

Sharī'ah Compatibility of Laws Governing Contracts of Mortgage and Pledge in Pakistan- Analytical Study in the Light of Sharī'ah and Law

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Abstract

This research article aims to investigate the Sharī'ah compatibility of laws governing contracts of mortgage and pledge in Pakistan. This research paper endeavors to conduct analytical study of statutory law of Pakistan on contracts of mortgage and pledge in the light of Sharī'ah and law. Sharī'ah appraisal of three core issues, that are, Sharī'ah issues in kinds of mortgage, legal status of mortgaged property and right of mortgagee to get benefit from mortgaged property, have been conducted. This paper finds that stern Sharī'ah issues are present in all kinds of mortgage except mortgage by deposit of title deeds which cannot be overlooked and un-noticed. Therefore, it is suggested that section 58 of the Transfer of Property Act, 1882 must be amended and different kinds of mortgage available and practiced must be barred by statutory law being repugnant to Sharī'ah. Moreover, this study concludes that mortgaged property is a trust, *amānah*, in the hands of mortgagee. Therefore, only mortgagor is allowed to get benefit from mortgaged property.

Keywords: Sharī'ah Compatibility, Contract of Mortgage, Contract of Pledge, Statutory Law

1.1 Introduction

The earliest form of contract of mortgage was the conditional conveyance or *fiducia* under which the property was forfeited in case of default of payment as debt. It gave the right to forfeiture. Later on the concept of *pignus* was evolved under which the ownership of property was not transferred but possession of property was transferred and right of forfeiture was not granted. Lastly, *hypotheca* was evolved under which the creditor acquired a right to sell the property in security but possession of property was not transferred.¹

Encumbrance is a burden or impediment or claim or liability on property that diminishes its value or effects transfer of ownership but do not prevent such transfer. A burden or impediment or claim on property can be in the form of pledge or mortgage or hypothecation or charge or lien.² A claim of pecuniary nature is usually secured by the creditor. It is a matter of common experience that the creditor demands greater surety of repayment of loan than the personal credit of the debtor. Security can be personal and called as guarantee. Security can also be in the form of property. Contract of securities where security is in the form of property include contract of mortgage and contract of pledge. If the security is moveable property then the contract of pledge is created and contract of mortgage is created in case of immoveable property.

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¹ S. Badar-ul-Hassan, *The Transfer of Property Act 1882*, 1st ed. (Lahore: Irfan Law Book House, 1993), p.313

² <http://www.thefreedictionary.com/encumbrance>, accessed September 14, 2016.

In this chapter, the Sharī'ah analysis of statutory law of Pakistan on contract of mortgage and pledge has been undertaken. In order to achieve the objective, some important issues have been selected pertaining to the kinds of mortgage, mortgaged-money must consist of principle amount only and not interest, legal status of mortgaged property, right of redemption of mortgagor, right of mortgagee to revoke the contract of mortgage, right of mortgagee to get benefit from mortgaged property, mortgaged-property subject to several mortgages, right of pledgee to retain possession of pledged property till the payment of interest and right of pledgee to sell pledged property.

1.2 Sharī'ah Issues in Kinds of Mortgage:

The contract of mortgage is defined in section 58 of the Transfer of Property Act, 1882 as,

A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by the way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.³

The person who transfers an interest in specific immoveable property is called as mortgagor. The person to whom an interest in specific immoveable property⁴ is transferred is called as mortgagee. Repayment of loan or a debt which is secured by the way of this transaction is called as mortgage money. The instrument through which such transaction is to be made effective is called as mortgage deed.⁵

Contract of mortgage is an agreement that creates an interest in real property as security for an obligation and which is to cease upon the performance of the obligation.⁶ Section 58 of the Transfer of Property Act, 1882 indicates that an interest in specific immoveable property is transferred to secure the pecuniary liability and such an interest can be a present interest or a future interest or merely a right in the land of another. Interest here implies rights, benefits, enjoyments or prerogatives. Therefore, the mortgagor need not be the owner having absolute and complete ownership in the property mortgaged. The interest in specific immoveable property in a contract of mortgage may be legal, equitable, divided or undivided.⁷ The term 'interest in property' indicates that the essential ingredients of ownership of property are lacking and right transferred is

³ M. Mahmood, *The Transfer of Property Act, 1882*, 7th ed. (Lahore: Al-Qanoon Publishers, 2013), p.551; Shaikat Mahmood and Nadeem Shaikat, *The Transfer of Property Act*, 6th ed. (Lahore: Legal Research Center 2013), p.414; Muhammad Naseem Chaudhary, *Commentary on The Transfer of Property Act 1882* (Lahore: Civil & Criminal Law Publications, 2014) 564; Vepa P. Sarathi, *Law of Transfer of Property*, 4th ed. (Lucknow: Eastern Book Company, 2000), p.187

⁴ The term immoveable property is not defined in Transfer of Property Act 1882. Section 3 of Transfer of property Act 1882 provides that immoveable property does not include standing timber, growing crops or grass. Immoveable property is defined in section 3 (25) of General Clauses Act (IX of 1897) as, "Immoveable property shall include land, benefits to arise out of land and things attached to the earth".

⁵ M. Mahmood, 551; Shaikat Mahmood and Nadeem Shaikat, *The Transfer of Property Act*, 414; Muhammad Naseem Chaudhary, 564; S. Badar-ul-Hassan, 310; Vepa P. Sarathi, p.187

⁶ Ronald A. Anderson, Ivon Fox and David P. Twomey, *Business Law*, 11th ed. (USA: South-Western Publishing Co., n.d), p.697

⁷ Ibid., p.698

Sharī'ah Compatibility of Laws Governing Contracts of Mortgage and Pledge in Pakistan-Analytical Study in the Light of Sharī'ah and Law restricted and limited. Transfer of ownership of property is different from transfer of an interest in the property.⁸

Besides definition of contract of mortgage, Section 58 of the Transfer of Property Act, 1982 also provides different kinds of mortgage besides defining mortgage.

1. Simple Mortgage:

The essential ingredients of simple mortgage are that the mortgagor himself undertakes the personal liability to pay the mortgage money to the mortgagee. The possession of the mortgaged property is not delivered to the mortgagee. The mortgagee is not entrusted with the right of foreclosure. The mortgagee is entrusted with the right of sale of mortgaged property in case of failure of repayment of loan or debt on specified and certain date when it becomes due. The transaction of simple mortgage is effected through registered document. Two distinct remedies are available with the mortgagee in case of simple mortgage. One of these two is suit for money decree and another is a suit for the sale of the mortgaged property.⁹

The researcher submits, Sharī'ah analysis of simple mortgage reveals that simple mortgage resembles more with a contract of *kafālah* than a contract of *rahan* as the mortgagor undertakes personal liability to pay the mortgage-money to the mortgagee.¹⁰ The possession of the mortgaged property is not delivered to the mortgagee in simple mortgage and delivery of possession of property in a contract of *rahan* is an essential ingredient for the making and conclusion of contract of *rahan* in Islamic law. It is based on the sayings of Allah Almighty in the Holy Quran:

وَأِنْ كُنْتُمْ عَلَى سَفَرٍ وَلَمْ تَجِدُوا كَاتِبًا فَرِهْنَ مَقْبُوضَةً فَإِنْ أَتَى بَعْضُكُم بَعْضًا فَلْيُؤَدِّ الَّذِي أُؤْتِمِنَ أَمْنَهُ وَلْيَتَّقِ اللَّهَ رَبَّهُ وَلَا تَكْتُمُوا الشَّهَادَةَ وَمَنْ يَكْتُمْهَا فَإِنَّهُ آثَمُ قَلْبًا وَاللَّهُ بِمَا تَعْمَلُونَ عَلِيمٌ

And if you are on a journey, and you find not a scribe then let there be pledge with possession. And if in between you one entrusts the other, then let he whom he trusted deliver his trust and fear Allah Who is his Lord and conceal not evidence; and whosoever would conceal evidence, then his heart is sinful from inside, and Allah knows your deeds.¹¹

2. Mortgage by Conditional Sale:

The essential ingredients of mortgage by conditional sale are that the mortgagor is not personally liable in case of default for the repayment of loan or debt. The mortgagor ostensibly sells the mortgaged property to the mortgagee. The mortgagor is ostensible seller and the mortgagee is ostensible buyer. The ostensible sale will be converted into absolute sale on the default of payment of loan or debt. If mortgage money is returned to the mortgagee (creditor) by the mortgagor (debtor) then mortgagee will resell the mortgaged property to the mortgagor at the expiration of stipulated time period

⁸ Mubashshar Sarshar, *Case Study: 1950-1970 Section 6 The Transfer Of Property Act 1882* (Delhi: National Law University, 2010), 1; Richard Stone, *Principles of Contract Law*, 4th ed. (London: Cavendish Publishing limited, 2000), p.374

⁹ Ehtsham Mahmood, *The Transfer of Property Act 1882* (Lahore: Mansoor Book House. n.d), 124; Vepa P. Sarathi, p.189

¹⁰ The researcher reached at this conclusion.

¹¹ Sūrah Al-Baqarah: p.283

against the price being the loan or debt advanced to him. The mortgagee is bound to resell the mortgaged property to mortgagor when mortgagor paid the mortgaged money to the mortgagee. Suit for foreclosure is available with the mortgagee in case of default in payment of mortgaged money to the mortgagee by the mortgagor. The transaction of mortgage by conditional sale is effected through registered document.¹²

It is difficult to create a difference between a mortgage by conditional sale and a contract of sale with an agreement to re-purchase. If the condition to re-transfer is stipulated in the same document then the law presumes that it is a mortgage and such a presumption can also be rebutted.¹³ A contract of sale with an agreement to re-purchase is not a mortgage because there is no financial liability in it for which the security in the form of property has been provided and also creditor debtor relationship does not exist in a contract of sale with an agreement to re-purchase.¹⁴

There is also a difference between absolute sale and mortgage with conditional sale. In case of absolute sale the relationship between the parties to the contract is that of seller and buyer and also the title in the property is absolutely passed on to the buyer by virtue of sale deed. However, in a mortgage with conditional sale the relationship of creditor and debtor exists and also the arrangement is made in it to borrow money and property is tendered as security for payment of the loan and if it is not paid the creditor can fall back on the security. In this situation relationship of mortgagor and mortgagee has been created and the ostensible owner of the property retains the interest in it.¹⁵

The researcher submits, Sharī'ah analysis of mortgage by conditional sale reveals that in mortgage by conditional sale two separate and distinct transactions have been tied together that is not allowed in Sharī'ah under the pretext of prohibition of *Bay'tain fil Bay'ah*.¹⁶ In mortgage by conditional sale it is stipulated in an agreement that the mortgagee will be the owner of the mortgaged property in case of default by the mortgagor in payment of amount of mortgaged-money. In Sharī'ah, the *murtahin* does not have a right to stipulate a condition that he should be the owner of the asset in case of default.¹⁷ Nevertheless, there is no prohibition for the *murtahin* to purchase the mortgaged asset at market value and take the portion of the value to which he is entitled.¹⁸

3. Usufructory Mortgage:

The essential ingredients of Usufructory mortgage are that the mortgagor delivers the possession of the mortgaged property to the mortgagee. The mortgagee is entitled to retain the possession of the mortgaged property until the payment of mortgaged money. The mortgagee is also entitled to receive rents and profits of the mortgaged property and the rents and profits may be appropriated in lieu of interest or in lieu of principal or in lieu of principal and interest both as agreed between the mortgagor

¹² Ehtsham Mahmood, 124-15; Vepa P. Sarathi, p.190

¹³ Atul M Setalvad, *Introduction to Law* (New Delhi: Lexis Nexus Butterworths, n.d), p.175

¹⁴ S. Badar-ul-Hassan, p.267

¹⁵ PLD 2014 Lahore 26; PLJ 2013 Lahore 637; 2013 CLR 1143.

¹⁶ The researcher developed this idea.

¹⁷ Wahbah Zuhylī, *Al-Fiqh Al-'Islāmī Wa 'Adillatuhū*, vol. 6, 1st ed. (Damishq: Dar Al-Fikr. n.d), 4209.

¹⁸ It was decided in 7th session of Islamic Fiqh Academy which was held in Jaddah, Saudi Arabia on 9th to 14th May, 1992.

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and mortgagee in mortgage deed. The mortgagor is entrusted with right of redemption after the payment of due amount or the due amount is discharged by appropriation of rents and profits received in lieu principal and interest. The mortgagee is not entrusted with the right of sale or foreclosure of the mortgaged property.¹⁹

The researcher submits, Sharī'ah analysis of Usufructory mortgage reveals that in Usufructory mortgage contract of lease and contract of mortgage have been merged together which is prohibited in Sharī'ah. In Usufructory mortgage two contracts have been concluded between the mortgagor and mortgagee simultaneously. One is of contract of lease and other is of contract of mortgage. In Sharī'ah, contract of *rahan* and contract of *ijārah* cannot be made simultaneously with respect to the same property. In such a situation the contract of *rahan* remains intact and contract of *ijārah* will be cancelled automatically.²⁰

4. English Mortgage:

The essential ingredients of English mortgage are that the mortgagor himself undertakes the personal liability to pay the mortgage money to the mortgagee. The property is transferred absolutely to the mortgagee by the mortgagor in English mortgage. This absolute transfer is subject to the condition that upon repayment of mortgage money by the mortgagor to the mortgagee on the specified and certain date the mortgagee will retransfer the mortgage property to the mortgagor. The possession of mortgage property is delivered to the mortgagee by the mortgagor. The mortgagee is entrusted with the right of sale but not with the right of foreclosure.²¹

The researcher submits, Sharī'ah analysis of English mortgage reveals that absolute ownership is transferred to the mortgagee by the mortgagor and that is in clear contradiction of definition of mortgage where an interest is only transferred in specific immoveable property for the purpose of securing the payment of loan or debt. Absolute ownership is transferred in case of sale and not in case of mortgage. Besides this, the proviso is also attached that the mortgagee will retransfer the mortgage property to the mortgagor upon the payment of mortgage money. Here it is similar to buy back transaction (*bay' al-wafā*) which is not allowed in Sharī'ah. Therefore, if English mortgage is considered to be sale even then it is in violation of Sharī'ah rules for the transaction of sale.²²

5. Mortgage by Deposit of Title-deeds:

Mortgage by deposit of title deed is also called as Equitable Mortgage. In Mortgage by deposit of Title deeds the mortgagor deposited the title deeds of his property to be mortgaged to the mortgagee with an intention to form the security for the loan or debt.²³

¹⁹ Ehtsham Mahmood, 127-128; Vepa P. Sarathi, pp.195-196

²⁰ Muhammad Burhan Arbouna, "The Combination of Contracts in Sharī'ah: A Possible Mechanism for product Development in Islamic Banking and Finance", *Thunderbird International Business Review*, Vol. 49, No. 3 (May-June, 2007), p.355

²¹ Ehtsham Mahmood, 130; Vepa P. Sarathi, p.200

²² The researcher developed this idea.

²³ Ehtsham Mahmood, 131; Vepa P. Sarathi, p.204

Case laws:

In a case of Union Leasing Limited vs. Pakistan Industrial Credit and Investment Corporation Limited and 8 others ²⁴ Mst Firdous Chughtai has mortgaged her property in favour of the Union Leasing Limited for the purpose of securing the finance facility allowed to Messer Kings Tyres Ltd and in this regard the physical deposit of the title documents of the property was also furnished. The appellant brought a suit against Messrs Kings Tyres Ltd and Mst Firdous Chughtai and claim the amount of Rs. 96,78,886. Messrs were the debtor and Mst Firdous Chughtai was the guarantor or surety for repayment of the finance. The learned trial Banking Court passed the judgment and decree in favour of appellant who was the creditor and mortgagee also and awarded him the claim of Rs. 74,92,137. For the satisfaction of its decree the appellant brought an application upon which the learned court directed for the sale of mortgaged property through court auctioneer. The appellant court also decided that the main question involved in this case is, whether a valid mortgage has been created in favour of appellant. The appellant court reached at the conclusion that it cannot be held that no valid equitable mortgage was created. Besides this, the original title documents are in possession of the appellant, which were handed over with the intention to create the equitable mortgage in accordance with section 58(f) of the Transfer of Property Act, 1882.

In a case of National Bank of Pakistan vs. Paradise Trading Company ²⁵ the respondent mortgaged her property to the appellant and had secured the finance facility from the appellant bank. Respondent become mortgagor and debtor also. The bank assumed the status of mortgagee and also the creditor. Respondent delivered to the bank a duly signed memorandum of deposit of sale deed but not the original sale deed and claimed that the original sale deed was lost. Respondent also submitted to the bank an affidavit claiming that she was the absolute owner of the mortgaged property by virtue of the sale deed which had been lost and that she had not created any lien or charge on the property. Respondent also submitted that when the sale deed was found, she would deposit the same with the bank. Later on the respondent defaulted and the appellant brought a suit against the respondent in a Banking Tribunal which passed decree in favour of the bank. Bank initiated the auction proceedings for the mortgaged property. During auction proceedings purported buyer of the mortgaged property claimed that property in question was sold to him by the respondent and he was in possession of the original title deed. The question regarding the validity of the mortgage transaction arose. The court held that purported buyer and respondent actively participated in commission of fraud to deprive the bank of its valuable security. Purported sale in presence of a mortgage could not be allowed to be sustained and was declared by the Supreme Court to be illegal and void. Supreme Court held that section 58(f) of the Transfer of Property Act, 1882 provides with the three requirements or necessary ingredients of Mortgage by deposit of title deeds which are: existence of debt, delivery of documents of title and intention that the document of title shall be security for the debt. All these three requisites are present in a mortgage transaction between the respondent and the bank. Therefore, the mortgage transaction is held to be valid and legal.

²⁴ 2005 CLD 958.

²⁵ 2015 CLD 366; 2015 SCMR 319.

The above mentioned case laws pointed out that in practice the mortgage by deposit of title deeds is prevalent commonly to secure the payment of finances as debt. The learned court in a case of, National Bank of Pakistan vs. Paradise Trading Company also stated that a sale cannot be executed in the presence of a mortgage. Mortgage by deposit of title deeds or equitable mortgage is valid and legal when the mortgage transaction fulfill the requirements which are, existence of a debt, delivery of documents of title and intention that the document of title shall be security for the debt.

The researcher submits, mortgage by deposit of title deeds seems to be Sharī'ah compliant because it covers the delivery of possession of mortgaged property in the form of title deeds which amounts to constructive possession and constructive possession is admitted by Sharī'ah.²⁶

6. Anomalous Mortgage:

The mortgage which is not in the ambit of simple mortgage or mortgage by conditional sale or Usufructory mortgage or English mortgage or Mortgage by deposit of title deeds is anomalous mortgage.²⁷ Practical example of anomalous mortgage is deficient.

The researcher submits, Council of Islamic Ideology, in its 14th report, did not analyse the definition and kinds of mortgage from Sharī'ah viewpoint. Thus, the Council did not raise Sharī'ah objections in section 58 of the Transfer of Property Act, 1882.

1.3 Mortgage-money must Consists of Principle amount only:

Section 58 of the Transfer of Property Act, 1882 provides that mortgage money includes the principal amount and interest; the payment of which is secured through contract of mortgage by transferring an interest in specific immoveable property to the mortgagee.

The researcher submits that mortgage money is a loan or a debt the payment of which is secured by contract of mortgage. Mortgagor is liable to make the payment of principal amount only to the mortgagee and no extra amount is allowed to be charged on principal amount because extra and excess amount on principle amount is equal to interest and interest is prohibited in Sharī'ah.²⁸

1.4 Legal Status of Mortgaged Property:

The possession of mortgaged property is delivered to the mortgagee usually in accordance with the type of the mortgage as mentioned in section 58 of the Transfer of property Act, 1882 and is therefore also entitled to receive the benefits from the mortgaged property and to use the mortgaged property also. Because of this reason, in Usufructory mortgage the mortgagee is allowed to use the mortgaged-property in land and can set-off the rent in lieu of mortgaged-money.

According to Ḥanafī school of thought the property in a contract of *rahan* is a trust in the hands of *murtahin*, therefore *murtahin* can only be held liable in case of willful-negligence and willful default. Possession of property is possession in trust or *yad al-amānah* in the hands of *murtahin* with respect to its possession. The possession of *murtahin* with respect to the liability of repayment of loan or debt is possession of *ḍamān*

²⁶ The researcher concludes the point.

²⁷ Ehtsham Mahmood, 132; Vepa P. Sarathi, p.209

²⁸ This analysis is based on the general prohibition of *ribā* in a loan transaction.

or *yad al-ḍamān*.²⁹ According to the majority of the schools of thought (Mālikī, Shāfi and Ḥanbalī) the possession of property in a contract of *rahan* in the hands of *murtahin* is possession in trust or *yad al-amānah* and not the possession in guarantee or *yad al-ḍamān*.³⁰

According to Sharī'ah Standard No. 39 the property is trust in the hands of *murtahin*. Hence, no responsibility rests with him in case of loss or damage occur to the property for a reason other than transgression or negligence and the loan or debt shall still remain valid.³¹

1.5 Right of Redemption of Mortgagor:

By mortgaging the property the mortgagor does not cease to be the owner of the property. Therefore, the mortgagor can redeem the mortgaged property by paying the mortgage money which includes principle amount and the interest due on it. The right of the mortgagor must not be barred by the Limitation Act, 1908. Right of redemption cannot be extinguished neither by act of parties nor by the decree of a court.³² Right of redemption is also called as Equity of redemption in English law. It is a statutory right; therefore, it is a legal right. Under the law of Limitation the right of redemption subsists for 30 years after the mortgage-money has become due.³³

Section 60 of the Transfer of Property Act 1882 provides with the legal rule regarding right of the mortgagor to redeem. After the mortgage money has become due at any time the mortgagor has a right, on payment of or tendering the payment of mortgage money, to require the mortgagee to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property, to deliver the possession of the mortgaged property to the mortgagor and to re-transfer the mortgaged property to the mortgagor.³⁴

²⁹ Muhammad Amīn ibn 'Uthmān ibn 'Abd al-'Azīz Ibn 'Ābidīn, *Hāshīyah Rad al-Mukhtār*, vol.5, 2nd ed. (Beirut: Dār Al-Fikr, 1992), p.342; Kamāl Al-Dīn Muhammad Ibn Humām Al-Dīn 'Abd al-Wāḥid Ibn 'Abd al-Ḥāmid Ibn Humām Al-Sīwāsī Al-'Iskandarī, *Fath Al-Qadīr Sharh Al-Hidāyah*, vol. 8 (Cairo: Matba'at Mustafā Muhammad, n.d), 198; 'Alā Al-Dīn Abū Bakar Bin Mas'ūd Bin Aḥmad Al-Kāsānī, *Badā'i' Al-Sanā'i' fi Tartīb Al-Sharā'i'*, vol. 6, 2nd ed. (Beirut: Dār Al-Kutab Al-'Arabī, 1974), 154; Muhammad Bin Aḥmad Bin Abī Sahal Shamas Al-Ā'imah, Al-Sarakhsī, *Al-Mabsūṭ*. vol. 21 (Beirut: Dār Al-Ma'rifah, 1993), p.63

³⁰ Abū Al-Walīd Muhammad Bin Aḥmad Ibn Rushd Al-Ḥafīd, *Bidāyah al-Mujtahid wa Nihāyah Al-Muqtasid*. vol. 2 (Cairo: Dār Al-Ḥadīth, 2004), 273; Abū Al-Qāsim Muhammad Bin Aḥmad Ibn Jazzy, *Al-Qawānīn Al-Fiqhīyyah* (Fās: Matba'at Al-Nahḍah, n.d), 324; Shamas Al-Dīn Muhammad Bin Aḥmad Al-Khatīb Al-Shirbīnī *Al-Iqnā' fi Hal Alfāz Abī Shujā'*, vol. 2 (Beirut: Dār Al-Fikr, n.d), 136; Muhammad Bin Yūnas Bin Salāḥ Al-Dīn Ibn Ḥassan Bin Idrīs Al-Buhūfī, *Kashshāf Al-Qinā' an Matn Al-Iqnā'*, vol. 3 (n.p: Dār Al-Kutab Al-'Ilmiyyah, n.d), p.328

³¹ AAOIFI, Shariah Standard No. 39, 'Mortgage and Its Contemporary Applications', Article 3/2/4, p.699

³² Ehtsham Mahmood, p.137

³³ Vepa P. Sarathi, p.248

³⁴ M. Mehmood, 610-611; Shaukat Mahmood and Nadeem Shaukat, *The Transfer of Property Act*, 476-487; Muhammad Naseem Chaudhary, 611-612; S. Badar-ul-Hassan, 349; Ehtsham Mahmood, pp.136-137

Case Law:

In a case of Khushi Muhammad and others vs. Muhammad Ashfaq and others³⁵ Hasab ud Din (deceased predecessor of the petitioner) mortgaged his shop to Mumtaz Ali (deceased predecessor of the respondent) to secure the payment of amount Rs. 7500 and executed a mortgage by conditional sale deed in favour of Mumtaz Ali. Hasab ud Din alleged that he was an illiterate old age villager. Mumtaz Ali fraudulently manipulated the entries regarding mortgage by conditional sale price as Rs. 10,000 instead of Rs. 7500 and period of six months for redemption of mortgage. Hasab ud Din filed a suit for redemption which was dismissed by the learned trial court. Being aggrieved Hasab ud Din preferred an appeal before Additional District Sahiwal which remanded the case for fresh decision. In post remand proceedings the learned court once again passed the decision in favour of Mumtaz Ali. Being aggrieved Hasab ud Din filed this revision petition. Justice Abdus Sattar Asghar held that Mumtaz Ali fraudulently manipulated the mortgage deed, therefore, Hasab ud Din according to section 60 of the Transfer of Property Act, 1882 is entitled to redeem his property in lieu of Rs. 10,000 and it is his statutory right. Besides it is also a rule of justice, equity and good conscience. The court further held that the possession of the property in the hands of the mortgagee will remain as mortgagee and would not be converted into a possession as buyer. There is no cavil to the proposition that consequent to the original transaction the parties are not debarred from converting the transaction from mortgage into a sale by drawing a separate sale deed otherwise the transaction would remain a mortgage and possession of mortgagee would not be converted into possession as an owner.

1.5.1 Partial Redemption:

The general rule is that a mortgage being one and indivisible security for the debt and every part of it, the mortgagor cannot redeem the mortgaged property in a piecemeal. Similarly a co-mortgagor cannot redeem his portion of the mortgaged properties. There is no bar to a mortgagor of an undivided share in redeeming the entire mortgage. Therefore, the owner of a part of the mortgaged property can offer to redeem the whole mortgage but not any part of it.³⁶

Redemption of the mortgaged property is regulated by a general rule of consolidation of mortgages. By consolidation a mortgagee in whose favour the same mortgagor has effected two or more mortgages could refuse to allow redemption of any one of the mortgages without redeeming the others. The doctrine of consolidation was based on a legal maxim, "He who seeks equity must do equity". At Common law after the expiry of the date fixed for the payment of the mortgage money the mortgagor has lost the right to redeem. The Court of Chancery took a different view and granted the mortgagor the equitable relief of redemption even though the due date for payment had passed. The Court of Chancery based their view point on the legal maxim, "Once a mortgage always a mortgage". The mortgagor was granted with the equitable relief of redemption of mortgaged property even after the right has been lost. The mortgagor was asked by the Court of Chancery to do equity to the mortgagee by redeeming all the mortgages which he had affected in his favour.³⁷

³⁵ PLD 2014 Lahore 26; PLJ 2013 Lahore 637; 2013 CLR 1143.

³⁶ Ehtsham Mahmood, p.145

³⁷ Ibid., p.149

Section 60 (last paragraph) and section 61 of the Transfer of Property Act, 1882 provides an exception to the consolidation of mortgages or to the general rule of whole redemption of mortgaged property in the form of partial redemption. Section 60 (last paragraph) provides that the partial redemption is allowed where the mortgagee has acquired a share of the mortgagor whether by way of purchase or inheritance etc.³⁸ Section 61 of the Transfer of Property Act, 1882 provides that where a mortgagor has executed two or more mortgages in favour of the same mortgagee, such a mortgagor can redeem any one of such mortgages separately or any two of the mortgages together when the mortgage money of any two or more of the mortgages becomes due.³⁹

The researcher submits that in Islamic law *rāhin* can redeem his mortgaged property at any time after making the payment of amount of money due to him to *murtahin*. In Islamic law right to redemption of *rāhin* is not required to be accrued on the lapse of time. *Rāhin* can redeem his property in a contract of *rahan* at any time after tendering the payment of amount of money due to him as a loan.⁴⁰

Furthermore, the researcher submits that in Islamic law partial redemption is allowed generally and not exceptionally unlike Common law where partial redemption is not allowed generally but exceptionally.

1.6 Right of Mortgagee to Revoke the Contract of Mortgage:

Contract of mortgage do not entitle neither the mortgagor nor the mortgagee to revoke the contract before date of maturity. Islamic law on contract of *rahan* allows *rahin* to make the payment of money at any time and to redeem his mortgaged property. Similarly, *rāhin* is also allowed to revoke the contract of *rahan* at any time and can demand the payment of money advanced by way of loan or a debt.⁴¹

Contract of *rahan* is *lāzim* for *rāhin* but not for *murtahin*. For this reason *murtahin* can revoke the contract at any time. If the property on which contract of *rahan* is created primarily to secure claim of money, the subsequent transaction on such property to make it security for another claim of money cannot be made without the consent of *murtahin*.⁴²

1.7 Right of Mortgagee to get Benefit from Mortgaged Property:

Muslim Jurists agreed on permissibility of getting benefit from utility of property because relieving property without getting benefit from its utility leads to its destruction and destruction of property due to its non usage is not allowed according to Sharī'ah general rules related to property. But Muslim Jurists differ in their opinions that who is entitle to get benefit from property in a contract of *rahan*.

i) Right of *Rāhin* to get Benefit from Property in a Contract of *Rahan*:

According to Ḥanafī and Ḥanbalī schools of thoughts *rahin* is not allowed to get benefit from the utility of property in a contract of *rahan* because getting benefit from the utility of property without taking prior permission from *murtahin* amounts to

³⁸ M. Mehmood, 611; Shaukat Mahmood and Nadeem Shaukat, *The Transfer of Property Act*, 487; Muhammad Naseem Chaudhary, 612; S. Badar-ul-Hassan, 350; Nafeer Ahmed Malik, 208.

³⁹ M. Mehmood, 632; Shaukat Mahmood and Nadeem Shaukat, *The Transfer of Property Act*, 534; Muhammad Naseem Chaudhary, 642; S. Badar-ul-Hassan, p.362

⁴⁰ AAOIFI, Standard No., "Mortgage and its Contemporary Applications", clause 3/1/1, p.697

⁴¹ Ibid.

⁴² Ibn-Qudāmah, vol. 4, p.397

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infringement of right of *murtahin*.⁴³ The opinion of Mālikī school of thought is stricter in this matter than Ḥanafī and Ḥanbalī schools of thoughts. According to Mālikī school of thought *rāhin* is not allowed to get benefit from the utility of property in a contract of *rahan* in any circumstances even with permission because according to Mālikī school of thought giving permission to get benefit from utility of property in a contract of *rahan* makes the contract of *rahan bāṭil* and such permission amounts to abandoning the right by *murtahin*.⁴⁴ According to Shāfi school of thought *rāhin* is allowed to get benefit from the utility of property in a contract of *rahan* because *rāhin* is the real and actual owner of property which is made security for payment of amount of money due on *rāhin* and *rāhin* is entitle to any sort of increase in such property owing to his ownership.⁴⁵

According to Sharī'ah Standard No. 39 the *rāhin* can get benefit from the property secured with the permission of the *murtahin*.⁴⁶

ii) Right of Murtahin to get Benefit from Property in a Contract of Rahan:

According to majority of schools of thoughts (Ḥanafī, Mālikī and Shāfi) *murtahin* is also not allowed to get benefit from the utility of property without seeking prior permission to do so from *rāhin*.⁴⁷ According to Ḥanbalī school of thought *murtahin* is allowed to get benefit from the utility of property in a contract of *rahan*.⁴⁸

According to Sharī'ah Standard No. 39 the *murtahin* cannot get benefit from *marhūn* free of charge with or without the permission of the *rāhin*.⁴⁹

1.8 Mortgaged Property Subject to Several Mortgages:

According to Ḥanafī, Shāfi and Ḥanbalī schools of thought the property in whole once made security for the payment of money by way of loan or debt cannot be made security for second time. According to them it is not permissible to give the second creditor any right which contradicts those of the first creditor. If the prior *murtahin* approves the second contract of *rahan* then second contract of *rahan* is executed and the first contract of *rahan* is voided.⁵⁰ According to Mālikī school of thought it is permissible to give the property in security for second time provided that the value of such property exceeds the value of first debt secured.⁵¹

⁴³ Al-Kāsānī, vol. 6, 146; Ibn 'Ābidīn, vol. 5, 342; Ibn Qudāmah, vol. 4, 288, Al-Buhūtī, *Kashshāf Al-Qinā' 'an Matn Al-Iqnā'*, vol. 3, p.323

⁴⁴ Al- Dardīr, *Al-Sharh Al-Kabīr*, vol. 3 (Egypt: Matba'āt Al-Bābī Al-Ḥalabī, n.d), p.241

⁴⁵ Shamas Al-Dīn Muhammad Bin Aḥmad Al-Khatīb Al-Shirbīnī *Al-Iqnā' fī Ḥal Alfāz Abī Shujā'*, vol. 2 (Beirut: Dār Al-Fikr, n.d), p.131

⁴⁶ AAOIFI, Standard No. 39, 'Mortgage and Its Contemporary Applications', clause 3/2/9, p.699

⁴⁷ Ibn 'Ābidīn, vol. 5, 342, Al-Kāsānī, vol. 6, 146; Ibn-Humām, vol. 8, 102; Al-Dardīr, *Al-Sharh Al-Kabīr* vol. 3, 246; Ibn Rush Al-Ḥāfid, *Bidāyah al-Mujtahid*, vol. 2, 273; Ibn Jazzy, 324; Al-Khatīb Al-Shirbīnī, vol. 2, p.299

⁴⁸ Abū Muhammad Mawfiq Al-Dīn 'Abdullah Bin Aḥmad Bin Muhammad Ibn Qudāmah, *Al-Mughnī*, vol. 4 (n.p: Maktabah Al-Qāhira, 1968), 385; Muhammad Bin Yūnas Bin Salāḥ Al-Dīn Ibn Ḥassan Bin Idrīs Al-Buhūtī, *Kashshāf Al-Qinā' 'an Matn Al-Iqnā'*, vol. 3 (n.p: Dār Al-Kutab Al-Ilmīyyah, n.d), p.342

⁴⁹ AAOIFI, Standard No. 39, 'Mortgage and Its Contemporary Applications', Article 3/2/9, 700.

⁵⁰ Al-Kāsānī, vol. 6, 147; Al-Khatīb Al-Shirbīnī, vol. 2, 127, Ibn Qudāmah, vol. 4, p.347

⁵¹ Al-Dardīr, *Al-Sharh Al-Kabīr*, vol. 3, p.238

If part of the property is made security for the payment of money due on one person then another part of the same property is made security for the payment of money due on another person but with the consent of *Murtahin* of first transaction. Such a transaction is *sahih* according to Shāfi, Mālikī and Ḥanbalī schools of thoughts. In such transaction possession of property can be delivered to *murtahin* of first transaction or to any other person as a trust on whom all the parties to the contract agree.⁵² According to Ḥanafī school of thought such a transaction is not *sahih*.⁵³

Property is made security for the payment of money in one transaction. Another transaction is made through which same property is made security for the payment of another amount of money. In such situation, second contract of *rahan* on same property is not allowed according to Ḥanafī, Shāfi and Ḥanbalī schools of thoughts. If *murtahin* of first transaction allow second contract of *rahan* on same property, second contract of *rahan* will be enforced. Free consent of real owner of property is also mandatory to do so otherwise transaction will not be *sahih*. If free consent of real owner has not been obtained to do so and property has been wrecked or ruined in the possession of second *murtahin*, owner of real property will be given a choice to fix the liability of bearing the loss on either of *murtahin* of first contract of *rahan* or second contract of *rahan*.⁵⁴ According to Mālikī school of thought, second contract of *rahan* is allowed only if the value of property which is made security is greater than the amount of money due in first contract of *rahan* and second contract of *rahan* is in lieu of that excess amount of money in terms of value of property. If property is sold out, both amount of money due in first and second contract of *rahan* must be satisfied from the proceeds of sale of property.⁵⁵

Section 81 of the Transfer of Property Act, 1882 provides a legal rule on marshalling by subsequent mortgagee. If the owner of two or more properties mortgages them to one person and then the owner mortgages one or more of such properties to another, the subsequent mortgagee is entitled to ask the prior mortgagee to satisfy his mortgage debt out of the property or properties which have not been mortgaged to him. The word marshalling means 'to manage'. The subsequent mortgagee has a right to ask the prior mortgagee to manage his claim of mortgage debt out of the property or properties which have not been mortgaged to him. If prior mortgage-debt cannot be satisfied from property or properties other than those which have been mortgaged to subsequent mortgagee then in such a situation the prior mortgagee can satisfy his mortgage-debt out of the property or properties mortgaged to subsequent mortgagee.⁵⁶

For instance: X mortgages properties M and N to A. X is the mortgagor. A is the mortgagee. Then X mortgages property N to B. B is subsequent mortgagee. Now B can ask A to satisfy his claim of mortgage-debt out of M which has not been mortgaged to B.⁵⁷ In marshaling by subsequent mortgagee different rights of the competing mortgagees in the property or properties mortgaged to them has to be determined.⁵⁸

⁵² Al-Khatīb Al-Shirbīnī, vol. 2, 127, Ibn Qudāmah, vol. 4, 347; Al-Buhūtī, *Kashshāf Al-Qinā'* 'an *Matn Al-iqnā'*, vol. 3, p.314

⁵³ Al-Kāsānī, vol. 6, p.147

⁵⁴ Al-Kāsānī, vol. 6, 147; Al-Khatīb Al-Shirbīnī, vol. 2, 127, Ibn Qudāmah, vol. 4, p.347

⁵⁵ Al-Dardīr, *Al-Sharh Al-Kabīr*, vol. 3, p.238

⁵⁶ M. Mehmood, 703.

⁵⁷ Ehtsham Mahmood, 195.

⁵⁸ Ibid., p.197

1.9 Right of pledgee to retain possession till payment of interest:

Section 173 of Contract Act 1872 provides that the pledgee has a right to retain the possession of the pledged property till the payment of interest.

This thesis argues that Islamic law does not allow the payment of extra money over and above the principle amount of loan or debt because of involvement of *ribā*. Therefore, section 172 of Contract Act 1872 must be amended to exclude claim of money on account of interest from the pledged money.⁵⁹

1.10 Right of Pledgee to sale pledged property:

Section 176 of Contract Act 1872 provides the right of the pledgee to sell the things pledged when the pledger makes default in the payment of amount of money.

The researcher recommends that section 176 should be amended and pledgee must exercise the right to sell the collateral in case of default of payment of pledged-money through court of law and not by himself.

1.11 Conclusion:

On the basis of above discussion, this research paper concludes that contract of *rahan* seems to be the counterpart of contract of mortgage and pledge. Section 58 of the Transfer of Property Act, 1882 must be amended to exclude the payment of money in lieu of *ribā* from the mortgaged-money being repugnant to the injunctions of Islamic law.

The researcher submits, Sharī'ah analysis of kinds of mortgage reveals that stern Sharī'ah issues are present in all kinds of mortgage except mortgage by deposit of title deeds which cannot be overlooked and un-noticed. Therefore, it is suggested that section 58 of the Transfer of Property Act, 1882 must be amended and different kinds of mortgage available and practiced must be barred by statutory law being repugnant to Sharī'ah.

Furthermore, the researcher recommends that mortgagee must be provided with the right to revoke the contract of mortgage at any time and can demand his money back after delivering the possession of mortgaged property back to the mortgagor. Moreover, the researcher recommends that section 67 of the Transfer of Property Act, 1882 must be amended and right to redeem the property can be exercised by the mortgagor at any time on making the payment of mortgaged-money to the mortgagee. Section 67 provides that right of redemption cannot be accrued till the lapse of time for which the property is mortgaged.

In addition to above suggestions, the researcher recommends that section 67 of the Transfer of Property Act, 1882 must also be amended to the extent, where after the exercise of right of foreclosure by mortgagee; right to redeem the mortgaged-property has been lost by mortgagor forever. The mortgagor being the owner of the mortgaged property must be provided with a right to redeem the mortgaged property, even after the decree of the court to order the sale of mortgaged-property to satisfy the mortgaged debt from the proceeds of the sale, if mortgagor pays the mortgaged-money in-front of court to the mortgagee.

⁵⁹ This argument is based on the general prohibition of *ribā* in a loan transaction.

Section 81 of the Transfer of Property Act, 1882 must also be amended to include that mortgagor is duty bound to get the consent of mortgagee in order to mortgage the already mortgaged property for second time so that the rights of prior mortgagee can be secured and protected.

The researcher also recommends that section 173 of Contract Act, 1872 must be amended to exclude the amount of money on account of *ribā* and pledged money must only consist of principle amount. Moreover, the researcher also suggests that section 176 of Contract Act, 1872 must be amended and right of sale of pledged property by pledgee must be exercised through court of law.