

## The Study of Selling of Mortgaged Property in Iran's Law

Ali Sadeghi

1-Department of Law, Ilam Sciences and Research Branch, Islamic Azad University, Ilam, Iran. 2- Department of Law, Ilam Branch, Islamic Azad University, Ilam, Iran.

Faramarz Bagher Abadi

1-Department of Law, Ilam Sciences and Research Branch, Islamic Azad University, Ilam, Iran. (corresponding author). 2- Department of Law, Ilam Branch, Islamic Azad University, Ilam, Iran (corresponding author)

(Received Jan. 2015 & Published online March. 2015 issue)

### Abstract

How we can justify the possibility of selling an estate by mortgagor owner with mortgage of it that is one of the aspects of enforcement of his ownership right in one hand, and simultaneously observance of mortgagee right with noted selling and continuation of protesting that right on the other hand? Resultant hypothesis of this question is that: however, jurisprudents in the field of canon law and jurists in the field of law believe that selling mortgaged estate is not penetrating without permission of mortgagee and it will be invalid if mortgagee rejects selling. In this research, it has been explained that such a selling is penetrating and correct because article v93 of civil law does not refer to selling. Therefore, noted selling and other similar possessions of mortgagee are not inconsistent with the right of mortgagee. Consequently, It is better to accredit the selling of mortgaged estate by logical interpretation so that can accredit many contracts that are similar to selling according to noted order. Therefore, we can solve problems that are related to banks relations with borrowers and mortgagor and mortgagee with each other. Societies and judicial courts are involved in these problems.

**Keywords:** mortgaged estate, selling of mortgaged estate, redeployment of mortgaged estate, objective front right of mortgagee, mortgagor owner.

### General purposes:

- 1- Study the position of selling of mortgaged estate in Iran
- 2- Study the impact of selling of mortgaged estate on Iran's law.

### Main question:

What is the impact of selling of mortgaged state on legal system and procedures of Iran?

### Main hypothesis:

Despite positive impacts, selling of mortgaged estate has shortages in Iran's law.

### Research method

The method of research is fundamental and theoretical. These researches are sometimes called basic researches and try to discover factors and realities of objects and events. These expand the boundaries of general knowledge, discover scientific rules, and explain the traits and characteristics of a reality. In this research, we may write a theory or test principles and hypotheses.

Therefore, their purpose is to increase knowledge regarding studied subject.

### Study and measurement of variables:

Independent variable (X): selling of mortgaged estate

Dependent variable (Y): Iran's law

### Method and tool of collecting data

In this research, we use analytical-descriptive method.

The collection of used data was made via library method. Books and Magazines were used.

### The tool of data analysis

This research tries to study the subject rationally via analytical-descriptive method.

In the past times, mortgages' time was not as long as present mortgages. Therefore, possessions prevented damage to the rights of mortgagee because mortgage issue was not reflected anywhere and merely remained between mortgage parties. Therefore, it was possible to ignore the

right of mortgagee via extermination of usual established notes or parties breach of promises. Consequently, the lack of absolute possession kept this promise continuous and new, and pawn was absolutely imposed on property itself, not like today on notes and documents. But what is more important is a note in which mortgaged is reflected, not property itself. Since the reflection of mortgage in formal notes of mortgaged property causes that mortgagee to be sure that his right will be protected. It is not important for him that estate to be in possession of everyone because today in real estate and moveable properties those are mortgaged, and are considered in custom of mortgage contract the issue of mortgage reflection is performed in formal and official centers.

According to articles 46-48 of real estate registration law and article 22 of that law regarding real estate, every kind of transfer note should be reflected in real estate registration office. It should be a formal note. If mortgage note to be registered, it will find enforcement power via registration of documents and official and governmental centers. Therefore, mortgagee enjoys such an assured mechanism to protect his rights. If he doesn't use it voluntarily, he will do a foolish action, and if he loses, he will be reproachable himself, not official or governmental centers.

Mortgagor should be prohibited from possession that is inconsistent with the right of mortgagee. For example, mortgage cancellation without the permission of mortgagee. But according to the expressions and words of article 793 of civil code, selling of mortgage has not been prohibited absolutely by mortgagor owner. Since today the ownership of individuals regarding real estate is achieved when according to article 22 of real estate registration law we take action about ownership. Otherwise, it wouldn't be generated any legal impact as ownership. Therefore, despite the obligation of real estate transactions registration in articles 46-48 of real estate registration law ownership is the first and most basic impact of it. In other words, mortgagor is owner when his ownership has been reflected in the office of a notary public. Mere transfer

of property in the register office of formal documents doesn't make him owner, but set document of register office is a document of official transfer, not an official document of ownership. Therefore, registration of that transfer in register office real estate registration department makes him owner. One of the impacts of this registration is the acceptance of document in banks for mortgage. On the other hand, If a mortgage is made, it will have a contract that leads to many financial impacts. Therefore, such a contract should be registered formally, and people to be aware of this point. We can see that all mortgage contracts often are between banks and individuals, and are formally conducted in a notary public by ownership document. Then with announcement to registration of documents office the mortgage issue will reflect in notary public below the registration of that property. Today this issue is observable and pursuable throughout the world due to the instantaneous registration of computerized system.

We can consider this subject from other point of view. Civil code is a front general law that was approved in 1928, and real estate registration act of country is a late and special law that was approved in 1931. Therefore, existent mechanisms of registration act articles that have made the registration of real estate transactions compulsory have allocated the articles of civil code including article 793 of civil code. What is the criterion of action in confrontation of two laws regarding subjects is to consider registration act as a late and special act. According to this fact that article 793 civil code to be approved latter than articles 26, and 46-48 of real estate registration act because latter general law cannot damage front special law, so above articles of real estate registration will be the criterion of action. Another point regarding this fact that article 793 of civil code is not inconsistent with the selling of mortgage: in the above article, inconsistent possession with the right of mortgagee is discussed. Whereas possession consists of absolute possession including material and legal possession, but many jurists have considered material possessions as profitable for mortgage or even it is not

profitable, doesn't damage it too. Some believe that since in mortgage contract time and duration of mortgage is determined. Therefore, mortgagor that is owner of property can lease the mortgaged property for mortgage term or less than it without permission of mortgagee, and this lease is correct. They state that the lease of mortgaged property is correct for mortgage terms or less than it and it is not inconsistent with the rights of mortgagee (Jaafari Langhroodi, Mohammad Jaafar, 2009, p 100).

In the contract of selling mortgaged property, general rules of contracts are observed. Therefore, legal department of Judiciary power the contract of selling mortgaged property considers as enforceable via paying the liability of mortgagor by himself, or mortgagee or third party. However, in a transaction that is not penetrating consequent permission of beneficiary (owner) is necessary. But in the selling of mortgaged property the permission of mortgagee whose debt has been paid is not necessary.

If the contract of selling mortgaged property is not penetrating, we should add the satisfaction of beneficiary to it. If it is penetrating, it wouldn't require the addition of other person satisfaction. Then, how is it about the case of manhnfih in which contract of selling mortgaged property is not penetrating due to the front objective consequential right of mortgagor in mortgage, but it is penetrating and correct just to the payment of mortgage debt. While this case is inconsistent with legal rules regarding the lack of penetration of rightful party. Therefore, this gap shows that we should interpret article v93 of civil code in other manner i.e. the selling of mortgaged property without the permission of mortgagee is penetrating and correct only when his right is protected. We can say that even without noting his right is penetrating and correct. Since mortgagee right results from mortgage even if it remains hidden in the contract of selling mortgaged property, it will be binding as a front objective consequential right. Therefore, recent interpretation is more reasonable. Only buyer has the right of cancellation. Recent interpretation is more reasonable, and consistent with general

rules of contracts. This doesn't imply that we should add a point other than general rules of contracts so that it doesn't have the impacts of those rules, and causes that the existence of mortgage is considered as the lack of penetration of selling of mortgaged property, and it is considered as penetrating via paying the debt of mortgagee without need for his permission. This leads to a gap in general rules of contracts and their impacts.

What has provided the field of doubt in veracity of selling of mortgaged property is the issue of protection from mortgage right that has been established for mortgagee, not the issue of incumbency of mortgage contract relative to mortgagor so that in the direction of incumbency of mortgage contract relative to mortgagor cannot perform acting to exit mortgaged property from mortgage conditions without mortgagee permission because in required contracts any kind of one way action on behalf of parties is forbidden. Therefore, in required contracts none of the parties can damage contract without collaboration of other party or perform one way action. But in mortgage contract despite the incumbency of contract relative to mortgagor, he can perform any action including the selling of mortgaged property under the conditions of farewell of mortgagee right and without mortgagee permission. According to article 34 of registration act that was corrected in 1972 and articles 131 and 132 of regulations of enforcement of formal documents contents and the manner of examination of complaint against executive operation that was approved in 1976 and even previous text of article 34 of real estate registration act that was approved in 1941 and article 776 of civil code, repeated mortgage has been accepted, Where as primary mortgage contract prevents any legal action that is inconsistent with mortgagee right. The second mortgage is one of the actions that are inconsistent with the right of mortgagee. According to present predominant suggestion it should not be performed, but in above cases such an action has been allowable.

When complete estate is on mortgage of mortgagee even if the value of estate to be more than the value of debt for which

mortgagor estate has located on mortgage of mortgagee, above complete estate will be on pledge of that debt. It legally belongs to mortgagee right. According to the interpretation of article 793 of civil code, the repeated mortgage of mortgaged estate is forbidden without the permission of mortgagee. Since complete estate has been mortgaged previously, and the conclusion of related mortgage is necessary relative to mortgagor. The repeated mortgage of estate is not possible without permission of mortgagee. While previous text of article 34 of real estate registration act that was approved in 1941 and its present text according to note 4 and article 776 of civil code have given such a right without the permission of mortgagee to mortgagor. It is completely inconsistent with contents of article 793 of civil code and present predominant theories and procedures. On the other hand, when a complete estate is mortgaged, we cannot imagine an excess for it to mortgage it again. Therefore, excess word is meaningless even if the value of estate is more than that of debt.

Generally legislator believes the selling of mortgaged is correct even without the permission of mortgagee. As we noted previously, the purpose of legislator is to protect the right of mortgagee, not the property of necessity of mortgage conclusion relative to mortgagor that prevents the selling of mortgaged estate by him; or hindrances that are related to general conditions of contracts (basic conditions of veracity of transactions in article 190 of civil code), or the existence of mortgagee rights is absolute hindrance. Since it is not among basic conditions of veracity of transaction or general rules of contracts, because mortgagee right is binding, and it is a front right. The selling of mortgaged estate doesn't damage the noted front objective right of mortgagee.

Therefore, we can say that the selling of mortgaged estate is penetrating and correct by mortgagor without the permission of mortgagee. This issue is inferred from articles 54 and 55 of executive act of civil judgment. In article 54 the excess of seized property that is discussed under the title of judicial mortgage has the potential of seizure again. Article 55 considers the farewell of rightful or mortgagee right as

the permission of second seizure of seized property. This issue is inferred from "excess" word that has been applied in the regulations of contents of enforceable formal documents and the manner of examination of complaints about executive operations that was approved in 1956 (articles 131 and 132).

In the past decades, there hadn't been a mechanism such as today registration mechanisms. Therefore, the possession of mortgaged property had been a challenging issue so that if the mortgaged property was in the possession of mortgagor, wasting the right of mortgagee would be possible. On the other hand, the possession of it by mortgagee was inconsistent with the ownership right of mortgagor.

Since the purpose of capturing mortgaged property by mortgagee is to confine it and provide the potential of mortgagee access to mortgaged property for seeking his debt, not to provide the field of exploitation from mortgaged property because the interests of mortgaged property belong to owner right that is mortgagor not mortgagee. Therefore, mortgagor and mortgagee were forbidden from possession.

But today there is a mechanism such as registration. First, ownership becomes meaningful via registration in a notary public that is the subject of article 22 of real estate registration act. Second, any kind of mortgage should be reflected in a notary public. Otherwise, it lacks legal impacts. Third, with above conditions mortgagor cannot waste the right of mortgagee because ownership right and mortgage right should be reflected in governmental and official centers. Otherwise, it lacks legal impacts, law cannot support him, and his right will be damaged. Fourth, mortgagee can refer to the executive department of registration and seeking his debt. It is not important whether property is in possession of mortgagor or mortgagee or third party because it is a front and objective right that can't be ignored or wasted. Therefore, in any case objective right of mortgagee is stabilized and superior over any new right that is to be established. If a selling is made, the right of mortgagee will be binding. Therefore, selling of mortgaged property doesn't damage it, and is

penetrating and correct. This objective right is so important that if mortgaged property is lost by mortgagor, should replace it. Therefore, there is no concern for wasting the right of mortgagee.

What has been noted frequently in article 34 of real estate registration act according to note 4 shows that selling of mortgaged property is penetrating and correct with payment of mortgage debt its farewell near a notary public without permission of mortgagee. This subject is evident in articles 54 and 55 of civil code. While in law science the philosophy of the lack of penetration is due to the need for the permission of beneficiary and rightful that should attach to the purpose of seller. In other words, when we talk about the lack of penetration that there is a intention, and contract has been concluded, but due to the lack of satisfaction contract is not penetrating. In any case, mortgagor is owner. His intention and satisfaction is the basis of selling contract, not intention and satisfaction of mortgagee.

Therefore, in article 34 of real estate registration act selling of mortgaged property is considered as penetrating and correct without the permission of mortgagee.

Therefore, the selling of mortgaged property is not a possession that to be inconsistent with the right of mortgagee because

- 1- Mortgage right is a front objective right. It is the characteristic of objective right that to be superior over any right, and is attributable to any person. It is pursuable under any conditions.
- 2- Mortgagee can seek his debt from mortgaged property, if he doesn't receive his claims on time. In other words, his right is pursuable. It is not important whether mortgaged property is in the possession of mortgagor or via selling it has been transferred to third party. In recent case due to the objectivity of mortgage right, vindication occurs in the ownership of new buyer because it is superior over ownership right of buyer, and has been established in favor of mortgagee before selling of mortgaged property. Buyer and mortgagor cannot eradicate it with their agreement.
- 3- Registration mechanisms lead to the achievement of ownership based on articles

46-48 of real estate registration act and articles 22 and 24 of the same act when these are registered in a notary. Mortgagee right should be reflected in a notary public. Therefore, reflection of such a right in notary public eliminates the potential of wasting the right of mortgagee. Mortgage right is a stabilized objective right that is supported in terms of form. Therefore, it doesn't seem reasonable that we consider ownership transfer of mortgaged property to any contract particularly the selling of mortgaged property that is the subject of this research as inconsistent with the right of mortgagee. We shouldn't interpret article 793 of civil code unreasonably.

It should be noted regarding judicial procedure of our country that: our country judicial procedure has experienced confusion and multiplicity in its votes and theories in many similar subjects so that we have frequently seen that conflicting verdicts have been issued by the courts and Supreme Court of country. In addition, different judicial theories have been raised and issued in the form of legal department theories of judicial power. While the base subject of related theories has been a similar subject, this conflict in verdicts and suggestions result from ambiguities that exist in the rules of our country, and pave the way for personal interpretations.

In one hand, it is useful. On the other hand, it damages legal and judicial system of our country. In this research, we try to study judicial procedure of Iran.

We have frequently seen that the verdicts of courts of first instance are not confirmed by appeal courts; Appeal courts issue a verdict that is contrary to the verdict of court of first instance. In addition, the verdicts of appeal courts are violated by high court cassation. In branches other verdict is issued that is contrary to first verdict. In addition, verdicts of unity of procedure of high court cassation are different and conflicting in a similar subject. These show that the judges of courts are different persons with different judicial suggestions. They issue different and conflicting verdict and suggestion based on their verdicts and suggestions based on their personal interpretations of laws.

### Conclusion

The obtained results from his research show that front objective right of mortgagee is respectful, and mortgagor can use his ownership right. His ownership right is respectful too. We haven't questioned the principle of contracts veracity, and considered it respectful. We should recognize the principle of contracts necessity between owner mortgagor and buyer, and respect the contract of selling of mortgaged property.

According to this principle, we recognize the necessity of contracts regarding the obligation of mortgagor and mortgagee about selling of mortgaged property. In addition, we have accepted the logical interpretation of selling of mortgaged property. We have made reliable many other contracts such as peace, donation, lease, etc. on the other hand, the buyer of mortgaged property with the action of mortgagee in the direction of vindication of his debt from mortgaged property can refer to seller of mortgaged property (mortgagor), and receive his loss from mortgagor. Since loss is imposed on anyone who has caused it. Here if mortgagor didn't pay his debt and mortgagee sought debt from mortgaged property that is in the possession of buyer, he will be responsible for this loss. Finally, he should compensate it. Therefore, with vindication of mortgage debt from mortgaged property that is in the possession of buyer any loss doesn't impose on buyer.

### References

- Abasi, Mohammad Masood, translated by AyatollaPayani, Vol 2009, scientific center press.
- Amami, Sayed Hassan, civil rights, Vol 1997, Islamic center press.
- Detailed negotiations of high court cassation, department of unity of procedure and publication of general board negotiations of high court cassation, first print, Tehran, 2001.
- Haeri. Sayed Ali, explanation of civil code, Volume 1 and 1997, knowledge treasure press.
- Jaafarilangroodi, Mohammad Jaafar, civil rights (Mortgage and peace), 2009, knowledge treasure press.
- Katozian. Naser, civil code in current legal order, 1998, Justice press.
- Mirzaee. Ali reza, civil code, volumes 1, 2 and 2012, Behnami press
- Negotiations and verdicts of general board of high court cassation (1997), the office of studies and researches of high court cassation, first print, Tehran, 1999.
- Registration rules and regulations (real estate registration), approved in 1931, visit press.
- Regulations of enforcement of contents of binding formal documents and the manner of examination of executive complaints, 1984.
- Rule and regulations that are related to enforcement of civil code, approved in 1997, periods press.
- Trade law.