

1. **Banks & Foreclosure Laws Relating To Mortgage Finance**

- a) Banks and DFI's in Pakistan are providing individual Home Finance as well as Housing Projects Finance. Home finance provided to individuals and project financing for housing involve different kinds of questions regarding appreciate financial structure. However, as regards foreclosure laws there are certain common issues.
- b) Foreclosure is a remedy available to a creditor secured by mortgage to proceed against the property for satisfaction of the mortgage debt. In classical terminology "foreclosure" would mean a right available to a mortgagee under which the mortgagor is disabled from redeeming the property and the property vests in the mortgagee when a foreclosure takes place. The other remedy available is to bring the property to sale for recovery of the secured debt. However, in Pakistan, the word foreclosure is used only in the sense of a right available to a mortgagee to bring the mortgaged property to sale to enforce the secured debt.
- c) To promote mortgage financing in Pakistan and to improve laws and procedures relating to enforcement of mortgages, the suggested measures shall have to be taken:

2. **Mortgage by Deposit of Title Deeds and Problems of Clear Title**

- a) Mortgage by deposit of title deeds is the easiest, cost-free and hassle-free method for a Financial Institution for creation of mortgage over an immovable property. But it also has certain drawbacks as discussed here.
- b) In certain cases, where there is only Extract of Revenue Record as proof of ownership and no registered document, mortgage by deposit of title deeds cannot be created for the reason that Extract of Revenue Record is a not a title document.

For such cases, an alternative method of creation of mortgage by getting an entry of equitable mortgage recorded in the Revenue Record was introduced in 1986 through the Finance Act by making an amendment in Section 58(f) of the Transfer of Property Act, 1882. But it failed to provide any relief to public as the Revenue Officers in Sindh did not understand the intention of the legislature and treated it as oral 'Khatooni transfer', which require huge amount of fee. The Revenue Authorities need to be instructed properly. Even otherwise Section 58(f) is not applicable in Punjab and the NWFP.

- c) Assuming that a party has agreed to sell its property to another person and that person has filed a suit for enforcement of the contract, or there is some other litigation relating to title of a property, there is no way for a Financial Institution to discover this through any reasonable mode of search out of public records. It is, therefore, important that a system be created where all rights relating to a property or any claims relating to it are marked against that property in some public record. If someone purchases such property, enters into an agreement to buy it, initiates some litigation etc. then entry on the public record must be made. In case such property devolves through inheritance then the record maintaining authority should be bound to enter the names of the heirs after due inquiry. Australia has been the pioneer of such a system (the "Torrens System") and it is being followed in quite a few countries.

- d) There would be a need to set up an appropriate system as visualized above. However, pending development of the system, a legal framework can be created, as an interim measure, where any claim regarding a property interest to the extent of agricultural land is entered in the revenue records (free of cost) and as regards urban property is entered in the property tax record. The property tax record would need to be maintained even regarding properties that might otherwise be exempted from tax e.g. properties upto 5 marlas, properties owned by widows etc.
- e) The system of mortgage by deposit of title deeds should be done away with. It often happens that the property, somewhere down the history of its title, might have been mortgaged by deposit of title deeds belonging to some earlier owner. There have been cases where a bank, when trying to enforce a mortgage against a shop in a plaza, has discovered that the entire plaza has already been sold since financing had been obtained for it secured on deposit of the ground title deed.

3. Mortgage by Registration of Mortgage Deed – Legal Mortgage

- a) Though, registration is an expensive and very formal method of creation of mortgage over an immovable property, it is often followed by Financial Institutions.
- b) The major reason that equitable mortgage is found attractive is that it is cost free while a registered mortgage is an expensive affair. To promote Legal Mortgage, it might be advisable that the stamp and registration duty should be reduced drastically.
- c) Though under the present legal regime, the Registering and Revenue Authorities are required to work as a team, this is not the actual case.

Thus, a Mortgage Deed or any other registered document relating to any immovable property is not automatically sent by the Registering Authorities to the relevant Revenue Authorities for entry in the Revenue Record of that property. A special instruction to this effect should be issued by the Government to all concerned.

4. Lien Marking over Immovable Properties

- a) In practice, there is also another form of creation of security over an immovable property i.e. marking of lien/assignment of contractual rights other than mortgage. This is done where a housing development agency such as CDA, DHA, Coop. Housing Society etc. have made only an allotment of property rights but still retain the ground title.
- b) Where property belongs to development agencies and only contractual rights are given to allottees, a difficulty arises for a financing bank as regards creation of effective security. This matter has been discussed in para 3.2 of the Annexure to Letter No. F.Agha/NHP 3.2.1(b) dated 5-3-2008.
- c) As regards the situation visualized in paragraph 3.2 discussed above, one solution could be that it should be made permissible for the banks to obtain transfer jointly in their own name as well as in the name of the party financed, with the status of the bank being that of a security holder. This kind of arrangement could also be useful when a bank is providing facility for purchase of homes even from individuals. In fact the arrangement would be the same as is at present practiced in some cases relating to a finance for purchase of vehicles where the equipment

is registered in the joint names of the party providing the finance as well as its recipient.

5. Record of Immovable Properties

This is the most important aspect of mortgage finance. The record keeping system of immovable properties, at present, is somewhat weak. Registered mortgages are entered on “document to document” basis and there is no entry against the previously registered sale contract. When a bank seeks a “non-encumbrance certificate” that very often is issued by the registration authority (in Punjab) on the basis of an affidavit provided by the property owner and not on the basis of any search. Even a search extends only upto the period of the last registered deed. If there has been a mortgage prior to that, it would have not been disclosed in the search. The basic problem is that there is no uniform system of recording of rights against the property itself, but even registered transactions are entered in unconnected disparate manner. Therefore, a system of consolidating and computerizing immovable property record all over Pakistan has to be put into place.

6. General

Following are some other general suggestions to improve the overall mortgage finance structures:

- a) There should be uniformity of immovable property laws all over Pakistan, especially with respect to Revenue Record and Registration and Transfer Fees. For example, transfer expenses for a transfer of an immovable property through a registered sale deed comes to be 10% of the value of the property in Baluchistan, while in Sindh, it is 7% of the value of the property. In other provinces, it is different.
- b) The Transfer of Property Act, 1882 should be made applicable to all provinces of Pakistan There should be no provision of Oral transfers.
- c) Military or Cantonment properties’ laws and rules are different. They should be consolidated with ordinary immovable property laws.
- d) For promoting mortgage finance, it is also important that measures be taken for encouraging securitization of mortgage receivables. Under this kind of arrangement special purpose vehicles/companies may be formed to purchase the mortgage backed receivables and sell them to investors in form of marketable mortgage backed securities. On sale of such receivables, the selling institution would be in receipt of funds that could again be invested in mortgaged backed financing. For enforcement of such mortgages (whose receivables have been converted into securities), it would be necessary that there be a trustee empowered to enforce each mortgage in default. There has to be some enabling legislation where a trustee should be able to enforce mortgages through the Special Courts for recovery of monies owed to financial institutions. It would also be extremely important that stamp duty required to be affixed on the marketable security instruments either be exempted or be drastically reduced. Mortgage backed securities would create a secondary market that would help in generating funds for investment in the housing sector.
- e) Building control rules and regulations should be simplified and consolidated. Obtaining Completion Plan and NOC of building control authority concerned

should be made mandatory for every financing against immovable property by the banks.

- f) DC values should be notified in all areas of Pakistan.
- g) Sale on the basis of unregistered Power of Attorney should be prohibited. Under Sec 33 of Registration Act, a power of attorney is required to be authenticated by the Sub-Registrar of the area where the property situates or the principal resides. But this system is not followed and many documents have been and still being registered by the Registration Authorities on the basis of unauthenticated power of attorney. Confusion as to whether Power of Attorney is a compulsorily to be registered document or not prevails all over the country. The process and mode of authentication of Power of Attorney should be clearly given in the Registration Act and it should be clarified that whether Power of Attorney is required to be registered or not and whether any document can be registered by the Registration Authorities on the basis of unregistered or unauthenticated Power of Attorney.
- h) If mortgage by deposit of title deeds system is to be retained, it should be clarified that mortgage by deposit of title deeds can be created in all areas all over Pakistan, as there is a confusion that mortgage by deposit of title deeds cannot be created in areas under the jurisdiction of Cantonment Boards and other areas of Sarhad and Baluchistan.
- i) Stamping of mortgage documents i.e. MODTD and Mortgage Deed is different in all provinces. It should be consolidated. Preferably, the stamp schedule introduced by Sindh Government through Stamp Amendment Ordinance 2002 for Banking Companies under Article 19 of Schedule of Stamp Act, 1899, should be made applicable all over Pakistan.
- j) A system of Microfilming every document registered with any Sub-Registrar of Properties, as operative in Karachi and other areas of Sindh, should also be made applicable all over Pakistan.

7. Enforcement of Mortgage

Enforcement of Mortgage is the most important aspect of mortgage finance. Following are some of the suggestions to improve the mortgage enforcement structure:

- a) For enforcement of a mortgage, it is necessary that a person having an interest in the mortgaged property be made a party (Order 34 Rule 1 of the Code of Civil Procedure). Sometime it happens that sale of a property has taken place subsequent to the creation of the mortgage. Under the present law, such subsequent sale is not void. On the other hand, when execution proceedings are levied, it is discovered that the person in occupation is someone who had purchased the property from the mortgagor. Although such person would be bound by the mortgage but he may not be bound by the decree, since he has not been made a party to the proceedings. To deal with such situations, the court of execution should be empowered to grant a hearing to such a person and rule on its claims or objections on merits. Under the present law, the position adopted by the execution court is that it has no power to deviate from the decree. As a result, the decree being not executable against the objector, it may become meaningless requiring the mortgagee to file a fresh suit by impleading the current owner who had not been heard in the case earlier.

- b) Many authorities that lease land especially DHA and other military authorities do not recognize rights of Financial Institution to sell immovable property themselves under Section 15 of Recovery Ordinance, 2001. A special instruction to this effect should be issued by the Government to the relevant departments and ministries.

- c) The Financial Institutions (Recovery of Finances) Ordinance, 2001 is a well designed piece of legislation that empowers banks to enforce mortgages with or without intervention of the court. However, there is one anomaly in Sub-section (6) of Section 15 that needs to be removed. Once a mortgage has been created, the mortgagor should not be in a position to create a better interest in the mortgaged property than he himself has. Where the property is already in possession of a tenant, the mortgagee bank should examine the terms of tenancy since the mortgagor would not be able to assure delivery of vacant possession at the time of creation of the mortgage.

However, where the mortgagor is in exclusive possession, he should have no power to create any tenancy interest or other interest in the property that would preclude the mortgagee to seek vacant possession at the time of enforcement of the mortgage. At present, Sub-section (6) of Section 15 visualizes that a lease may be created even after the date of mortgage, and the question whether it was created bonafide or not would be determined by the court. This, in practical terms, means a long drawn out litigation to determine whether the lease is bonafide or not. The law should be amended so as to provide no recognition to any lease, or alteration in the terms and conditions of the existing lease, unless it is done with the express written consent of the mortgagee.