drafting of deed are also essential.

Before going to discuss about the deed of mortgage, it is very essential to see section 69 of The Transfer of Property Act, 1882.

(1) A mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section, have power to sell or concur in selling the mortgaged property, or any part thereof, in default of payment of the mortgage- money, without the intervention of the Court, in the following cases and in no others, namely: --]

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan or Buddhist 1[or a member of any other race, sect,

tribe or class from time to time specified in this behalf by 2[the State Government], in the Official Gazette];

(b) where 3[a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage- deed and] the mortgagee is 4[the Government];

(c) where 3[a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage- deed and] the mortgaged property or any part thereof 5 [was, on the date of the execution of the mortgage- deed], situate within the towns of Calcutta, Madras, Bombay, 6[7[or in any other 8[town or area which the State Government may, by notification in the Official Gazette, specify in this behalf]□.

REQUIREMENTS OF MORTGAGE DEED:

1. A thorough investigation of title upto 60 years and preparation of an abstract on title and a thorough search in all the places as required in the case of sale.
2. Recitals: a short history of the property right upto its vesting in the mortgagor and the object of the loan-Amount and rate of interest.
3. Parties to the deed: Mortgagor first and thereafter the mortgagee.
4. Operative words: in the case of a simple mortgage, the property is charged and assured as security for repayment of the mortgage debt. In case of English mortgage, it is out and out sold to the mortgagee subject to the covenant as to re-conveyance upon repayment of the debt with interest. (Sec 58 (e) of Transfer of Property Act).
5. Possession: An English mortgagee has the right to take possession of the property. Such a mortgage should contain a clause as to the appointment of a Receiver who may be a nominee of the mortgagee. Sec 69A of Transfer of Property Act.
6. Execution and Attestation: Attestation is compulsory to every mortgage. In case where the mortgagor does not know the language, the deed must be explained to him by some competent person.
7. Registration: Compulsory in case of mortgage of value above Rs 100/-, and in all cases under the West Bengal Land Reforms Act (Vide section.7).
8. Delivery of title deed: A mortgagee is entitled to all the title deeds of the mortgaged property. If for any reason they are left with the mortgagor through inadvertence or negligence, he can manipulate a prior equitable mortgage by depositing the same elsewhere.
9. Redemption: Period is fixed by agreement between the parties. Under Article 61 of The Limitation Act,1963, a suit for redemption may be brought within 30 years from when the right to redeem accrues according to the agreement. In case where the property has been transferred by

the mortgagee for valuable consideration the period of limitation is 12 years for the date of knowledge.

CONCLUSION:

Before a deed is executed, the executant should read the entire deed. If the executant cannot read, then it should be read over and explained to him by a competent person. That too, in case of a purdanashin lady, care should be taken that she totally understands the terms of the deed, implications and effect of the deed. A fortiori, the fact of explaining should be endorsed on the deed itself.

* M.A (English)., B.Ed., B.L., (LL.M) I Addl Junior Civil Judge, Bhimavaram.

