Chapter Three

Mortgage (Security of Immovable)

❖ Definition

Marcel Planiol, in his comment on the French Civil Code provides that:

- mortgage is a real security which without presently dispossessing the owner of the property hypothecated, permits the creditor at the due date to take it over and have it sold, in whosever hand it is found and to get paid from the proceeds by preference to the other creditors.

From this definition we can understand the following basic points.

1. Mortgage is a real security**: -**The right that creates relation between a person (creditor) and a thing (the ppty given as security); and the right that can be enforced against everybody in the world**.**
2. Creation of mortgage doesn't result in dispossession of the debtor thereby allowing him to use, enjoy, administer or do anything he wants to do with his property. Art 3084, 3088.
3. Mortgage by its nature entitles the creditor to exercise his security right only if the debtor fails to perform his obligation at the due date.
4. The principal right of mortgagee creditor is the right of **pursuit** and **preference**. i.e the right to follow the property and satisfy his claim in whosever hand the property may be found and the right to be paid first from the proceeds of the sale of the property in priority to other creditors.
   - ✓ There is no any provision dedicated to the definition of mortgage in Ethiopian legal system.

   ### ❖ Subject matter of mortgage

   - ✓ Mortgage is created principally against immovable together with its intrinsic elements and accessories. Art 3047(2)
   - ✓ In some exceptional circumstances special types of movables may be mortgaged. e.g. Business as special movable and subject to registration can be mortgaged. Art 171-193 Com.C.

   ### ❖ Essential Characters of Mortgage

a. **It is a real right. –** It creates relation between the creditor and the mortgaged property.
   - ✓ It entitles the mortgagee creditor to exercise his security right against the property wherever the property may be.
   - ✓ While enforcing his right as a mortgagee, the creditor proceeds against the property encumbered with the right of mortgage; not against anybody.

b. It is created against immovable
   - ✓ Mortgage is created principally against immovable together with its intrinsic elements and accessories however in some exceptional situations special type of movables may be mortgaged.

c. **It is accessory to the principal obligation**

- ✓ Mortgage is accessory rights in substitution or an alternative remedy of the principal obligation.
- ✓ It cannot exist or can't be enforced in the absence of the principal obligation.
- ✓ The extinction of the principal obligation for whatsoever reason, results in the extinction of the accessory right - mortgage.
- ✓ The enforcement of accessory right is conditioned upon the failure of the debtor to perform his obligation.
- ✓ The existence of mortgage depends on the existence of the principal claim. Art 3109(1), 3110(a)

d. **Indivisibility of mortgage**

- ✓ Almost all securities by their nature are indivisible. Indivisibility is reflected in two principal ways.

- Even if the debtor pays a portion of the claim, he is not entitled to claim the proportional reduction of the value of mortgage. The unpaid part of the claim shall be secured by the total value of the original mortgage. Art 3055(3).
- For various reasons the immovable subject to mortgage may be divided, for example, among heirs. However, the mortgage over the divided immovable continues as undivided.
- Each part will be encumbered with the total value of mortgage for the payment of the total claim. Art 3087.

❖ **Importance of mortgage**

- Mortgage has been recognized as the most effective and economic type of security for various reasons.
  - ✓ Like all other real rights it entitles the creditor to proceed against property in case the debtor fails to pay the claim.
  - ✓ It does not affect the power of the debtor to possess, use, collect fruit, improve, manage, create rights for others or even dispose the property. Art 3084.

❖ **The essential requirements for the creation and enforcement of mortgage**

a) Written form. because of:

- The huge capital or money which it guarantees.
- The nature of property (immovable which has multifaceted economic value) it affects.
  - ✓ Mortgage shall have a legal effect only if its creation is evidenced by a written document. Art. 3045 (1).

b) Registration

- ✓ Creditor is required to register his right for the effective protection of his right as a secured creditor. Art 3052, 1723 cc.
- ✓ Mortgage starts to be effective only as of the date of registration.
  - ➢ Registration guarantees **two** principal rights in the security of the creditor.

a) The right of priority in payment.

- The right to be paid first from the proceeds of the sale of the immovable in case there are other creditors of the same debtor. Art 3076.

b) The right of pursuit or the right to follow the mortgaged immovable in the hands of third parties who acquire the thing subsequent to registration of mortgage.

- The creditor can enforce his security right irrespective of the fact that the thing has been transferred to any third party provided that he registers his right of mortgage prior to the transfer. Art 3085, 3089.

✓ Registration also serves the purpose of publicity.

- It notifies all third parties what kind of rights and encumbrances already exists on the immovable.
- So registration is one of the essential preconditions for the valid existence and effectiveness of mortgage.

c) Ownership

✓ The debtor (mortgagor) is required to be the full owner of the immovable against which he is creating mortgage. Art 3049(2).

✓ Unless the person is the owner who is entitled to dispose the thing at the time of creation of mortgage, the mortgage cannot be valid and enforced. Art. 3049 & 3050.

✓ Even if the mortgagor acquires full right of ownership later on after creation of mortgage, this fact does not rectify the defect in the mortgage and it remains to be of no effect.

✓ What if the debtor has the right of ownership but it is common ownership like between spouses?

✓ Art. 68 & 69 of the RFC requires consent of both spouses for the creation of valid mortgage even if the property is registered in the name of one of the spouses.

✓ What if the debtor is given the power of attorney to dispose the thing but not to mortgage it?

✓ Art. 2205 (2) cc, in the law of agency also requires a special agency for an agent to create valid mortgage on the property of the principal.

d) Specification of the maximum claim secured by the mortgage

✓ The maximum claim secured by the mortgage has to be clearly specified in the document or contract creating a mortgage. Art 304545(2), 3048.

✓ It has two principal purposes.

1. It informs all third parties (other creditors, purchaser etc…) to know the maximum value of encumbrances on the thing.
2. It enables the debtor to create another mortgage on the same immovable in order to take additional loan from other creditors.

❖ **Types of Mortgage**

✓ Mortgage may be divided into three principal types.

1. Legal Mortgage

✓ The mortgage rights of creditors arise from the provisions of the law itself without any agreement between the creditor and the debtor. Art. 3042.

- ✓ E.g. an owner who sells his immovable is entitled to legal mortgage on the immovable he has sold as far as he is not paid the full price of the property.
- ✓ Co-heirs also have the same protection since they are entitled to legal mortgage against immovable put in the share of another co-partitioner. Art 3043.

2. Judicial Mortgage

- ✓ Where the right of mortgage for the creditor is provided by decision making organs, principally Courts and Administrative Tribunals against one or more of the immovable belonging to the judgment – debtor. Art 3044.

3. Contractual Mortgage

- ✓ It arises from clear/express agreement between the mortgagor and the mortgagee. Art 3045(1).
  - ✓ Whatever its type may be, mortgage can have a legal effect only if it is duly registered. Art. 3052

❖ **Effects of Mortgage**

- ✓ The creation of mortgage results in rights and duties for the parties to the contract of mortgage.
- ✓ It will have a legally binding effect on the parties if it is created by fulfilling the requirements of the law.
- ✓ Even it may affect the interest of third parties in certain circumstances.
- ✓ The requirement of registration applies to all types of mortgages. Art. 3052.
- ✓ registration of mortgage and specification of maximum value secured enables the debtor:
- ✓ To create another additional mortgage.
- ✓ To make economic use of the property even after the creation of mortgage.

❖ The Relations between the Parties to Mortgage

A. The Rights of the Creditor (mortgagee)

- ✓ The creditor derives two principal rights from mortgage.

1. The Right to be paid first (priority right)

- ✓ The right to be paid from the proceeds of the sale of the property, in priority to any other creditor.
- ✓ This right is referred to as the right of preference or priority in payment.
  - ✓ A creditor can demand to be paid in priority to any other creditor of the same debtor or any other third party based on the date of registration. Art 3081, 3082.
  - ✓ The registration of the right of mortgage has to be made before third parties registered any type of right in rem over the property mortgaged. Art 3057, 3059 (1) & (2), 3081/82, 3085 and 3088/89.
  - ✓ The creditor can demand to be paid in priority first the principal claim, next the contractual interest to be calculated on the principal. Art 3076, 3077(1).
- ✓ The interest calculated for the time not exceeding two years. Art 3077(2)(3)

- ✓ The creditor will assume the position of an ordinary creditor if there is an interest that has been calculated in excess of two years.
- ✓ The creditor can demand in priority of others the necessary expenses incurred for the preservation and insurance of the immovable:-
- ✓ when the mortgagor is not financially capable to preserve the thing and
- ✓ When an insurance policy which may terminate unless the premium is paid by creditor. Art.3078, 3069, and Art 684 Com.C.
- ✓ The cost of attachment, any rent collected after the attachment of the immovable. Art 3079.
- ✓ In the first place, the priority right of the creditor applies to the immovable itself.
- ✓ Immovable obviously includes the intrinsic elements from which the immovable is made and some objects which may be fixed to the immovable as accessories.
- ✓ Intrinsic element or accessory shall form part of the mortgage; read Art.3065 of the civil code.
- ✓ However, the mortgagor may transfer some of the intrinsic elements or accessories to third parties separately from the immovable itself.
- ✓ Art.3065 provided that the creditor cannot follow the intrinsic elements or the accessories in the hands of third party.
- ✓ Because when they independently considered, they are principally movable and anybody who acquires movables in good faith is entitled to legal protection as such.
- ✓ However when such transfer reduces the value of the immovable and this in turn affects the security right of the mortgagee the law provides alternative remedy for the mortgagee. I.e. - He can demand the debtor to provide another property which can replace the intrinsic elements or accessories transferred to third parties Art 3073(1) or
- ✓ To demand immediate performance of the part of the principal claim which turns out to be unsecured. Art. 3065, 3073(2), 3074 and 3075.
- ✓ Next to the immovable itself the law considers the priority right as extending to improvements that may be made to the mortgaged immovable.
- ✓ Another property to which the security right extends is the rent which may be collected from the mortgaged immovable.
- ✓ Any rent collected after the attachment of the immovable (when z debtor fail to perform his obligation on due date) forms a part of the property to which the priority extends. Hence the creditor will have priority right on such rents.
    - ✓ The priority right of the creditor applies even against other creditors who clam security right on the same immovable.
- ✓ But, in case all the competing creditors are secured creditors, the priority right shall be enforced on the basis of the date of registration. Arts. 3081 – 3083cc

2. **The right to follow the property**
   - ✓ It is sometimes referred to as the right of pursuit.
   - ✓ The mortgagee has the right to follow the property in the hands of third parties whose right is registered after the registration of the mortgage.
   - ✓ Mortgage is a real right in the sense that the security right of the creditor is against the mortgaged immovable.

B. The Rights of the Debtor (Mortgagor) on the Property after the Creation of Mortgage

- ✓ The debtor continues to possess and exercise his right of ownership on the thing.
- ✓ Mortgage doesn't result in the disposition of the debtor of his mortgage property.
- ✓ The debtor can exploit his property in the manner he thinks fit even after giving it as a mortgage.
- ✓ Registration and specification of the maximum value secured by the mortgage entitle him to do that.
- ✓ Arts.3084 and 3088cc envisage that the debtor is entitled to create or enjoy all possible rights on the mortgaged immovable
- ✓ These rights can't be restricted even by express agreement between the debtor and the creditor.

❖ The place of third parties in the mortgage relations

- ✓ the mortgaged immovable may be transferred to a third party buyer as the law itself allows the mortgagor to do so; or
- ✓ The immovable itself may belong to third party who mortgages it on behalf of the debtor.
- ✓ Hence, both the buyer and the third party mortgagor may be considered as third parties with respect to the principal relation between the debtor and the creditor.

? What is the fate of the third party who acquires rights in rem subsequent to the registration of mortgage or the third party who mortgages his property on the?

- **in case of third party buyer**:-

- ✓ The debtor has full right to transfer the immovable to a third party buyer even after mortgaging it.
- ✓ On the other hand, the creditor who registers his right of mortgage duly is entitled to proceed against the immovable even if it is in the hands of third party.
- ✓ 1st It is the duty of third party, before entering into contract of sale, to check what rights have been already created and registered on the immovable.
- ✓ The law provided some remedies with some preconditions stipulated under Arts. 3090, 3091, 3093, 3094, 3095 & 3097 for such third parties who are ousted from the immovable by the secured creditor.
- o Such third party can invoke against the secured creditor (mortgagee) taking the position of the guarantor and relies defenses available for the guarantor. Art 3090.
  E.g. He can show that:

- The primary obligation is invalid owing to the incapacity or mistake on the part of the debtor (Art. 1923), or
- The primary obligation has been extinguished for whatsoever reason (Art.1926 [1]), or
- The primary obligation has been extinguished through substituted performance (Art.1927), or that
- The primary obligation has been varied or date of its payment has been extended

- ✓ The third party buyer can demand the mortgagee to proceed against other assets of the debtor. Inorder to raise this defence:-
- ✓ it should be prior to the debtor's declaration of bankruptcy [Art 1935(2)];
- ✓ he has to indicate other assets of the debtor which are free from any litigation and possible to be attached [Art. 1936(2)]
- ✓ He has to advance sufficient money to proceed against the assets or properties of the debtor, consider [Art. 1936 (1)].
- ✓ Then if the creditor fails to proceed against the indicated assets or against the debtor the third party can invoke Art. 1937 and 1938(2) to relieve himself of an obligation to surrender the immovable to the secured creditor.
- o 2nd remedy is that if the third party can't avail himself of Art 3090 and the creditor attached and sold in the hands of third party buyer, this third party has a right to claim compensation, from proceeds of the sale, for the improvements that he has made on the immovable.
- ✓ He has also the right to become the owner of fruits that he has collected from the immovable prior to the attachment of the immovable in his hands (Art3093).
- ✓ The third party is not liable for any loss or deterioration of the immovable unless the loss is because of his own fault or negligence.
  However he may be liable when the loss occurs after he has been informed that a proceeding has been instated for the attachment of the immovable.
- ✓ 3rd remedy is that the third party has the right to bring action for warranty against the debtor that he will perform his primary obligation or at least he will return the price which has been paid to him by the third party.
- ✓ This is a right to demand security from the debtor that the third party will not be dispossessed of the immovable.
- ✓ If dispossessed he has the right to be subrogated to the right of the creditor (Arts 3095& 3097).
- ✓ The third party may pay the debt on behalf of the debtor before attachment of the immovable with the consents of the creditor to accept payment by the third party, but after attachment even without the consent of the creditor. Arts. 3095, 3097 & 1971.

- **In case of the position of third party mortgagor**

- ✓ Where the immovable is given as security by a third party on behalf of the debtor.
- ✓ The law refers to such third party as guarantor under Arts. 3105 – 3108.

- ✓ This third party is not liable for the payment of primary debt. It is only because of his good faith or because of his good relation with the debtor or the creditor that he is securing the debt of another person, i.e. the debtor.
- ✓ The maximum liability of the guarantor (third party mortgagor) is limited only to the immovable that he has given as security. Art 3105 cc
- ✓ If the value of the immovable that the guarantor has given as security cannot settle the whole claim of the creditor other properties of the guarantor are not liable.
- ✓ The third party mortgager can avail himself of all the defenses /remedies that any third party who acquires the immovable mortgaged from the debtor.Art. 3107. 3106 + 3090 ff without prejudicing Art 3107 and 3108 together with Art 3094 and 3098.
- ✓ The mortgagee creditor may face all the challenges as though his security is guarantee (personal security) while the creditor might have purposely chosen real security by calculating the importance and easily enforceable nature of securities on properties.
- ✓ the debtor is legally entitled to transfer the mortgaged immovable (Art. 3084) or to make use of mortgage offered by third party (Art. 3105) while the third party buyer and the third party mortgagor are also entitled to challenge the mortgagee by raising the above stated defenses.

❖ Extinction of mortgage

- ✓ In principle, as the existence and effectiveness of mortgage should de evidenced by registration, its extinction should also be evidenced by cancellation of the registration.
- ✓ Hence, cancellation of the registration is the main proof of extinction of mortgage.
  Art 3109.
- o Cancellation may be sought from the court if:-
- ✓ The principal claim is extinguished or settled for one or the other reason.Art.3110.
- ✓ Where the creditor renounces his right of mortgage. Arts. 3110 (b) and 3112 (1).
  However, renunciation of the mortgage doesn't amount to renunciation of the principal claim Art. 3112 (2)].
- ✓ When the creditor makes the subrogation impossible the third party mortgagor has a right to demand cancellation of the mortgage.Art 3113-3116cc.
- ✓ Sale of mortgage is the first and the most important step towards the enforcement of security right of the mortgagee.
- ✓ The sale and enforcement of mortgage is not different from that of pledge. Art 3060-3063.so refer back to the discussion on the sale of pledge in the previous chapter.

Chapter Four- Antichresis

Definition

- ✓ It is a contract whereby the debtor undertakes to deliver an immovable to his creditor as a security for the performance of his obligations. Art 3117.
  - the essential elements of the definition of antichresis are:-
- ✓ It is a contractual relation between the debtor and the creditor. It arises only from contract.
  - It cannot be created in any other way unless there is clear contract between the debtor and the creditor with an intention to create antichresis.
- ✓ It can be created only against immovable.
- ✓ The principal purpose of antichresis is to secure the performance of an obligation.
- ✓ The immovable will be delivered to the creditor.
  - Antichresis is a special type of mortgage.
  - The subject matter, the requirements for creation, and the main purpose under contract of antichresis is not different from that of mortgage except for some differences which are introduced to serve certain purpose.
    - **Creation of antichresis**
- ✓ All the requirements for the valid creation and effectiveness of mortgage shall apply to contract of antichresis. Art 3118 cc
  - It should be in the written form.
  - It should specify the maximum claim secured by the contract of antichresis.
  - The person (the debtor) who provides antichresis as a security needs to have full right of ownership on the immovable.
  - The contract of antichresis should be registered duly. Art. 3129).
    - **Distinction between antichresis and mortgage**
- ✓ In case of ordinary mortgage, there is no transfer of possession of the immovable mortgaged and it remains in the hands of the debtor, but in case of Antichresis the possession of the mortgaged immovable will be transferred to the creditor.Art. 3117.

- ✓ It is this transfer of the immovable which changes the relation between the debtor and the creditor from ordinary mortgage to special type of mortgage (antichresis).
- ✓ In case of antichresis, the transfer of possession to the creditor will entitle him to the right to make use of the mortgaged property, however in the case of ordinary mortgage the creditor doesn't take the possession of the immovable let alone using the immovable.
- ✓ Before transfer of possession of the immovable or once the immovable returns to the possession of the debtor, the contract of antichresis remains to have the same effect as mortgage.Art.3121.
- ✓ Once the creditor takes possession, he is entitled to use the immovable. The use that the creditor derives from the immovable replaces the interest to be calculated on the principal claim. Art. 3124.
- ✓ No other additional interest can be calculated on the principal claim on top of the use the creditor drives from the immovable.
- ✓ The creation of antichresis has to be necessarily supported by contract. It can't be inferred from the conduct or any prior relation between the debtor and creditor or from the provisions of the law.
- ✓ There should be clear agreement for the creation of antichrists Art. 3119cc.
- ✓ Except the above stated differences, antichresis is essentially similar to ordinary mortgage for its creation, registration, effect, and extinction.
- ✓ Like all other securities, antichresis also has accessory character. Art. 3128.
- ✓ The principal reason to conclude contract of mortgage in the form of antichresis is to stop the calculation of interest on the principal claim by entitling the creditor to have possession of the immovable and make use of it in place of the interest.