Ques.) What is "Equity of Redemption"? Can this right be validly curtailed under the Transfer Of Property Act, 1882?

Ans.) Right to redeem is the right to recover something by making certain payments. Mortgagor's right of redemption is a right to recover or get back the property after making the payment of loan. By way of security, the mortgagor transfers an interest in his immovable property, If the loan has been paid back by the mortgagor, the interest so transferred must revert back to the mortgagor. And the mortgagee cannot retain any interest in the mortgage-property. If the debt does not exist by making payment of the loan with its interest, the mortgagor becomes entitled to redeem, i.e., call back the interest given to mortgagee as security for repayment. Mortgagor's right to redeem the mortgaged property after repayment of loan is a right which rests in him by virtue of his residuary ownership in the property, because immovable property is a bundle of several interests. Out of all such interests only an interest is transferred to mortgagee as security for repayment of loan and remaining interests are still with mortgagor. The remaining Interests are called <u>Residuary ownership</u>. Basis of mortgagor's right of redemption is his residuary ownership in the mortgaged property.

Mortgage is effected only for giving security for repayment of loan. Mortgagor neither intends nor desires that property should go absolutely to mortgagee. If mortgagor could not repay a loan on a fixed date, the law must extend his right of redemption upto a reasonable time. It would be unfair and against the very object of the transaction of mortgage that the mortgagor's right of ownership is lost merely due to non-payment of loan within specified period. Principles of justice, equity & good conscience would not allow that a transaction which is basically a borrowing transaction should become an absolute conveyance only because there was no repayment on a fixed date. Mortgagor's right of redemption has been incorporated in Sec. 60, TP Act. It is statutory right in India. This is an inherent right of every mortgagor irrespective of the kind of mortgage. The right of redemption as laid down in Sec. 60, TP Act, is based on the equity of redemption under English law.

The Hon'ble S.C. in Mathew Varghese V. M. Amritha Kumar, AIR 2015 S.C., held that the principles incorporated in Sec. 60, TP Act, are in essence general in nature in respect of all mortgages.

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⇒ **EQUITY OF REDEMPTION** : In England, the mortgagor's right of redemption was introduced by the chancery courts. Chancery courts were the courts of equity. Mortgagor's right to redeem the mortgage by making payments even after the due date is known as Equity of Redemption. The Equity Courts introduced this right in order to do justice.

The courts Of Equity (Chancery courts) realised that the main purpose of effecting a mortgage was to give security to the money lender for repayment of his money. The money-lender should not be given any legal right to hold on the property absolutely if mortgagor was ready to pay within reasonable time after expiry of the due-date and this right of mortgagor to redeem even after he was in default, was known as Equity Of Redemption. The mortgagor shall have the right to redeem the mortgage at any time before the foreclosure or sale by the mortgagee. Equity while protecting the interest of mortgagor protected also the interest of mortgagee beyond a reasonable time, the mortgagor lost his equity of redemption and mortgagee was entitled to get decree for foreclosure by the courts of Equity. The Courts Of Equity held that it was an important right of mortgagor that it could not be denied to him in any manner, as it is an essential characteristic of every mortgage and equity declared that "Once a Mortgage, always a Mortgage".

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"ONCE A MORTGAGE, ALWAYS A MORTGAGE"

Equity of redemption was introduced by the Chancery Courts in England to give relief to those mortgagors who could not repay the loan within the stipulated time. The main purpose of developing the doctrine, the equity of redemption was to protect the interest of mortgagors who in default of payment of loan had to lose all rights in their properties.

In essence it provided that mortgagor's right of redemption would not be defeated by any agreement to the contrary even though mortgagor himself had agreed to it. The maxim "Once a mortgage, always a mortgage and nothing but a mortgage" simply means that a transaction which at one time is mortgage could not cease to be so by having any stipulation in the mortgage-deed calculated to prevent the right of redemption. The well-known rule that agreement of the parties over-rides the law, does not apply to mortgages. Thus, no contract between mortgagor and mortgagee which was entered into at the time of mortgage is valid if it prevents mortgagor's right of calling back his property on repayment of loan. This maxim

This maxim has been explained by Lord Henley that necessitous men are not free man and to answer the present exigency will submit to any terms that the crafty may impose upon them.

This maxim may be applied to explain following two situations:

- First, where in essence a transaction is mortgage, but may be given the form of sale, its nature of mortgage cannot be converted to that of a sale merely because of any stipulation in the mortgage-deed that after expiry of due-date, the mortgagor shall have no right to redeem and mortgagee shall become full owner of the property. A mortgage is always considered as redeemable even though there is an express agreement between the parties that it cannot be redeemed after the due date.

- Secondly, equity does not permit any clog on redemption which means any stipulation or provision in the mortgage-deed itself which restricts the mortgagor's right of redemption. A clog on redemption is VOID, and cannot be enforced as being contrary to the very nature of mortgage.

The Full Bench of P & H H.C. in
Ram Kishan V. Shlo Ram, AIR 2008 P & H (FB)
held that the right to seek redemption does not arise on the date of mortgage.

It arises on the date when the mortgagor pays and deposits in court the balance amount. The principle that "once a mortgage, always a mortgage", and therefore always redeemable becomes applicable.

The Hon'ble S.C. in Chandrakant Shankarrao Machale V. Parubai Bhairu Mohite, AIR 2008 S.C. followed the decision in Harbans V. Om Prakash, AIR 2006 S.C. and Gurudeo Kaur V. Niranjan Singh, AIR 2008 P & H H.C., held that no time limit is for redemption of usufructuary mortgage and mortgagor's right to seek redemption at any time is permissible. The mortgagee in possession could not be declared to be the owner of the property by efflux of time. Mortgagor could have right to seek redemption at any time by tender of dues.

CLOG ON REDEMPTION

"Clog on Redemption" means condition or stipulation which prevents the mortgagor from redeeming the mortgage-property on payment of loan. Right of redemption is also known as Mortgagor's right of redemption. Equity does not permit any fetters or clog on mortgagor's right of redemption and holds that once a mortgage, always a mortgage and nothing but a mortgage. A clog on equity of redemption is VOID. The mortgagor's right of redemption as laid down in Sec. 60, TP Act, is a statutory right because no condition or stipulation and a clog on mortgagor's right of redemption is void can prevail against a statutory right given by Sec. 60, TP Act, 1882, and the courts too have accepted that the doctrine of clog on equity of redemption being a rule of justice and good conscience, it must be given recognition. Even a mortgagor cannot stipulate against his own right of redemption. If he does so, it may be void as being clog on his right of redemption.

A condition or stipulation is a 'clog' and is void, only in the following circumstances:

(i.) The condition or stipulation has been imposed only by the mortgagee, not by any other person who is stranger to transaction.

(ii.) The condition or stipulation must be incorporated in the mortgage-deed itself. Parties are free to stipulate otherwise by any independent contract outside the mortgage-deed.

(iii.) The condition or stipulation included in the deed must be unreasonable, against public policy and with mala-fide intention.

(iv.) The condition or stipulation puts either absolute restraint on mortgagor's right of redemption or prevents him from redeeming the mortgage for unreasonably long period.

What condition or stipulation may amount to be a clog on mortgagor's right of redemption is a matter of fact. It depends on the matter of each case.

⇒ EXTINGUISHMENT OF RIGHT OF REDEMPTION: (Proviso to Sec.60, TPA)

The right of redemption is a statutory right. It can be extinguished only in the manner provided under Sec.60, TP Act. The second paragraph of Sec.60, TP Act provides for only modes of termination of the right of redemption —

(i.) By act of parties, and
(ii.) By decree of Court.

• **By act of parties:** The right of redemption is extinguished when the parties themselves stipulate for it under a seperate agreement after execution of the mortgage-deed. Such extinction (termination) of right is possible only where it is outside the transaction of mortgage. By act of parties redemption may be terminated only if such termination is not included in the mortgage-deed.

Secondly, such stipulation must also be subsequent to the mortgage-deed. The act of parties intended to extinguish the right of redemption must not form part of the mortgage transaction.

Extinguishment of the right of redemption by operation of law has not been included in Sec.60, TP Act, but the right is lost also by operation of law. For Eg: Where mortgagee obtains the right of redemption by succession or by adverse possession or the mortgagor gets mortgagee's right by inheritence, the right is terminated by operation of law as held in Markanda v. Varada, AIR 1949 Patna H.C.

By the act of parties, the right of redemption may be extinguished in the following manner:

(i.) Redemption of mortgage by mortgagor;
(ii.) Foreclosure of mortgage by a mortgagee U/Sec.67, TPA
(iii.) Sale by mortgagee under Sec. 68, TPA
(iv.) By Lapse of time

Under Sec. 60, TP Act, the right of redemption can be exercised if it has not been extinguished by act of parties or by a decree of court or by payment of the money due.

- By decree of court: The right of redemption may be extinguished also by a decree of court. Such decree must be a final decree. In the suit on mortgages two decrees are passed by court. One is preliminary decree and the other is a final decree. Such final decree is passed by the court either in the mortgagor's suit for redemption under

Order XXXIV, Rule 8(3), CPC, or in mortgagee's suit for redemption under Order XXXIV, Rule 3(2), CPC. The final decree declares that the mortgage is foreclosed, i.e., no mortgage exists at all. This extinguishes the mortgagor's right of redemption.

The Hon'ble S.C. in Rukmani Ammal V. Jagdesa Gounder, AIR 2006 S.C. said that a sale of the mortgaged property by the mortgagor to the mortgagee by a court auction and the period of 12 years has expired from the date of sale, the mortgage becomes the owner by adverse possession. The mortgagee's claim to absolute ownership of the mortgaged property is sustainable when such claim is based on a transaction with the owner-mortgagor, such a sale of the mortgaged property to the mortgagee.