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Comparative Analysis of Redemption Rights in Secured Transactions: The SARFAESI Act vs. Transfer of Property Act in India

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Abstract: ***This research paper explores the concept of the right of redemption in the context of secured transactions in India, focusing on the SARFAESI Act, 2002, and the Transfer of Property Act, 1882. The right of redemption is a critical legal provision that allows mortgagors, or borrowers, to reclaim their mortgaged property by repaying the secured debt in full. This right serves as a crucial mechanism for balancing the interests of both borrowers and lenders within the framework of secured transactions. The paper undertakes a comparative analysis of the SARFAESI Act and the Transfer of Property Act, exploring how each statute addresses secured transactions and the right of redemption. The SARFAESI Act, enacted to streamline the recovery of non-performing assets by financial institutions, provides a more expedited and efficient process for enforcing security interests. It empowers lenders with significant rights to recover debts without resorting to lengthy judicial procedures, thus enhancing the speed and efficiency of debt recovery. On the other hand, the Transfer of Property Act, 1882, rooted in traditional mortgage principles, places a strong emphasis on protecting the rights of mortgagors, particularly through the provision of the right of redemption. Through this analysis, the study highlights the contrasting approaches of these two legislative frameworks. While the SARFAESI Act is lauded for its effectiveness in facilitating quicker recovery processes, it also raises concerns about the potential erosion of the mortgagor's rights. Conversely, the Transfer of Property Act, with its emphasis on the protection of the mortgagor's right to redemption, offers a more borrower-centric approach, ensuring that borrowers have the opportunity to redeem their property upon fulfilling their debt obligations.***

Keywords: right of redemption, secured transactions, SARFAESI Act, Transfer of Property Act, India

1. Introduction

What is the right to redemption?

The right of redemption is a legal mechanism that allows borrowers to reclaim their mortgaged property upon repayment of the debt. This right is an essential component of secured transactions and provides a balance between the interests of borrowers and lenders.

In India, the right of redemption is governed by various legal frameworks, including the SARFAESI Act and the Transfer of Property Act. The right of redemption is a vital legal safeguard that provides individuals facing mortgage default with a pathway to reclaim their property. This right empowers borrowers to rectify financial setbacks by settling their outstanding debts, including accrued interest and penalties, before foreclosure proceedings commence. Section 58 of the Transfer of Property Act, 1882, defines a mortgage as the transfer of an interest in specific immovable property for securing the payment of money advanced or to be advanced by way of loan. In this context, the person transferring the property is called the mortgagor, and the person to whom the property is transferred is the mortgagee.

Right of Redemption: Concept and Importance

While mortgages and sales both involve the transfer of property, their legal implications are significantly different. In a sale, the seller relinquishes all rights to the property, transferring absolute ownership to the buyer in exchange for consideration. Once this transfer is complete, the seller loses any claim over the property. Conversely, in a mortgage, the mortgagor transfers only a temporary interest in the property to the mortgagee as security for a loan. The mortgagor retains the right to reclaim the property by repaying the debt, which is the essence of the right of redemption.

The right of redemption ensures that once the mortgagor pays the debt, they are entitled to regain full possession and ownership of their property. This right is fundamental to the concept of a mortgage and is legally protected under Section 60 of the Transfer of Property Act, 1882. This section explicitly states that the mortgagor can redeem the property "at any time" after the debt has become due, unless a decree of foreclosure or sale has been issued by a court. This proviso is one of the most debated aspects of the right to redemption, often involving judicial scrutiny to prevent any unjust restrictions on this right.

Significance:

Understanding the right of redemption within these legal frameworks is crucial for ensuring fair and equitable treatment in secured transactions, which directly affects the financial stability of borrowers and the efficiency of lenders in asset recovery.

2. Historical Background

In early civilizations, loans or pledges on property were likely made through pledges rather than mortgages, as the absence of written language and stable settlements made actual possession the primary form of security. Mortgages of a unique nature are believed to have been practiced by the Jews, who are credited by some historians as the originators of land mortgaging. The concept is thought to have spread from the Jews to the Greeks and Romans, and subsequently became integrated into English Common Law. Under Roman Law, two main forms of property transfer were used as security for

debts: the pignus and the hypotheca. The pignus, or pledge, involved the transfer of possession of an item to a creditor as security for a loan, with the understanding that it would be returned once the debt was repaid. The hypotheca, on the other hand, did not involve the transfer of possession; instead, the pledged item remained with the debtor, resembling the modern concept of a mortgage.

The concept of the equitable right of redemption was developed by the English Courts of Equity. This principle asserts that a borrower retains the right to reclaim mortgaged property after defaulting on a loan, up until foreclosure, and sometimes even after foreclosure, by repaying the owed debt. Any loan agreement clause that obstructs or "clogs" a borrower's right of redemption might be deemed unenforceable. Such a clog could be any provision that gives the lender an unfair advantage, like an option to purchase, a deed, or a grant of equity that prevents the borrower from reclaiming the property before foreclosure proceedings.

The evolution of mortgage law is largely centered around the development and peculiarities of the equity of redemption, which governs the rights of both the mortgagee and the mortgagor. The right of redemption is not limited to the mortgagor alone; it extends to heirs, legal representatives, and others with a legitimate interest in the property. However, a mere personal claim, without a vested interest or charge upon the land, does not suffice to claim the right to redeem. Although the law strongly upholds the right of redemption and scrutinizes any attempts to infringe upon it, it does not allow mortgagees to be subjected to claims by unrelated parties. To exercise the right of redemption, the mortgagor must repay all amounts that are equitably due as part of the debt.

Current Legal Framework Governing secured transactions in India

The legal framework governing secured transactions in India is primarily built around two key statutes: the SARFAESI Act, 2002, and the Transfer of Property Act, 1882. These laws provide the foundation for the creation, enforcement, and redemption of security interests, balancing the rights and obligations of borrowers and lenders.

Lets Take a look at SARFAESI Act, 2002 (The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.) The SARFAESI Act was enacted to enable banks and financial institutions to recover their non-performing assets (NPAs) efficiently without the intervention of courts. The Act provides mechanisms for the securitization of financial assets, the reconstruction of financial assets, and the enforcement of security interests.

The SARFAESI Act allows banks and other financial institutions for auctioning commercial or residential properties to recover a loan when a borrower fails to repay the loan amount. The SARFAESI Act, 2002 allows banks to address their Non-Performing Assets (NPAs) through recovery and reconstruction efforts. Under this Act, banks are empowered to seize a borrower's property without needing to approach the court, with the exception of agricultural land. The Act applies specifically to secured loans, where banks can enforce securities such as hypothecation, mortgage, and pledge. Court intervention is only required if the security is deemed invalid or fraudulent. However, for unsecured loans, banks must file a civil case against defaulters in court.

- **Section 13:** Empowers secured creditors to enforce their security interest without court intervention upon default by the borrower. The section outlines the procedure for issuing a notice to the borrower and the steps to take possession of the secured asset.
- **Section 14:** Allows secured creditors to seek assistance from the Chief Metropolitan Magistrate or the District Magistrate in taking possession of the secured asset.
- **Section 17:** Provides for an appeal mechanism through the Debts Recovery Tribunal (DRT) for borrowers aggrieved by any action taken by the secured creditor under the Act.

The government has expressed its intent to significantly lowering the number of non-performing assets (NPAs) and removing the economic obstacles they create. The SARFAESI Act plays a key role in achieving this objective by cutting down NPAs. Therefore, the Act's effectiveness should be judged by the results seen during its enforcement. If there has been a reduction in NPAs, it would mark the Act as a successful policy. Many banks have already reported a notable drop in their NPAs, and some are projecting even lower levels for this fiscal year.

Originally, cooperative banks were not covered under the SARFAESI Act. However, in 2013, the Indian government amended the Act to include them. This amendment has greatly benefited cooperative banks by helping them avoid lengthy delays in recovering bad debts that were previously tied up in civil courts and cooperative tribunals.

The Transfer of Property Act, 1882, governs property transactions in India, including sales, mortgages, leases, and exchanges. It defines various types of mortgages and outlines the rights of both mortgagors and mortgagees. For instance, Section 60 allows mortgagors to reclaim their property by repaying the debt, while Section 67 gives mortgagees the right to foreclosure or sale if the debt remains unpaid. The Act provides a legal framework to ensure fairness in property transactions.

Right of Redemption

The right of redemption serves as a crucial legal protection, allowing individuals who default on a mortgage to recover their property. This right enables borrowers to resolve financial issues by paying off their debts, including interest and penalties, before foreclosure actions begin.

Section 13 of the SARFAESI Act addresses the enforcement of security interests. If a borrower does not meet payment obligations despite receiving a demand notice under sub-section (2), sub-section (4) grants the lender the authority to seize the secured asset—such as the mortgaged property—and auction it off. This action can be taken without requiring court or tribunal involvement. The lender may proceed under sub-section (4) if the borrower fails to pay the dues as specified in the notice under sub-section (2).

Section 13(8) of the SARFAESI Act grants borrowers the right to redeem secured property, while also allowing creditors to sell it. To address these conflicting rights, the law

specifies a timeline. Rule 8 of the Security Interest (Enforcement) Rules, 2002 mandates that a secured creditor must issue a 30-day notice to the borrower before selling the secured property. Additionally, if a public auction is planned, a notice must be published in two newspapers. Rule 9 requires a 30-day public notice before any sale of immovable property can occur. These rules call for separate notices: one for the borrower and another for the public. However, after the 2016 Amendment, a borrower's right to redeem the secured assets by settling dues is terminated once a notice of public auction or a call for quotations is published.

The right of redemption is a fundamental legal entitlement that every mortgagor holds, rooted in the mortgage deed itself. This right is deemed inalienable, meaning it cannot be taken away from the mortgagor through any agreement or contract that seeks to limit or extinguish it. The Transfer of Property Act, 1882, specifically addresses this right under Section 60, which elaborates on the conditions and circumstances under which a mortgagor can exercise their right to reclaim the mortgaged property.

Section 60 of the Act outlines three key provisions:

- The right of redemption
- The concept of a clog on redemption
- The principle of "Once a Mortgage, Always a Mortgage"

These provisions are designed to protect the interests of the mortgagor, ensuring that the right to redeem the property is preserved and that any attempts to restrict this right are deemed void. The law, therefore, provides a balanced framework that upholds the integrity of the mortgage contract while safeguarding the mortgagor's ability to regain ownership of their property.

Right of Redemption

The right of redemption grants a mortgager the ability to reclaim their mortgaged property by fulfilling the financial obligations stipulated in the mortgage contract. Under the Transfer of Property Act (TPA), this right is a fundamental aspect of mortgage law, designed to protect the property owner's interests. Specifically, Section 60 of the TPA articulates that a mortgagor can redeem the property any time before the mortgagee (the lender) has taken action to foreclose the redemption rights. This provision ensures that the mortgager can regain control of their property by paying off the debt, thereby preventing the mortgagee from unjustly enriching themselves at the expense of the property owner.

Clog on Redemption

A clog on redemption refers to any action that prevents a mortgagor from reclaiming their property. Even the mortgagor cannot waive their right to redemption. Several scenarios can create a clog on redemption, and these are considered void from the outset. Some examples include:

1) **Postponement by the Mortgagee for Personal Gain:**
   Mere delays in redemption do not necessarily constitute a clog, as they may be beneficial to both the mortgagor and the mortgagee or could arise from unavoidable circumstances. However, if it is determined that the mortgagee is deliberately postponing redemption to exploit their position, it becomes a clog. For instance, in *Seth Ganga Dhar v. Shankar Lal*[1], a delay of 85 years was not deemed a clog due to the prevailing conditions. Conversely, in *Bhullan v. Bachcha*[2], a condition in a usufructuary mortgage that allowed redemption after 60 years was considered a clog. Therefore, the duration of delay can be deemed a clog depending on factors like the terms of the mortgage and the amount of money involved.
2) **Conditional Sale of Property:**
   Any condition allowing the mortgagee to sell the property if the mortgagor fails to pay on time constitutes a clog. Such a provision is void because the right of redemption is an equitable right that cannot be negated by a sale under any condition.
3) **Restriction on Subsequent Mortgages:**
   In a mortgage, the mortgagor transfers only their interest, not ownership, in the property. The mortgagor retains the right to mortgage the property again to secure another loan. If the initial mortgage deed includes a clause preventing the mortgagor from subsequently mortgaging the property, it is considered a clog.
4) **Collateral Benefits in Usufructuary Mortgages:**
   In a usufructuary mortgage, the mortgagee is entitled to collect rent from the property, which is not illegal. However, if the mortgagee exploits the mortgagor's vulnerable situation to gain additional collateral benefits, it becomes a clog. The case *Krelinger v. New Patagonia Meat & Cold Storage Co. Ltd*[3]. outlined conditions under which collateral benefits could result in a clog, such as when the benefit is unfair, restricts redemption, or is inconsistent with the mortgagor's rights.

Every rule has its exceptions, and the right to redemption is no different. While this right is fundamental and cannot be entirely extinguished, there are instances where it may be subject to certain restrictions. These limitations do not abolish the right of redemption but may alter its application in specific circumstances. The primary exceptions to the principle of clog on redemption include:

- The right of redemption cannot be extinguished within the mortgage deed itself, but it can be terminated after the deed through the voluntary surrender of the right of redemption, by selling the property, or through any other form of free transaction.
- The right may also be extinguished by a court decree. The mortgagor holds the right to obtain such a decree, which can delay the exercise of the right until the court passes a judgment that forfeits the right of redemption.
- If both the right of redemption and the mortgage interest become vested in a single person, the right of redemption is terminated.
- The right is also extinguished if the mortgaged property becomes vested in the state or if the property is acquired by the government.
- If the mortgagee acquires a share in the mortgaged property, the indivisibility of the mortgage is disrupted, allowing the holder of the remaining share to redeem their portion.

[1] AIR 2000 SC 770
[2] AIR 1945 All. 280
[3] (1914) AC 25

In the case of *Narandas Karsondas vs S.A. Kamtam & Anr*[4], the court determined that a mortgagor's right of redemption is only terminated once the conveyance is executed and the transfer of the mortgagor's interest is registered through a formal instrument. The inclusion of a provision in a mortgage deed that grants the mortgagee the power to sell the property without involving the court does not automatically take away the mortgagor's right to redemption. This right remains active until the completion of the deed that grants such power. It is not simply extinguished by the lapse of time, and the equity of redemption persists beyond a mere contract for sale. The mortgagor's right to redeem continues until the sale is fully executed by the mortgagee through a registered deed.

Similarly, in *L.K. Trust vs EDC Ltd. and Others*[5], the court affirmed that under Indian law, the mortgagor remains the owner who has temporarily given up certain ownership rights. The right of redemption is tied to the mortgagor's residual ownership and allows the reclaiming of what has been transferred. This right, which is statutory in nature, persists as long as the mortgage itself is in effect. Judicial interpretations have shown that the dismissal of a previous redemption suit—whether due to abatement, withdrawal, or default—does not prevent the mortgagor from filing another suit for redemption as long as the mortgage continues. This right can only be nullified through actions by the parties involved or by a court decree.

In the case of *Jaya Singh D. Mhoprekar and Anr. v. Krishna Balaji Patil and Anr*[6]., it was established that the right of redemption under a mortgage deed can only be terminated through lawful means. This termination can occur via mutual agreement between the involved parties, a merger, or through specific statutory provisions that bar the mortgagor from redeeming the mortgage. The right of redemption is exercised when the mortgagor makes a payment or offers to pay the mortgage amount at the correct time and place. If this right is extinguished by the actions of the parties, those actions must follow the legal requirements set by law. Even if the mortgagor fails to repay the debt on time, the right of redemption remains intact as long as the mortgage exists. Any provision designed to block or hinder the right of redemption is considered legally void.

The doctrine of clog on redemption is crucial for safeguarding the mortgagor's rights. Without this doctrine, the right of redemption could easily be undermined. It sets necessary limits and is based on the principles of fairness, equity, and justice. The exceptions to this doctrine are reasonable and lawful, ensuring that no party's rights are unfairly affected. This doctrine not only protects the mortgagor's rights but also imposes duties on the mortgagee, ensuring a fair balance between both parties.

Once a Mortgage, Always a Mortgage

The doctrine "Once a Mortgage, Always a Mortgage" stems from the principles of Equity, Justice, and Good Conscience. In simple terms, equity means fairness and impartiality. Historically, the justice system in England faced significant shortcomings, leading to the appointment of Chancellors by the king to administer justice beyond the limitations of common law. These special courts, known as Courts of Chancery or Courts of Equity, were established to provide remedies unavailable in common law courts. Mortgage law evolved predominantly within these Courts of Equity. It is noteworthy that the principle of equity of redemption, which allows a borrower to reclaim their property upon fulfilling their debt obligations, has its roots in English mortgage law, influenced by Roman civil law traditions.[7]

The essence of the maxim was clearly articulated by Lindley M.R. in the case of *Stanley v. Wilde*, where it was stated that any provision designed to obstruct the redemption of a mortgage upon repayment of the debt is considered a clog or fetter on the equity of redemption and is therefore void. This leads to the principle that "once a mortgage, always a mortgage." This maxim signifies that a mortgagee remains a lender and cannot assume ownership of the mortgaged property. Any attempts by the mortgagee to assert ownership are viewed as a violation of the borrower's right to redemption.

Contemporary Developments

The recent Supreme Court of India ruling in *Celir LLP v. Bafna Motors (Mumbai) (P) Ltd.*[8] has significantly impacted the legal and financial sectors, especially concerning the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act). Here's an in-depth analysis of the case's implications:

Clarification of Section 13(8) of the SARFAESI Act: The court's interpretation has clarified the amended Section 13(8) of the SARFAESI Act, which now makes it clear that the borrower's right of redemption is extinguished if the outstanding dues are not settled before the auction notice is published. This interpretation aligns with the legislative intent of the SARFAESI Act to enable swift enforcement of security interests, thereby reducing unnecessary judicial intervention. By restricting the redemption period to before the auction, the ruling helps prevent delays caused by improper tactics, enhancing the efficiency of the Act.

The court pointed out that the amended Section 13(8) does more than limit the secured creditor's ability to handle the property; it also eliminates the borrower's redemption rights once the auction notice is issued. After the amendment, the law specifically sets a deadline for the borrower to pay off their dues to stop the creditor from proceeding. Therefore, if a borrower wants to redeem their asset, they must do so before the lender or creditor publishes the auction notice under Section 13(8). Section 60 of the Transfer of Property (TP) Act does not apply in the post-amendment context, as it contradicts Section 13(8) of the SARFAESI Act, and Section 35 of the SARFAESI Act explicitly states that the Act's provisions will take precedence over conflicting laws. Additionally, the Supreme Court criticized High Courts for exercising jurisdiction under Article 226 of the Constitution

[4] 1977 AIR 774, 1977 SCR (2) 341
[5] AIR 2011 SC 2060
[6] 1985 4 SCC 162
[7] Thomas W. Bigley, William Mitchell Law Review, Volume 21 Issue 1,
[8] 2023 105 SC

when borrowers have an adequate remedy under Section 17 of the SARFAESI Act.

The court also criticized the conduct of the bank involved, noting that it should have issued a sale certificate to the auction purchaser once the sale was confirmed and the full amount paid. The court ruled that the bank could not engage in private agreements with the borrower after confirming the sale in favor of the auction purchaser. Furthermore, the court reprimanded the bank for reversing its position before the High Court, allowing the borrower to redeem the mortgaged asset by accepting the borrower's payment offer. The court emphasized the importance of maintaining the integrity of public auctions and stated that the auction process should only be interfered with under exceptional circumstances.

Safeguarding Auction Purchasers' Rights: Importantly, the court's decision also protects the rights of auction purchasers, ensuring that once they have acquired assets through an auction, their ownership is secure. This bolsters trust in the auction system under the SARFAESI Act, preventing disruptions that could compromise its effectiveness. Maintaining the integrity of the auction process is critical for fostering confidence and effectiveness within the financial system.

Reshaping the Judicial Approach: The ruling highlights the importance of respecting the jurisdictional boundaries and procedural frameworks established by the SARFAESI Act. By discouraging forum shopping and underscoring the role of specialized tribunals such as the Debts Recovery Tribunal (DRT), the court promotes legal consistency and discourages strategies aimed at circumventing established processes. Maintaining the sanctity of tribunal proceedings is vital for preserving legal integrity and ensuring efficient dispute resolution.

Ensuring Bank Accountability: The ruling also holds banks accountable for adhering to legal requirements and maintaining transparency in their operations. The decision emphasizes the consequences of failing to follow prescribed procedures, stressing the need for banks to act within the law and uphold the auction process's integrity. This serves as a critical reminder of the importance of legal compliance and ethical behavior within the banking industry.

In summary, the Supreme Court's ruling in *Celir LLP v. Bafna Motors (Mumbai) (P) Ltd.* marks a significant development in clarifying the complexities of the SARFAESI Act, protecting stakeholder interests, and reinforcing the principles of legal consistency and accountability. As India's legal framework continues to evolve, decisions like these are crucial in shaping a resilient and equitable system for financial transactions and dispute resolution. Going forward, adherence to legal mandates and a commitment to transparency will be essential for fostering trust and stability within the financial ecosystem.

3. Issues and Challenges

With the changing and rapidly advancing age there are numerous issues arising in the way right to redemption is utilized specially in SARFAESI Act the SARFAESI Act allows financial institutions to take possession of and sell secured assets without court intervention, which can sometimes conflict with the mortgagor's right to redemption under the Transfer of Property Act, leading to legal disputes. Furthermore, the right of redemption also can be complicated by insolvency proceedings, where the mortgagor's ability to redeem the property may be restricted or overridden by other creditors' claims under the Insolvency and Bankruptcy Code (IBC), 2016.

While our judicial system often interprets and defines the scope of The right of redemption Courts have provided varying interpretations of the right of redemption, especially concerning what constitutes a clog and how the right can be exercised. This inconsistency creates legal uncertainty for both mortgagors and mortgagees.

Courts often apply principles of equity in cases involving the right of redemption. While this promotes fairness, it also introduces subjectivity, which can lead to different outcomes in similar cases and leads to lots of confusion and unyielding delays in handling the already copious amount of cases.

4. Conclusion

This study provides a comparative analysis of the right of redemption within Indias legal framework for secured transactions, highlighting the different approaches of the SARFAESI Act and the Transfer of Property Act. While the SARFAESI Act offers a streamlined process for asset recovery, the Transfer of Property Act emphasizes traditional mortgage rights. The research identifies key challenges, including procedural delays and legal ambiguities, which need to be addressed to improve the efficiency and fairness of secured transactions in India. Further legislative updates and judicial oversight are essential to align the legal framework with the evolving financial landscape.

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