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Islamic Emirate of Afghanistan
Supreme Court
General Directorate of Secretariat
Correspondence Department
Circular Section

Circular No: 1

Date: August 13, 2023 (1445/1/26)

To: The Officials of the Directorates of Cassations, Divisions, Appellate, and Primary Courts of the Islamic Emirate of Afghanistan!

May Peace and Mercy and Blessings of Allah be Upon You!

A query has emerged from some courts: "Does a mortgage impede implementation?" This question was deliberated upon during the High Council of the Supreme Court meeting on July 5, 2023 (17/12/1444). The High Council issued the following guidance under Decision No. 5 of Approval No. 45:

("Since a mortgagee is also a creditor, is he/she equivalent to other creditors in terms of debt? The General Directorate of Scrutiny and Studies is assigned to prepare a comprehensive, well-substantiated report on conditions of the sale and entitlement and present it for discussion in the subsequent High Council meeting."). As per the direction of the honorable High Council of the Supreme Court, the General Directorate of Scrutiny and Studies presented its opinion on the issue, which was raised in the meeting dated July 12, 2023 (24/12/1444) of the High Council of the Supreme Court. According to decision NO (3) of approval No (46), the High Council directed the following: The issue prepared by the Directorate of Scrutiny and Studies, stating that a mortgage does not impede implementation, is approved. The General Directorate of the Secretariat is instructed to disseminate this information to all courts via a circular.").

Therefore, the High Council of the Supreme Court's written directive and prepared statement have been sent to all relevant directorates of Cassations, Divisions, Appellate, and Primary Courts so that the legal and Sharia proceedings will be made per the direction mentioned above.

Respectfully,

Mufti Abdul Rasheed "Saeed"

General Director of the Secretariat of the Supreme Court

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Scrutinized Opinion from the General Directorate of Scrutiny and Studies of the Supreme Court

We have received a letter, designated as No. 1899/975, dated July 8, 2023, requesting an opinion subject to scrutiny. This letter has been logged in the Book of Enquiries under No. 2202, dated July 9, 2023.

The letter reads:

Pursuant to letter no. (1742), dated 21/11/1444 (10 June 2023) from the General Directorate of Secretariat, we respectfully state that:

The High Council of the Supreme Court meeting took place on July 5, 2023. It was chaired by the Honorable Chief Justice of the Supreme Court and the Islamic Emirate of Afghanistan. In this meeting, Agenda Item #5 was as follows: "Based on Decision No. 8 from Approval No. 39, dated May 17, 2023, the High Council directed the General Directorate of Scrutiny and Studies to offer their opinion on whether a mortgage impedes implementation." Our Directorate has opined that a mortgage under the specified conditions does not impede implementation. The High Council's subsequent directive was: "Further analysis is needed, including detailed references to conditions of entitlement and debt. This will be discussed in a future High Council meeting."

Based on Decision No. 5 from Approval No. 45, dated July 5, 2023, the High Council issued the following instruction:

"Given that a mortgagee is also a creditor, the question arises: Does he/she hold equal status with other creditors in terms of debt? The General Directorate of Scrutiny and Studies is tasked with preparing a comprehensive, well-substantiated report on both the sale and entitlement conditions. This report will be presented in a future High Council meeting." Therefore, the aforesaid written directive of the High Council of the Supreme Court is communicated to Your Highness for future actions via this letter.

Scrutinized Opinion:

Assessment of the Letter from the General Directorate of the Secretariat on Mortgaged Property Sales and Entitlement:

Where the mortgaged property is sold out for the debt of the creditors or acquired through entitlement, its detailed ruling is given below:

Ruling on Debt:

1. When creditors' claims over the mortgagor are validated under Sharia law, the presiding judge should either authorize the sale of the mortgaged property in compliance with Sharia rules or personally oversee the sale after following the requisite legal procedures under Sharia. Three scenarios exist concerning the property's value:

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- (1) The property value exceeds the mortgagee's debt.
- (2) The property value falls short of the mortgagee's debt.
- (3) The property value equals the mortgagee's debt.

In all these scenarios, the mortgagee's debt will be settled from the sale proceeds before any disbursements to other creditors.

For Scenario (1), where the property's value surpasses the mortgagee's debt, the remaining funds are distributed among other creditors in accordance with their respective shares under Sharia law. In Scenario (2), if the sale proceeds are insufficient to cover the mortgagee's debt, the mortgagee shares proportionally with other creditors in the remaining assets of the mortgagor. The implications of Scenario (3) are straightforward: the mortgagee's debt is fully covered.

Ruling on Entitlement:

2. In entitlement cases, the beneficiary is allocated a predetermined share from the mortgaged property. This is predicated on the condition that the mortgagor must hold ownership of the mortgaged asset. If the mortgagor is not the owner, the mortgage on the specified property is unenforceable without the actual owner's consent.

Therefore, when the mortgaged property is sold to settle debt, the mortgagee's claim is prioritized and settled first, as previously outlined. Conversely, when the property is acquired through entitlement, the beneficiary's share takes precedence over that of the creditors.

Reasoning for the First Type:

«مجلة الأحكام العدلية» (ص ١٣٨):

«(المادة ٧٢٩) حُكْمُ الرَّهْنِ أَنْ يَكُونَ لِلْمُرْتَهِنِ حَقُّ حَبْسِ الرَّهْنِ لِحِينَ فَكَاكِهِ وَأَنْ يَكُونَ أَحَقُّ مِنَ سَائِرِ الْغُرَمَاءِ بِاسْتِيفَاءِ الدَّيْنِ مِنَ الرَّهْنِ إِذَا تُوْفِيَ الرَّاهِنُ.»

«درر الحکام في شرح مجلة الأحكام» (٢ / ١٥٣):

«وَقَوْلُهُ (أَحَقُّ مِنَ سَائِرِ الْغُرَمَاءِ) يَعْنِي أَنَّ سَائِرَ غُرَمَاءِ الرَّاهِنِ لَيْسَ لَهُمْ أَنْ يَتَدَاخَلُوا فِي الرَّهْنِ الْمَذْكُورِ أَوْ أَنْ يَدْخُلَ فِي قِسْمَةِ الْغُرَمَاءِ. سِوَاءَ أَكَانَ الرَّاهِنُ تُوْفِيَ أَمْ حَيًّا أَمْ مُفْلِسًا فَالْحَالَةُ هَذِهِ تَعْبِيرٌ (وَفَاةً) الْوَارِدُ فِي الْمَجَلَّةِ لَيْسَ اخْتِرَازِيًّا.»

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المَسْأَلَةُ الْمُتَفَرِّعَةُ عَلَى الْحُكْمِ الثَّانِي: وَفِي هَذَا التَّقْدِيرِ يُبَاعُ الرَّهْنُ وَيُوفَى الدَّيْنُ كَامِلًا مِنْ ثَمَنِهِ، فَإِذَا بَقِيَ مِنْهُ شَيْءٌ يُقَسَّمُ غَرَامَةٌ بَيْنَ سَائِرِ الْغُرَمَاءِ وَإِذَا لَمْ يُوفَ ثَمَنُهُ دَيْنَ الْمُرْتَهِنِ يَسْتَوْفَى الْمُرْتَهِنُ بَاقِيَ الدَّيْنِ غَرَامَةً مِنْ سَائِرِ أَمْوَالِ الرَّاهِنِ (فَتَاوَى ابْنِ نُجَيْمٍ وَالْبَرَازِيَّةُ).
«الفتاوى الهندية (٥/٤٣٣):

«إِذَا مَاتَ الرَّاهِنُ فَهُوَ أَحَقُّ بِهِ مِنْ سَائِرِ الْغُرَمَاءِ فَيَسْتَوْفَى مِنْهُ دَيْنَهُ فَمَا فَضَلَ يَكُونُ لِسَائِرِ الْغُرَمَاءِ وَالْوَرِثَةِ، وَلَوْ مَاتَ وَأَفْلَسَ وَعَلَيْهِ دُيُونٌ يَكُونُ الْمُرْتَهِنُ أَحْصَى بِهِ مِنْ سَائِرِ الْغُرَمَاءِ كَذَا فِي مُحِيطِ السَّرْحَسِيِّ.»

Reasoning for the Second Type:

«فقه المعاملات» (٢٧٢/١) بترقيم الشاملة آليا):

«(أن يكون مملوكا للراهن محوزا) وهذا ليس شرطا لجواز أو صحة الرهن، وإنما هو عند الحنفية والمالكية شرط لنفاذ الرهن، وبه يعرف حكم رهن مال الغير.

فيجوز رهن مال الغير بغير إذن بولاية شرعية كالأب والوصي، يرهن مال الصبي بدينه، وبدين نفسه.

ويجوز رهن مال الغير بإذنه، كالمستعار من إنسان ليرهنه بدين على المستعير.

فإن لم يكن هناك إذن من المالك بالرهن، كان الرهن كالباع موقوفا على الإجازة، فإن أجاز نفذ وإلا بطل.»

«الموسوعة الفقهية الكويتية» (٣/٢٢٦):

«إِنْ اسْتَحَقَّ الْمُرْهُونُ الْمَعِينُ كُلَّهُ بَطَلَ الرَّهْنُ اتِّفَاقًا، وَإِنْ اسْتَحَقَّ الْمُرْهُونُ الْمَعِينُ قَبْلَ الْقَبْضِ خَيْرَ الْمُرْتَهِنِ بَيْنَ فسخِ عَقْدِ الْمُدَايَنَةِ مِنْ بَيْعٍ وَنَحْوِهِ، وَبَيْنَ إِمْضَائِهِ مَعَ إِبْقَاءِ الدَّيْنِ بِلَا رَهْنٍ، وَكَذَلِكَ يُخَيَّرُ الْمُرْتَهِنُ إِنْ كَانَ الْإِسْتِحْقَاقُ بَعْدَ الْقَبْضِ وَعَرَهُ الرَّاهِنُ، فَإِنْ لَمْ يَعْزِهِ بَقِيَ الدَّيْنُ بِلَا رَهْنٍ وَإِنْ كَانَ الْمُرْهُونُ غَيْرَ مُعِينٍ وَاسْتَحَقَّ بَعْدَ قَبْضِهِ أَجْبَرَ الرَّاهِنُ عَلَى الْإِيتْيَابِ بِرَهْنٍ بَدَلَهُ عَلَى الْقَوْلِ الرَّاجِحِ، وَلَا يُتَصَوَّرُ اسْتِحْقَاقُ غَيْرِ الْمَعِينِ قَبْلَ قَبْضِهِ.»

Respectfully

Maulavi Hamdullah Muhammadi

Maulavi Abdul Karim Al-Karimi

Judicial Scrutinizer

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Maulavie Hizbullah Ibrahimi

General Director for Scrutiny and Studies

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